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Constituent Assemblies: The Canadian Debate in Comparative and Historical Context

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CONSTITUENT ASSEMBLIES: THE CANADIAN DEBATE IN COMPARATIVE AND HISTORICAL CONTEXT

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BACKGROUND STUDIES

OF THE YORK UNIVERSITY CONSTITUTIONAL REFORM PROJECT

STUDY NO. 4

CENTRE FOR PUBLIC LAW AND PUBLIC POLICY

This study criticizes the widely-held opinion that the convening of a constituent assembly would provide a more open, democratic, and accessible process for amending the constitution of Canada. It examinines the experience with constituent assemblies in other western-style democracies since 1945. The study provides an in-depth examination of four case studies: Spain in 1977, Newfoundland in 1947, Germany in 1948, and Australia in 1972-85. The authors argue that the conditions which have led to the successful use of constituent assemblies are not present in Canada: there is neither a breakdown of existing constitutional order nor a consensus on the need for a total rewriting of the Canadian constitution. They also argue that current expectations are totally unrealistic, especially the assumption that a constituent assembly would allow the "grassroots" to engage in constitutional change.

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THE YORK UNIVERSITY
CONSTITUTIONAL REFORM PROJECT

This publication is part of the Centre's latest project, the York University Constitutional Reform Project. The Project studied the legal issues surrounding Québec sovereignty, Ontario's interests in the current constitutional discussions, and the federal proposals released in September of 1991. A comprehensive eight-month study by researchers at the Centre, meetings and conferences with eighteen distinguished academics from York University and the University of Toronto, and individual studies by distinguished academics and professionals throughout Canada culminated in the publication of eleven Background Studies and a Final Report. The Final Report, *An Agenda For Constitutional Reform*, is written by Patrick Monahan, Director of the Centre, and Lynda Covello, Coordinator and Director of Research for the Project. The Report puts forward and discusses forty-eight recommendations on constitutional reform. The publications are listed on the inside of the back cover.

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Study No. 4
Background Studies of the York University Constitutional Reform Project

This Background Study was published simultaneously with the Final Report and the ten other Background Studies of the Project. The inside of the back cover lists the publications, and explains how to order them.

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PART I: INTRODUCTION

In a few short months, the idea of a constituent assembly seems to have taken hold of the Canadian political imagination.[1] It is being hailed as a means of transforming constitutional politics from a process dominated by elites and closed-door negotiations into an egalitarian exercise which will provide for more public involvement at every stage. Current political arrangements and institutions, it is popularly argued, have lost legitimacy. Canadians are said to be unwilling to accept the idea that political leaders have a right to decide when and how to amend the constitution. The convening of a constituent assembly is widely thought to be the best way of securing "grass-roots" involvement in the constitutional process. It is also regarded as the best way of forging a new nation-wide consensus that would rally Canadians from all parts of the country behind a new national vision.

Support for the idea of a constituent assembly is emanating from many diverse quarters. The proponents of some form of constituent assembly as a remedy for the country's current constitutional malaise include a number of provincial premiers (Ontario's Bob Rae, Manitoba's Gary Filmon, and Newfoundland's Clyde Wells), a former judge of the Supreme Court of Canada, the federal New Democratic party, a number of prominent university academics, and the chair of the Citizen's Forum on Canada's Future, Keith Spicer. These advocates of a constituent assembly all cite the need for a forum for increased public participation in constitutional decision-making and consensus-building. They maintain that the membership of a constituent assembly would be "more representative of Canadian

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[1] Although some analysts distinguish between constituent assemblies and constitutional conventions, arguing that the former are made up of delegates selected from the population at large, and the latter of elected legislators, most commentators (including the Beaudoin-Edwards Committee, *infra*, note 2) prefer to use the terms interchangeably, to refer to a number of different possible formulations.

society than First Ministers' meetings, and would develop amendments more reflective of public needs and wants."[2] Our present political institutions and processes have lost their legitimacy, they argue, and a constituent assembly is one way to regain it. Supporters of the constituent assembly idea often point out that both the American constitution of 1787 as well as Canadian confederation of 1867 were the products of constitutional conventions.

The arguments in favour of a constituent assembly have not gone unchallenged. Opponents of the idea argue that it would inevitably become bogged down in procedural issues. Disputes over methods of delegate selection, over who should be included, and over its mandate, could sabotage the workings of the assembly. Considerations relating to timing are also cited by opponents of the idea. There is simply not time, they argue, for a constituent assembly to be selected, convened, and have completed its work before the Québec referendum deadline of 1992. Furthermore, the stated unwillingness of the Québec government to participate in any such assembly has been stressed as a reason why the idea should not be pursued at the present time.[3]

Thus far, the Government of Canada has refused to convene a constituent assembly. Instead, it has committed itself to the current Joint Senate-Commons Committee process, which is to culminate in a report by 28 February 1992. However, the government has not ruled out the possibility of convening a constituent assembly sometime following the report of the Joint Committee. Moreover, as the country moves towards the Québec referendum deadline of 26 October 1992 and the pressure to achieve some kind of accommodation grows, we expect that there will be renewed interest in a constituent assembly. This will be particularly true if the Government of Canada convenes a First Ministers' Conference in an effort to break the constitutional logjam in the spring of 1992. Any such return to traditional methods of "executive federalism" to resolve the constitutional crisis will

[2] *The Process for Amending the Constitution of Canada: The Report of the Special Joint Committee of the Senate and the House of Commons* (Ottawa: Ministry of Supply and Services, 20 June 1991) at 45 (Co-chairs: The Hon. Gérald Beaudoin, Senator, and the Hon. Jim Edwards, M.P.) [hereinafter Beaudoin-Edwards Report].

[3] See, generally, the Beaudoin-Edwards Report, *ibid.*

generate considerable criticism and public support for some kind "democratic alternative."

Thus, we believe that the constituent assembly idea merits clo attention and analysis. We also maintain that comparative analysis h a key role to play in evaluating the various arguments on either side this debate. Comparative analysis is important because it permits us test out hypotheses and expectations against the measuring rod of tl experience in other countries. Comparative analysis is particular important in the current Canadian debate over the merits constituent assemblies, for at least two reasons.

First, as we will discover shortly, many of the proposals f constituent assemblies have been framed in extremely general term The main focus of these proposals has been the method of selection the delegates for the assembly. Much less attention has been devot to details such as the manner in which the assembly would operate what the final product of the assembly would be. (Many proposals a silent on such questions, suggesting that these matters would have be settled by the assembly itself.) By exploring the experien elsewhere, it is possible to begin to make an assessment of the relati merits of the differing approaches that are being proposed. It is al possible to offer a much more concrete and specific analysis of t detailed workings of an assembly and of what it might be expected t produce.

Secondly, almost all of the proposals for constituent assembli share an important assumption: that the constituent assembly woul provide democratic legitimacy and generate a popular consensus i favour of changes to the constitution. Yet, there has been almost n serious analysis and discussion of this assumption. To what exter would a constituent assembly operate as a "democratic alternative" t negotiations between party and government leaders?

An important way of providing an answer to this question is t examine the experience elsewhere. Comparative analysis will permit u to identify the circumstances which have led other societies to conven constituent assemblies. It will also provide insight into the degree t which constituent assemblies have permitted non-politicians and nor elite groups to participate in the process of constitutional change. Thi comparative context can then be employed to generate a mor

informed debate over the process options currently being discussed in the Canadian debate.

In undertaking this comparative analysis, we do not purport to be exhaustive. There have been countless instances of constituent assemblies and it would be impossible to canvass them all adequately in the space of a single paper.[4] We also believe that an in-depth analysis of a relatively small number of cases is likely to prove more valuable than a cursory discussion of a larger number. Accordingly, we have restricted our analysis in this paper to the following four examples: Spain in 1977, Australia from 1972 to 1985, Germany in 1948, and Newfoundland from 1946 to 1948.

We have selected these four countries for close analysis because we believe that these particular case studies are fairly representative of the international experience with constituent assemblies. We also believe that conditions in these countries are sufficiently similar to the current Canadian situation to permit meaningful comparisons to be drawn. Each of the four constituent assemblies were convened since 1945 in a western-style, industrialized society. Included in the case studies is the only example of a Canadian constitutional convention since 1945.

Of course, it is evident that none of the examples is a perfect match with the contemporary Canadian situation, and it will be important to keep in mind the existence of these differences in attempting to draw lessons for Canada. We do believe, however, that analysis of the experience in these four cases permits us to draw some important conclusions for the current Canadian constitutional process.

The first section of the paper presents an overview of the current debate over constituent assemblies in Canada. As we shall see, there has been a wide variety of proposals advanced for the design and operation of constituent assemblies. Most of these proposals have tended to concentrate on the manner in which the delegates to the constituent assembly would be selected. Relatively less attention has

[4] For a study that deals with more examples, see P. Fafard & D.R. Reid, *Constituent Assemblies: A Comparative Survey* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1991).

been paid to the manner in which the assembly would operate or th relationship between the assembly and the existing institutions of th Canadian state. The degree of variation in the proposals for constituen assemblies is quite striking. The nature of the differences between th various proposals will be identified and discussed.

The second section of the paper provides an detailed analysis o the four case studies which we have selected for examination. Eacl case study will be organized around the following four questions:

> *Catalyst*: What was the catalyst for the convening of th constituent assembly? What did the "old constitutional order' fail to do, or what obstacles did it create?
>
> *Operations*: How did the assembly work; who initiated it an how; also, who was there, and how were they selected? A important question, especially given the current "deadlines" fo reform in Canada, is how long the process lasted.
>
> *Consensus*: Was a consensus or compromise achieved? Wha were the factors which led to a consensus or compromise o which inhibited one from developing?
>
> *Public Participation*: To what extent did the process permi public participation? Did the assembly operate in an open o public fashion or were the discussions carried on behind close doors? What role did political parties and their leaders play i the deliberations of the assembly?

The final two sections of the paper will suggest a number o general conclusions which flow out of this survey and then identify th relevant lessons for Canada. We will suggest that constituen assemblies have tended to be successful only in very particula circumstances and contexts. Moreover, we will argue that the succes of constituent assemblies has been directly linked to the participatio within the assembly of established political parties and elites. Th opportunity for private negotiations between party leaders and the us of party discipline to enforce compromises have been critical t successful outcomes. These hard "political realities" do not seem t have been reflected in the current Canadian debate over the potentia function to be played by a constituent assembly in writing a nev

constitution. We will suggest that if such a mechanism is to be employed now or sometime in the future, the expectations surrounding such a gathering will have to be altered significantly for it to succeed.

Given this comparative analysis, we will argue that there is little basis for supposing that a constituent assembly will serve as a remedy to Canada's current constitutional crisis. The conditions which have led to successful outcomes in other contexts simply do not exist in Canada at the present time. Moreover, there is no precedent for the use of a constituent assembly as a vehicle for the involvement of non-politicians in constitutional change. If a constituent assembly is ever convened in Canada, it ought to be on the basis that political parties and their leaders will have a central role in the process.

While we are unpersuaded as to the merits of a constituent assembly in the short-term, we do indicate that this conclusion might be different if political conditions change. In particular, in the event that Québec opts for political independence, then the calculation as to the merits of an assembly for the rest of Canada would appear significantly different. We will argue that in this type of situation, the case for a constituent assembly becomes significantly more plausible. We will suggest why this is so, and identify the implications of such a process for negotiations between Québec and the rest of Canada over Québec sovereignty.

PART II: THE CURRENT DEBATE IN CANADA

A. *Recent Proposals for Constituent Assemblies*

The appropriateness of a constituent assembly for Canada ha been a subject of much debate since the failure of the Meech Lak Accord in June of 1990. The Beaudoin-Edwards Committee repor that the constituent assembly was "by far the most commonly suggested alternative to executive federalism" proposed in the course o its hearings. The Committee defines the term broadly, to incluc "assemblies, conventions, and hybrids of the two." It found that th proposals could be separated on the basis of the method of selectin delegates. There were two types: first, proposals for a directly-electe constituent assembly, elected in special elections; and, secondly proposals for an appointed constituent assembly, with delegate appointed from either elected politicians or non-elected non-politician on some kind of proportional representation basis.[5]

Examples of the first category of proposals, a directly electe assembly, are those of Professor Philip Resnick[6] and of the Canac West Foundation (CWF),[7] a non-partisan organization which studi economic and political alternatives to enhance the West within th Canadian federation. The Resnick and CWF proposals have a numbe of points of convergence. They share a fundamental assumption th Canada needs a wholly new constitution and that a constituer assembly is the best way to go about drafting one. Resnick go further and suggests that we need a whole new political order, with th two essentially separate states of English Canada and Québe

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[5] Beaudoin-Edwards Report, *supra*, note 2 at 43.

[6] *Toward a Canada-Québec Union* (Kingston: McGill-Queen's University Press, 199

[7] *Citizens and Government: Who Decides?* (Calgary: Canada West Foundation, Jur 1991).

cooperating on a number of international issues, but separate as to all other powers and functions.

Both proposals set the ideal size for the assembly at around one hundred members. Selection techniques vary somewhat. Resnick favours a proportional representation basis for the election of delegates; the CWF provides a blended formula, with some delegate seats allotted on the basis of provincial equality, and some on the basis of representation by population. Both scenarios make special provisions for the inclusion of First Nations representatives, but the representation of other groups is left to the normal workings of the democratic electoral process.

Resnick's proposal is perhaps the more revolutionary of the two, in that he makes no attempt to include Québec in English Canada's assembly. Instead, he suggests two separate assemblies that can exchange negotiating committees at some point. CWF wants to include Québec in its assembly, but on the basis of equality of all provinces, not as a separate or quasi-sovereign entity. The appeal for a constituent assembly, it argues, should, if necessary, be made directly to the people of Québec, bypassing the provincial government. If the Québec government will not cooperate, the Report suggests that "there is no legal or practical bar to the federal government conducting an election within Québec in pursuit of national purposes and subject to national legislation."[8] Both proposals suggest a limited time period for the exercise: Resnick suggests not more than twenty-four months while the CWF proposes nine to fifteen months. Neither proposal makes any provision for or mention of the possibility of private negotiating sessions. Indeed, one of the chief attractions of the constituent assembly idea for these authors is the need to avoid constitutional discussions behind closed doors, restricted to First Ministers and their advisers.

The CWF plan seems more intended to complement existing institutions and processes for constitutional change. First Ministers' meetings are integrated with the assembly process, and the draft constitution must be submitted to Parliament and the ten provincial legislatures before it goes to referendum. Resnick does not pay as

[8] *Ibid.* at 10.

much attention to harmonizing new and existing processes, perha because what he is proposing is essentially a new political order f Canada.

In the second category, those favouring an appointed assembl include the federal NDP,[9] former Supreme Court of Canada Justi Willard (Bud) Estey,[10] professor of political science Peter Russell, and Newfoundland Premier Clyde Wells.[12] Premier Wells and t federal NDP advocate a type of "hybrid" assembly, made up of combination of elected parliamentarians and "others." The "others would be drawn from a number of social groups whose viewpoints a not adequately represented "within our present electoral system." The Estey proposal (co-authored with lawyer Peter Nicholson) al calls for a body of appointed delegates, but the method of appointmer is somewhat novel. The names of the delegates would be chosen by computer-run lottery structured to produce appropriate "provinci allocations." Names would be submitted to the lottery by electe politicians, thus ensuring some public accountability, if only for the choices (which would be made public).

Most of these proposals leave the determination of the detaile workings of the assembly up to the assembly itself. The NDP proposa for example, suggests only that the assembly would "travel the countr and elicit views on the substance of constitutional reform fro Canadians,"[14] and then submit a report on its findings to Parliamen Judge Estey suggests that the constitutional reform process woul operate in a series of stages. The first stage would be the convening c a constituent assembly to draft changes to the constitution. Expe advisory groups would be assembled to help the assembly wor through the issues. The details of how it would operate are nc

[9] See Beaudoin-Edwards Report, *supra*, note 2 at 73-77.

[10] See Proceeding of the Joint Committee on the Process for Amending th Constitution of Canada, testimony of the Hon. Mr. Justice Willard Z. Estey, (22 Apr 1991) at 24:5; see also, "Giving Power to the People" *The Globe and Mail* (22 April 1991

[11] See "Towards a New Constitutional Process" in R.L. Watts & D.M. Brown, ed *Options for a New Canada* (Toronto: University of Toronto Press, 1991) at 141.

[12] See "The Case for a Constitutional Convention" (Spring, 1991) 2 no. Constitutional Forum.

[13] Beaudoin-Edwards Report, *supra*, note 2 at 75.

[14] *Ibid.* at 75.

elaborated, but rather left to the assembly to decide once it has convened. The proposals generated by the constituent assembly would then be submitted to the people for ratification in a national referendum.

Peter Russell, like Premier Wells, sees an assembly as complementing, not replacing or competing with, the existing amending procedure. It is to be used as "a negotiating instrument."[15] Russell proposes that delegates would be sent from the federal and provincial legislatures, as well as the territories and the First Nations. Each legislature would be free to decide how to select its delegation, allowing for election or appointment of politicians or non-politicians. Unlike many of the other proposals, Professor Russell does discuss how the assembly would operate. He specifically notes that there should be provision for both public sessions as well as private bargaining among the delegates.[16] He foresees a relatively short-time period for the assembly's work: "one or two months should be the outer limit." Like Resnick and the CWF, Russell suggests that English Canada, or as many provinces as possible (minimum of seven, with at least fifty per cent of the population, and the federal government), could initiate the process by holding its own assembly without Québec. He would integrate Québec and other "hold-out" provinces at a later stage, after the first assembly had completed its work.

None of these proposals presents any detailed comparative analysis, although passing reference is sometimes made to the previous use of constituent assemblies. The examples most often referred to are Philadelphia in 1787 and Charlottetown in 1864, but Australia, Spain, Germany, and Newfoundland have also been mentioned favourably.[17]

[15] Russell, *supra*, note 11 at 151.

[16] *Ibid.* at 152.

[17] The CWF, *supra*, note 7 at 11, mentions America, Australia (1890), Germany and Spain; Resnick, at 90, has a brief section in which he mentions Germany (1871), Japan, the United States, France, Latin America, Asia, Africa, and India; Russell, *ibid.*, mentions Philadelphia, Charlottetown, and Australia (1890). See also, D. Kilgour, "We Need a Constitutional Convention" (1990) 12 Policy Options Politiques 8, where he suggests that we should follow the model of Germany in 1948.

B. *Summary*

A number of points emerge from this review of the curren Canadian debate over the merits of a constituent assembly as a metho for amending the constitution. First, even among supporters of th idea of a constituent assembly, there is quite radical divergence o opinion as to how the assembly should be established, let alone how i would function, and what the effect of any resolutions it might develo would be. While the proponents of the idea of a constituent assembly see it as a means of achieving greater public participation in the reform process, they have quite different expectations about how this migh best be accomplished. Further, the legal status of the constituen assembly in the amendment process is somewhat unclear. Som proposals seem to contemplate a merely advisory role for the assembly with the results of the meeting being presented to First Ministers and their governments for consideration. Others seem to proceed on th basis that the constituent assembly would be given a mandate t negotiate changes to the constitution directly.

Secondly, the chief popular attraction of the concept of a constituent assembly appears to be its promise of involving "non-politicians" in the constitutional reform process. This is reflective o a more general antipathy towards existing political institutions and political leadership in this country. As such, the debate over the idea has tended to focus on who would participate in such an assembly rather than on how it would operate or what it would produce. This emphasis on membership is reflected in the Beaudoin-Edwards analysis of the concept: Beaudoin-Edwards classifies the various proposals based on their scheme for representation in the assembly. The emphasis on membership is understandable, given the popular rejection of the closed-door Meech process. However, concerns for participation are merely one aspect, albeit a central one, in the design of a constitutional process. The process must also be effective; it must be capable of bridging the differences that exist rather than highlighting them; and, above all, it must be a practical mechanism for achieving closure on the issues and interests within its mandate. We believe, as we have suggested earlier, that comparative analysis will assist in developing additional insights on these practical aspects of the debate. By examining the experience elsewhere, we can come to an understanding

of what might realistically be accomplished by a constituent assembly. We can develop an understanding of the possible benefits, as well as the limitations and drawbacks, associated with this method of constitutional reform. With this information, we will then be in a better position to assess the merits of the various proposals for constituent assemblies which have been advanced in Canada over the past few months.

PART III: THE CASE STUDIES

A. *Spain 1977-79*

Spain in 1977 was a country emerging from under the yoke of totalitarian rule.[18] From 1939 to 1975, Spain was a totalitarian state ruled by one man. Dictator Francisco Franco created an ultra-conservative, Catholic state, in which political parties and other forms of expression were strictly prohibited. He managed to maintain almost immeasurable personal power for nearly forty years by entrenching a loyal and powerful bureaucracy, and by playing the country's political elites off against one another.

A shrewd tactician and political strategist, his restoration of order after the Spanish Civil War lent him political legitimacy that endured for a remarkably long period. By the 1970s, however, most of the generation that had lived through the war had died out, and there was widespread support for democratic reform and more political freedom. Business interests in Spain looked longingly at the increasingly-affluent European Community, which would admit only those countries possessing democratic government. The Church, always politically astute, began to distance itself from the government. Regional tensions increased, and Basque terrorism escalated.[19]

Somehow, in the context of this diversity and potential for violence, Spain managed the transition to democracy without bloodshed. A key element in securing this result was the convening of a constituent assembly to develop a set of proposals for constitutional change.

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[18] For a general historical account of the Spanish constitution-making exercise, see A. Bonime-Blanc, *Spain's Transition to Democracy: The Politics of Constitution-Making* (Boulder: Westview Press, 1987).

[19] See D. Share, *The Making of Spanish Democracy* (Toronto: Praeger, 1986) at 2.

1. The catalyst for the Constituent Assembly

The old regime ended with Franco's death. Because of his unitary and dictatorial style of governing, his death created a political vacuum. There was a widely-shared consensus among both the public and political elites that Spain required a fundamentally new form of government. There was also a consensus that this new form must be democratic. The problem was that there was no existing set of institutions or processes to manage the transition to democracy in a peaceful and orderly fashion.

The challenges Spain faced during the transition period were very considerable. Diverse regional, cultural, religious, and political interests had to be accommodated within the new power structure. There were disparities in economic development amongst the various regions. A violent separatist movement had emerged in the Basque region, based on linguistic and cultural differences. The Roman Catholic Church had been entrenched as the state religion by Franco, and now stood in danger of losing that position. Newly formed political organizations spanned the ideological spectrum.

In the last decade of the regime, controls over the press and union activity had been gradually relaxed. Even before Franco's death in 1975, the last Franquist President, Arias Navarro, had introduced a series of partial political reforms, which allowed for political associations to form.[20] Once Franco died, and King Juan Carlos became head of state, the pace and scale of reform increased. The King was committed to making Spain a democracy, in the form of a constitutional monarchy. Navarro was dismissed, and a pragmatic politician, Adolfo Suarez, was appointed president. In September of 1976, Suarez introduced a dramatic set of electoral and political reforms.[21] The content of the law was a product of negotiation between the government and fledgling political factions. The law provided for an elected bicameral parliament, the Cortes, replacing the puppet assembly of the Franco era. The Cortes was to function as a general

[20] J. Coverdale, *The Political Transformation of Spain After Franco* (Toronto: Praeger, 1982) at 42.

[21] *Ibid.* at 50-53.

law-making body, but was also charged with developing a set of constitutional proposals which would be submitted to the people for ratification in a referendum.

The election was supervised by the Ministry of the Interior. Political parties were required to register and gain approval before entering the campaign. In December of 1976, King Juan Carlos announced that elections would be held on 15 June 1977.

2. Operation of the assembly

Elections were held for the new parliament (Cortes), which would be responsible for drawing up the new constitution. Newly formed political parties ran on constitutional platforms. Six hundred members were elected to the Cortes, a bi-cameral parliament, divided between the Congress of Deputies[22] and the Senate.[23] The Cortes was elected for a period of four years. Its work on the development of a new constitution lasted from 22 August 1977 to 27 December 1978, a period of sixteen months. If one takes into account the time required to hold elections and to hold a ratification referendum, the process occupied a total of two years.

The Congress as a whole did not begin debate on the constitution immediately. Instead, a seven member subcommittee of deputies was mandated to draw up the first draft of a working constitutional document. The Ponente, as the subcommittee was called, was tightly tied to party discipline. It was less an independent think-tank than it

[22] The congress was elected in the following manner. Each of the fifty provinces of Spain would have at least three representatives in the Congress. Provinces with larger populations would have more representatives. The distribution of seats between the political parties in each province would be determined through proportional representation using the d'Hondt system. In all, about three hundred and fifty deputies were elected. See D. Gilmour, *The Political Transformation of Spain* (London: Quartet Books, 1985) at 172.

[23] The Senate was designed to represent provinces on an equal basis. Each province, regardless of size, elected four senators. The ballot for the Senate gave each voter three votes. Senators were elected on a "first past the post" basis. Forty Senators were appointed by the King to preserve the monarch's power over the Cortes, and to assuage the old regime's supporters who were opposed to reform. In all, there were about two hundred and forty Senators. See Share, *supra*, note 19 at 5.

was a formal-negotiation committee between the parties in the Cortes. The governing UCD had three representatives, and the PSOE, PCE, AP, and the Catalan party each had one.[24] Its members, who were constitutional experts, reported back to their party leaders on all the proposed elements of the constitution. The discussions were conducted entirely behind closed doors.[25] Each party was bound by an agreement that they would not release to the public information concerning any of the proposals under discussion.

The chair of the subcommittee rotated amongst its members. Expert legal advice was limited to congressional legal advisors. Its deliberations were private, with proposed articles being released when unanimous consent was obtained. Mid-way through its deliberations, in November of 1977, the working draft of the constitution was leaked to the press before an all-party agreement was reached. This did not derail the process. Instead, the incident put additional pressure on the parties to achieve a consensus.[26]

On 10 April 1978, the Ponente released its final draft, which was sent to a thirty six member committee of the Congress. This stage of the process was designed to permit public discussion of the Ponente's draft before the constitution reached its final drafting stage.

The thirty-six member committee of Congress met from 5 May 1978 to 20 June 1978. The debates in the Congressional committee were open to the public. However, as the debate in the committee proceeded, party consensus over a number of sensitive issues threatened to dissolve. It appeared that the committee might be unable to reach agreement on a text to forward to the full Congress. Then, in late May, four members of the UCD and the socialist party held an all- night private meeting at a Madrid restaurant. This late-night negotiating session between the key political leaders resulted in a series of crucial compromises on the outstanding issues. These compromises were

[24] The names of the parties (or coalitions), and their political stance, were as follows: UCD — Union de Centro Democratico (centre right); PSOE — Partido Socialista Obrero Espanol (socialist); PCE — Partido Comunista Espanol (communist); AP — Alianza Popular (Franquist right); MC — Minoria Catalana (regional autonomist). See Bonime-Blanc, *supra*, note 18 at 28 and 38.

[25] See, *e.g.*, Bonime-Blanc, *ibid.* at 37.

[26] *Ibid.* at 54.

incorporated in the committee's draft and an agreement was reached on a text to forward to the Congress.

The committee draft was debated in full plenary session of the Congress from 4 July 1978 to 21 July 1978. Hundreds of amendments were considered and debated. However, in the end, only minor changes were made to the committee's draft. The parties in the Congress adhered to the compromises that had been reached in the restaurant meeting in May. The draft constitution was approved by a majority of ninety four per cent in Congress.

Once the draft passed through Congress, it was reviewed by a Senate committee from 9 August 1978 to 14 September 1978. The Senate committee proposed a number of important amendments to the proposals from the Congress. The Senate committee's draft was debated and voted on between 25 September 1978 and 5 October 1978, in a plenary session of the Senate.

Since the final Senate proposals differed from the draft of the Congress, the process again threatened to break down. In order to reconcile the two drafts, an eleven member joint Congress-Senate committee met from 11 October 1978 to 25 October 1978. The joint committee meetings were conducted entirely in private. After two weeks of private negotiations, the joint committee reached agreement on draft constitutional proposals. In general terms, the revised draft reaffirmed the primacy of the original Congressional draft of July. The proposals of the Congress, more often than not, were accepted in place of those of the Senate — in part because of the perceived greater democratic legitimacy of the Congress.[27]

The final draft was then voted on separately by each chamber of the Cortes on 31 October 1978. In Congress, ninety-four percent of the deputies approved the final draft. In the Senate, likewise, ninety-five percent were in approval. The high approval was testimony to the effective work of the parties. They had allowed for a blend between public debate and private negotiations aimed at achieving compromises. Once those compromises were agreed upon, the party leaders were able to deliver their followers' votes at the final, crucial moment.

[27] Bonime-Blanc, *ibid.* at 50.

A national referendum was held, on 6 December 1978, to vote on the constitution. Rather than a pro/anti constitution campaign, those opposed to the constitution, the regional autonomists, campaigned for abstention from the vote. Approximately thirty-three percent of the electorate abstained; in the Basque region, less than half the electorate voted. Nevertheless, almost eighty-eight percent of the total votes cast were in favour of the constitution — which translated into roughly fifty-nine percent of the entire national electorate.[28] On 27 December 1978, the King proclaimed the new constitution.

3. Consensus in the process

There was a great deal of consensus among the people of Spain that the dictatorial form of government was no longer appropriate for the country and could not be allowed to continue beyond Franco's death.[29] Democracy was attractive for many reasons, especially to the newly emerging political parties and the regions desiring more independence in decision-making. So there was a societal consensus concerning what the constituent assembly was expected to do: it was to produce a constitution that would make Spain a democracy.

Consensus on broad principles, while crucial to the eventual success of the process, is no guarantee that an agreement will be reached. The major political players in the assembly had to negotiate and compromise to build a consensus on the detailed provisions of the final document they submitted to the electorate for ratification. There were several points where consensus appeared to be in danger of breaking down. At each of these points, negotiations among the party leaders, external to the assembly, were the key element in achieving and maintaining agreement. A key point in the process was the all-night meeting in the Madrid restaurant in late May of 1978 which secured agreement on the broad outlines of the constitutional package. The party leaders then ensured that this political compromise was endorsed by the assembly, as they delivered their followers in both the Congress and the Senate.

[28] Coverdale, *supra*, note 20 at 119.
[29] *Ibid.* at 16-19.

4. Public participation in the process

The entire Spanish process was publicly scrutinized and debated, but the public had only two actual points of entry into it: near the beginning, when it elected the delegates, and, at the end, when it ratified the constitution in a national referendum. The drafting and the crucial negotiations were conducted in private. The delegates who drafted and negotiated the constitution were all elected politicians who were accountable for their actions to the electorate in the next elections. There were no members of the public or non-elected participants in the assembly.

The process was elite-driven. It was initiated by the old order and dominated by political elites. The laws providing for the process were initiated by the dictator before his death and enacted by members of his government afterwards. If the major political elites had not cooperated and compromised, the process could never have succeeded. At the same time, there was a great deal of grass-roots support for the process, and there were points at which the public was directly involved in determining the course of the political future of the country. This meant that the entire process acquired sufficient political legitimacy to enable the constitution to be endorsed in a national referendum.

B. *Australia 1972-85*[30]

The constitutional division of powers in Australia gave powers over revenue gathering to the Commonwealth Government, while the states were responsible for the delivery of social services. With the advent of the welfare state after the Second World War, the states found they were being required to deliver more services, but that they were not receiving adequate revenues from the central government. Under this burden, the states began to discuss the possibility of constitutional reform, specifically to enhance their ability to raise revenues. It was these concerns over the division of powers and

[30] See generally, A. Patience & J. Scott, eds, *Australian Federalism: Future Tense* (Melbourne: Oxford University Press, 1983).

revenue sharing between governments which led to the interest in constitutional reform in the late 1960s and early 1970s.

1. The catalyst for the Constituent Assembly

The Australian Constitutional Convention was the offspring of a 1970 resolution in the state of Victoria's Parliament to invite the other states to discuss the constitutional reform of revenue sharing and program funding. Two years later, at a meeting of the State Attorneys-General, the six states unanimously called for the convening of a constitutional convention. The Commonwealth Government attended at the invitation of the states.

These discussions began prior to the federal election that saw the defeat of the Liberal Party and the formation of the government by Gough Whitlam and the Labour Party. In office, Whitlam pursued several policies that strained federal-state relations. New ministries were set up to deliver programs which strayed into state jurisdictions. Unconditional grants were being phased out and specific purpose payments were substituted, tying the hands of state governments. Finally, a constitutional amendment (which subsequently failed) was proposed by the federal government to give it power to impose wage and price controls. These measures were opposed by the state governments, including those with ruling Labour parties.

Prior to Whitlam's election, the idea of a convention surfaced in a relatively peaceful period of intergovernmental relations. Peace soon evaporated in light of federal actions, and the convention became a partisan battle ground. Instead of reaching general consensus, battles between the Labour, Liberal, and Country Party politicians dominated the proceedings. Whitlam's social policy agenda, coupled with a centralist constitutional agenda, met with stiff opposition from the Liberals and the Country Party in the federal parliament. A serious impasse occurred between the Labour-dominated House of Representatives and the Liberal-controlled Senate, which blocked the Labour government's supply bill. This stalemate ultimately resulted in Whitlam's dismissal in 1975, and the appointment of a Liberal administration.

2. Operation of the assembly

There is no constitutional provision for holding a convention in the Australian Constitution, despite the fact that such a body produced the federation at the turn of the century. The convention, therefore, was established by separate resolutions in each of the seven parliaments of the country. The goal was to revisit the constitution. Given that the seven parliaments, and not the general public, had thought that the process was necessary, it did not have a high degree of popular political legitimacy.

In negotiations between the states and the Commonwealth, it was decided that the Commonwealth parliament would have sixteen delegates, and each of the six states would get twelve delegates. In addition, three local government delegates would be present from each state, and two local government delegates from the Northern Territory and Canberra respectively. In all, one hundred and ten delegate spots were created. The Northern Territory was given two more spots, for delegates from its legislature, in 1975.[31]

All the delegates from the states and the commonwealth were legislators, appointed by the parties represented in the parliament. Each jurisdiction's delegation was composed as any normal parliamentary committee would be, with representatives from both the government and opposition. Because of the issues under discussion, each delegation tended to have the first minister and the leader of the opposition as members, as well as prominent ministers and critics. As all but one of the state governments had an upper house, each delegation had to draw its membership from both houses.

In short, the convention collected the most powerful legislators from all levels of government. The convention had another unique feature: as parliaments were dissolved for elections, and governments rose and fell, the delegations and committees were in a constant state of flux. The membership at the first plenary session thus differed significantly from that of the last.

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[31] D. Blackwood, P. Ford & A. Schik, *A Short Historical Survey of the Activities of the Australian Constitutional Convention* (Government Printer of South Australia, 1983) at 5.

It was agreed that a secretariat should be established to provide expert advice and administrative support to the convention. First convened in 1973, the convention lasted until 1985, when it ceased to meet — dying with a whimper rather than a bang. Though it did not meet continuously over this period, it held plenary sessions in 1973, 1975, 1976, 1978, 1983, and 1985. Not all governments attended each plenary session.

As the convention could not meet on a regular basis, an executive committee was created to act on behalf of the convention in its absence. It had a membership of twenty one, with five members being drawn from the Australian Parliament, two from each state parliament, and four territorial representatives. Again, membership was balanced along partisan lines. The executive committee was in charge of scheduling the times for the plenary sessions, each of which would last for only a few days at a time. Between plenary sessions, the executive committee resolved difficulties, received the committee reports to be debated in the plenary sessions, and set the agenda for upcoming sessions.

At the first plenary session in Sydney in 1973, four standing committees were created, each with a mandate to report to the convention at later sessions regarding a broad range of powers. One examined economic powers; another examined the amendment process in the constitution; the third examined the legislative powers of the Commonwealth; and the last examined the structure of the electoral system and the Commonwealth parliament. Each committee had two representatives from the seven parliaments, and one delegate from a territory or local government — a total membership of fifteen. Party representation from the convention was copied in the committees. The first committee was dominated by First Ministers. As working bodies, they were dysfunctional, given their size, partisan composition, and their infrequent meetings.[32]

[32] R. Doyle, "The Australian Constitutional Convention, 1973-79" (July 1980) 63 The Parliamentarian 154.

3. Consensus in the Process

For all its efforts, the convention proposed very few amendments — mostly because of partisan disagreement. From 1973 to 1975, the Australian Parliament was deadlocked in a constitutional crisis — an impasse between its two houses. As the deadlock was the product of partisan division, the struggle overflowed into the plenary sessions of the convention. For all its efforts, the convention effected very little change.

Perhaps, the process might have succeeded if the partisan atmosphere had been peaceful. After its first session from 3 September 1973 to 7 September 1973, it was supposed to meet the next year in Adelaide. The 1974 Adelaide meeting never took place, however, since the Whitlam government withdrew from the Executive Committee over some minor disagreements, and failed to appoint a delegation. The Queensland parliament was also in the midst of an election when the plenary session was to have taken place.

By 1975, when the Convention was to meet in Melbourne, these problems were supposedly settled. However, a whole new set of partisan disagreements emerged and resulted in many delegations refusing to attend. The federal opposition parties, the Liberal Party and Country Party, decided to boycott the meeting due to their disagreements with the political agenda of the Whitlam government. The conservative government of Queensland also passed a resolution that banned its state parliamentarians, of any political affiliation, from attending. The New South Wales and Western Australian governments decided not to attend because of the boycott. The Victorian government, which was the official host, decided to withdraw as well. Victoria even went so far as to lock the doors of its legislature where the conference was supposed to meet. Thus, only the Labour governments of Tasmania, Southern Australia, and the Commonwealth were present (in addition to the opposition labour party delegates from each state except Queensland). The conference was moved to a nearby Melbourne hotel.

The 1975 meeting did result in a number of resolutions being approved by the delegates in attendance. Once tempers had cooled, another session was held, in Hobart in 1976, to allow for the absent states to review the resolutions from Melbourne. By that time, the

Whitlam government had been replaced with a Liberal-Country Party coalition. The resolutions coming from Melbourne were mostly re-adopted in Hobart. Four of these twenty resolutions were put to the electorate in a referendum in 1977 by the federal government, of which three were ratified. However, the adopted changes were minimal: casual Senate vacancies would be filled by someone appointed from the same political party; judges would be mandatorily retired; and territorial residents would be allowed to vote in national referenda. A fourth proposal, calling for simultaneous elections for the two houses of the Commonwealth Parliament, was defeated.

Perth was selected as the site for the 1978 session. This session was dominated by the continuing fallout over the 1975 constitutional crisis between the Senate and the House of Representatives. The main proposal considered at the 1978 meeting was one to prevent the elected Senate from blocking motions of supply in the House of Representatives. The debate on this resolution re-opened the political wounds which had been inflicted during the tenure of the Whitlam Government in the mid-1970s. Apart from the sound of axes grinding, the session produced little in the way of concrete results.

After the 1978 Perth meeting, the convention did not reassemble in plenary session until 1983 in Adelaide. At this session, the committee structure was overhauled. An umbrella committee was created to consolidate the role of the four standing committees. Further, six subcommittees were created to examine the judiciary, external affairs, fiscal powers, the structure of government, constitutional amendment, and industrial relations. Membership for the subcommittees was again drawn from the list of convention delegates. The main advantage of this approach was that it allowed more convention representatives to participate. Nevertheless, the committees encountered the same difficulties as had emerged earlier: ungainly size, partisan disagreement, and infrequent meetings.

The 1983 convention and the changes it instituted resulted in two proposals being put to the people for ratification in a referendum held in 1984. However, both of these proposals (making the term of the Senate the same as that of the House of Representatives, and providing a method of state-commonwealth inter-delegation of powers) were defeated. This set the stage for the sixth and last session of the convention in Brisbane in 1985. After over a decade of meetings and

minimal results, the legitimacy and value of the process was widely questioned. At the meeting, the Commonwealth Attorney General announced the "demise" of the convention. In a last gasp of energy, the executive committee reconstituted itself as the Australian Constitutional Convention Council — a body that is now redundant. By 1985, unimpressed by the efficacy of the convention, the Commonwealth Government created a "blue ribbon" commission of constitutional experts to propose constitutional amendments. Its proposals, however, were resoundingly defeated in a 1988 referendum.

4. Public participation in the process

The convention was restricted to legislators, but its sessions were open to the press and public. Once the convention had passed a resolution concerning a specific item of constitutional reform, it had no way to put it before the Australian electorate in a referendum. The Australian constitution can be amended only by joint resolution of the bicameral federal parliament, and a majority vote of the electorate, with majorities in at least four of the six states. Only the Commonwealth government can initiate the holding of a referendum.[33] The convention was only successful in directly proposing six amendments that were included in referenda over its lifetime, four proposals in 1977, and two in 1984. Only three relatively minor proposals obtained the required majority to be adopted.

It is little wonder that the convention exercise from 1972 to 1985 failed. Executive federalism in Australia is the dominant mode of intergovernmental negotiation and remained so throughout the life of the constitutional convention. Rather than becoming a true decision-making body and a forum for achieving compromise, the constitutional convention became just another opportunity for partisan disagreement. This may have been because of the absence of any sense of urgency associated with the work of the convention. The Australian constitution remained valid and operational throughout the process. There was neither a deadline for achieving agreement nor any

[33] Australians have voted in eighteen referenda since 1901, on forty two amendments, and have approved only nine amendments.

consequences to fear if the convention failed to achieve a consensus. Nor was there general public support for fundamental changes to the constitutional order. This rendered the convention and its membership simply unable to broker compromises on any controversial constitutional issues.

Perhaps the greatest weakness of the Australian convention was its interminable lifespan. Rather than being charged with resolving one set of issues, its mandate never required it to wind down, until popular disenchantment with the process and its participants spelled an inglorious end.

C. *Germany*[34]

Germany in 1948 was politically and economically shattered by the war it had just lost. Constitutional issues were not high on the list of priorities of the average German citizen. Four foreign military powers jointly occupied the country. Yet the Western Allies, at least, were determined that Germany should be politically reorganized and put back into the hands of its people. The Allies directed that a constituent assembly be held to draft a new constitution. For sensitive political reasons, the gathering that eventually convened was not called a constituent assembly, and the document it produced was not intended to be a true constitution, but merely a provisional one. Although this document was never ratified by the German people, it has served as the constitution of the Federal Republic of Germany (FRG) since that time, and is widely regarded as a resilient, practical, and efficient document.

1. The catalyst for the Constituent Assembly

The catalyst for the German constituent assembly of 1948 was even more disruptive than that for Spain: the German political and economic order had been shattered by the Allied victory of the Second World War. Members of the Hitler regime were either dead or on

[34] See generally, E.M. Hucko, *The Democratic Tradition: Four German Constitutions* (New York: St. Martin's Press, 1987).

trial, or were trying to escape from Allied justice. They were in no position to impede the establishment of a new political structure.

The occupation forces decided that a completely new German state must be created, one which would eventually take its place in the world order as a peaceful and productive democracy. To this end, the territory was redivided into "länder," new territorial units, many divided along lines that had no traditional basis (Prussia was subdivided, though Bavaria remained largely intact) and which were designed to prevent the emergence of a strong central state. The impetus for the constituent assembly was thus provided by the western Allies. They wanted to end their occupation, but would not withdraw until a stable and democratic order had been set in place.

For their part, the Germans were more concerned about the division of their country along East-West lines, and about regaining domestic control over their country and its economy. Their primary concern, reflected in the Basic Law, was that the new constitution be provisional to keep alive the possibility of a united Germany[35].

As in our Spain and Newfoundland examples, there was in Germany at that time no existing political institution with the authority or legitimacy to act as the forum for negotiation and compromise between the relevant interests that had to be accommodated in order to establish the new political order. An extraordinary institution was created by external authorities in response to an extraordinary situation.

2. Operation of the assembly

As Germany was divided into four administrative zones, each governed by a different Allied power, any new political order had to be approved by the occupying powers. Since the Soviet Union refused to participate in any talks about German unification, the Western powers met in London to consider the establishment of a Western German government. The London Conference, which met from 23

[35] Article 146 of the Basic Law, in translation, reads: "This Basic Law shall cease to be in force on the day on which a constitution adopted by a free decision of the German people comes into force": see L. Wolf-Phillips, ed., *Constitutions of Modern States: Selected Texts and Commentary* (New York: Praeger, 1968).

February 1948 to 6 March 1948, reached an agreement on fusing the Western zones of control. The ministers-president of the eleven western lander were then directed to call a constituent assembly to write a new federal and democratic constitution for Germany, to be approved by the three western powers, and ratified in a national referendum. It was not until 30 June 1978 and 1 July 1948 that the military governors met with the ministers-president, and delivered the "Frankfurt Documents." The ministers-president, in discussion with the military governors, expressed reservations.

Three concerns were voiced. Partition of Germany, dividing the Soviet and Western zones, would be unacceptable. Secondly, German citizens in the Soviet zone could not participate in a referendum. Finally, Allied retention of sovereign powers denied full legislative competence for any assembly. The three western Allies attempted to accommodate these German concerns. Instead of a constituent assembly, a "Parliamentary Council" was to be convened, composed of delegates from the länd governments. The Council would author a Basic Law, not a full fledged constitution, to be a framework document pending reunification of Germany. Finally, the document would be ratified by the lander diets rather than through a national plebiscite.

The constitutional process went forward on the basis of these modified proposals. It was agreed that the Parliamentary Council would have seventy delegates. Each länd would be allowed a delegate in council for every 750,000 citizens, giving the larger ländtags greater representation. Delegates were selected by the ländtags rather than through general elections. Sixty-five delegates were chosen in this way. The delegates were länder parliamentarians, with each delegation reflecting the party strength in the respective ländtag. Of the sixty five voting delegates, the CDU/CSU coalition and SPD each had twenty-seven; the FDP had five; the DP had two; the KPD[36] had two; and, a centre party had two delegates, as well. Because no party had an outright majority, progress was only reached through inter-party bargaining. The representation of Berlin in the Council posed a problem. It was

[36] These acronyms represent the following Parties: CDU — Christian Democratic Union; CSU — Christian Social Union; SPD — Social Democratic Party of Germany; FDP — Free Democratic Party; DP — German Party; and KDP — Communist Party of Germany.

contained in the Soviet zone, and was governed jointly by the four Allied powers. In the end, it was allowed to send five delegates, but only as observers.

The Parliamentary Council was to convene on 1 September 1948. Prior to the convening of the Parliamentary Council in Bonn, a committee of experts from the länder met for two weeks, from 10 to 23 August 1948, to provide a working draft for the new "constitution." Each länd sent two constitutional experts to the meeting to draft the document which would be considered by the council. Germans (and the Western Allies) were agreed that a federal and democratic state should be created. The draft they produced, which was the only scheme the Council formally considered, laid the foundation for the new constitution.

Once it convened, the council elected one of the delegates, Konrad Adenauer, to serve as president. Adenauer was the head of the Christian Democratic party in the British zone of occupation. Six special committees were formed (on Basic Rights, the Distribution of Powers, Finance, Governmental Organisation, the Judiciary, the Occupation Statute, and Electoral Law) that reported back to a supervising body called the Main Committee. Its chair was a prominent social democrat, Carlo Schmidt, the justice minister of one of the western länd. All committees had cross-party representation based on their representative standing in the council. The Main Committee of twenty one members met, beginning in November 1948, to review the special committee reports and formulate the substance of the new constitution. Disagreements from the special committee stage were supposed to be resolved at the Main Committee, before matters proceeded to the full Council.[37]

In January 1949, it became clear that consensus was limited. The provisions of the new constitution were being approved in the Main Committee, but only by very narrow majorities, while, partisan disagreement was prevalent. The Council had earlier agreed that the draft should be endorsed by eighty per cent of the delegates before it would be submitted to the Allies and the länder. The draft was in

[37] P. Merkl, *The Origin of the West German Republic* (New York: Oxford University Press, 1963) at 61.

jeopardy of being rejected. An informal and secretive process was devised to overcome these obstacles. A five person committee, representing the major parties in the council, met to bargain and iron out compromise. An Editorial Committee of three experts also advised this five-member group regarding textual changes. The Editorial Committee went beyond its mandate and offered substantive amendments in the face of opposition from the special committees.

This closed-door process, involving the main party leaders, managed to broker a compromise on the key issues in dispute. A final constitutional draft was presented to the Main Committee of 21 members for third reading from 8 February 1949 to 10 February 1949. The draft was approved by the Main Committee and also received substantial support in the Council.

The proposals then were considered by the occupying military powers. From the end of February to the end of April, a tense round of negotiations took place between the occupying powers and the political parties in the Parliamentary Council. The western Allies delayed the process by refusing to agree upon two aspects of the Basic Law. They approved neither of the proposal to grant Berlin full membership in the federation nor with the division of powers regarding central finance. These compromises had been the subject of great debate in the council, and their rejection by the foreign authorities placed the entire exercise in jeopardy. Finally, the three Allies assented to the scheme of powers proposed by the Council.

The final draft of the Basic Law was approved by a fifty-three to twelve vote of the full Parliamentary Council on 8 May 1949. Approval from the military governors was granted on 12 May 1949. The draft was then put to the länder diets. Ten of the eleven länder assemblies approved the proposed constitution. Only Bavaria's assembly dissented; however, Bavaria did agree to recognize the validity of the new constitution. The Basic Law came into effect on 23 May 1949.

3. Consensus in the process

There was in Germany at the time overriding societal consensus on three things: rebuilding the economy, restoring democracy, and

ending foreign military occupation.[38] Constitutional issues attracted little or no public interest. Political parties had been allowed to reorganize by the allies in the western zones after December of 1945. The party elites were now resolved to address the three popular concerns; they could achieve two of them, and facilitate the third, by drafting a provisional constitutional document to satisfy the occupiers' conditions for withdrawal.

As in the Spanish example, compromises reached between party leaders were the driving force behind the success of the German constituent assembly. The Constituent Assembly or Parliamentary Council, as it was then called, was the forum for reaching inter-party compromise, and the political parties were the links between the länder diets and the council. Compromise was possible because the party leaders were willing to give up some ground in order to achieve the establishment of the new political system and see the end of the occupation. Partisan politics took second priority to this need to reach agreement on a constitutional document. It was inter-party cooperation which allowed successful compromises to be achieved and maintained.

The disastrous outcome of the war for Germany and its people undeniably contributed to the formation of consensus. Importantly, in Germany in 1948, as in Spain in 1977, the old order was irretrievably shattered and new elites were rising to dominate the political arena. These elites agreed that their countries should become constitutional democracies. The constituent assemblies in both cases thus had a clear goal, and the delegates as well as the public knew exactly what outcome was expected.

4. Public participation in the process

Of these case studies, the German process was the most isolated from the public. The process was entirely dominated by two sets of elites, one internal (German) and one external (the Western Allies). The first set of elites was able to cooperate in order to produce a compromise that would satisfy the second set of elites. The 1946

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[38] K. Sontheimer, *The Government and Politics of West Germany* (London: Hutchinson, 1972) at 30-32.

elections to the länder diets had not been run on constitutional platforms. New elections were not called to select delegates to the assembly; rather, the delegates were chosen by their länder governments. The first draft of the constitution was produced *in secret* by a committee of experts before the convening of the assembly. The sessions of the Parliamentary Council were not secret, but received little press coverage and attracted even less public attention.[39] The important compromises were reached by the party leaders meeting privately, either in the five person committee of the party leaders or in the 21-member Main committee. The Basic Law was not put to the electorate for ratification, but was quietly passed, first by the Western Allies, and then by the länder parliaments. There was really no point of access for the German public into the process.

Nevertheless, the process was a success, in the sense that it produced a constitutional document which was to provide a stable and resilient form of government for Germany for the next fifty years. The Basic Law established a framework which permitted the German state to rebuild from the devastation of the war. Within a generation, Germany had regained its status as one of the world's great powers. The key to the success of the process was the ability of the political leadership in Germany in 1949 to put aside partisan differences and to arrive at a consensus on the political future of their society.

D. *Newfoundland*[40]

The only constituent assembly held in Canada in the post-war period is the Newfoundland National Convention of 1946-1949. As in the German example, Newfoundland was externally governed at the time and the assembly was called by an external force, the British Governor. In this case, however, delegates were directly elected rather than appointed. Three options dominated the political discussions of

[39] Merkl, *supra*, note 37 at 128-30.

[40] See generally, D. MacKenzie, *Inside the Atlantic Triangle: Canada and the Entrance of Newfoundland into Confederation, 1939-1949* (Toronto: University of Toronto Press, 1986); and P. Neary, *Newfoundland in the North Atlantic World* (Kingston: McGill-Queen's University Press, 1988).

the time: independence, economic association with the United States, and union with Canada.

The Convention was not charged with drafting a constitutional document, but with providing advice to the British Government concerning the future of Newfoundland. That advice, when tendered, was rejected by both the British authorities and the people of Newfoundland. The convention did, however, promote public debate and awareness of the various political options and choices. Thus the constitutional convention process in Newfoundland during this period might best be described as a mixed success.

1. The catalyst for the Constituent Assembly

In 1945, Newfoundland was governed by a six person British Commission of Government and a British Governor. The war, which had brought a brief resurgence to the country's economy, was over and the British had severe economic troubles of their own. They did not wish to retain responsibility for Newfoundland, which was expected to become once more a serious drain on the British treasury. Newfoundlanders, for their part, were critical of the Commission of Government, and wanted to explore other possibilities, such as a return to responsible government, union with Canada, or economic association with the United States.

A new political arrangement had to be found, and there was no existing political institution capable of generating concrete proposals in a legitimate manner. For this reason, the British Commission determined that a constituent assembly ought to be elected, to debate the island's future. British Prime Minister Clement Atlee announced the constituent assembly's mandate in a statement to the British House of Commons. The body was "to consider and discuss among themselves, as elected representatives of the Newfoundland people ... the position of the country and to make recommendations to H.M.G. as to possible forms of future government to be put before the people at a national referendum."[41]

[41] St John Chadwick, *Newfoundland: Island into Province* (London: University Press, 1987) at 193.

2. Operation of the assembly

Delegates were elected by universal adult suffrage in elections called for the assembly. The island was divided into thirty-seven constituencies, the thirty-eighth being all of Labrador. At least one representative was selected for each constituency. Five constituencies had multiple representation because of their larger populations. The two St. John's constituencies (St. John's City East and St. John's City West) each had three representatives, Humber had two, as did Harbour Main and Grand Falls. In all, forty five delegates were selected.[42]

In an attempt to prevent wealthy or powerful St. John's business or professional leaders from "parachuting" into delegate spots, a residency or armed service qualification was required. Multiple member constituencies did not use a "second preference" method, *i.e.*, only one name could be entered on a ballot. Thus, the candidates topping the polls were selected in a "first past the post method," rather than a true method of proportional representation.

The election was governed by local legislation, first drafted in March 1946, and then published to receive public input. In effect, the informal campaign started in December 1945. The election day was set for 21 June 1946, although three northern polling days were rescheduled because of inclement weather. The results were a mixed success. Eight delegates were acclaimed, some constituencies had a less than fifty-percent turn out at the polls, while others had hotly contested races.[43]

The convention began 11 September 1946 and reported on 29 January 1948 — a duration of sixteen months. Elections had not been contests between the old political parties. Although some former (and future) politicians were elected, the convention was composed of men from a variety of occupations who were more interested, for the moment at least, in the island's future, rather than a return to the partisan logjam of the past.[44]

[42] F. Hollohan & M. Baker, eds, *A Clear Head in Tempestuous Times, Albert B. Perlin: The Wayfarer; Observations on the National Convention and the Confederation Issue 1946-1949* (St. John's: Harry Cuff Publications, 1986) at 170.

[43] *Ibid.* at 32-33.

[44] Chadwick, *supra*, note 41 at 196.

Committees were struck to report to the convention on public health and welfare, finance, tourism, forestry, the fisheries, mining, local industries, transportation and communication, education, and agriculture.[45] However, the committees were virtually handcuffed because the assembly was effectively powerless. They had no powers of subpoena and no budget for independent advisors; and there was no requirement for the Commission of Government or its members to make either themselves or their files available. The Committees' actions had to be approved by the British Governor, and the assembly had to make application to him to send delegations to the U.S., Canada, and Great Britain to negotiate economic and political association. The requested trips to the U.S. were expressly forbidden. The subcommittees did eventually prepare reports, which were debated in full plenary session, and which radio broadcast to the public. Much of the debate was taken up by consideration of the two main options: independence and union with Canada.

In February of 1947, after a Christmas recess and a month long session, a resolution was passed in the assembly to approach the British Commission of Government with a three-part question. It asked about initiating negotiations with the United States, the option of continued association with Britain, and the option of union with Canada. A subcommittee met with the Governor and was informed that the first question, negotiations with the United States, was beyond the mandate of the assembly. Approval was granted, however, to send fact finding missions to Ottawa and London.[46] In March of 1947, the convention voted to send delegations to both capitals.

The British Government finally agreed to meet with a delegation at the end of April. These talks made it clear that, while responsible government was possible, the British had no intention of supporting an independent Dominion. Furthermore, the British government considered any critique or overhaul of the Commission of Government to be beyond the assembly's mandate.

After these discussions were reported to the convention, another resolution was passed (in May 1947) to send a delegation for trade talks

[45] Mackenzie, *supra*, note 40 at 170.

[46] Chadwick, *supra*, note 41 at 197.

to Washington. The Commission of Government overruled this resolution and would not allow the delegation to leave. Another delegation was sent to Ottawa in June, where they met with some members of the Canadian Government's cabinet committee, called the Interdepartmental Committee on Canada-Newfoundland Relations.[47] Talks continued from the end of June until the beginning of October, and were of a highly-detailed nature on all aspects of a potential Canada-Newfoundland political union.

In the Ottawa delegation's absence, the convention had adjourned. The chair of the delegation to Ottawa was also the chair of the convention. In July, in an attempt to derail the Ottawa negotiations,[48] five members of the convention tried to reconvene the assembly. They telegraphed the chair in Ottawa for permission to reconvene immediately. The chair refused, and the assembly remained adjourned while the discussions continued in Ottawa.

The Ottawa delegation returned to Newfoundland in October of 1947, with proposed Terms of Union which had been negotiated with the Canadian government. From 6 November 1947 to 19 January 1948, the proposed Terms of Union with Canada, as well as the option of responsible government, were debated. Joey Smallwood estimated that thirty-four days were spent discussing the proposed Terms of Union and only about four days discussing responsible government.[49]

On 19 January 1948, it was moved that the question of a return to responsible government, or, in the alternative, the continuation of the Commission of Government, be put to the electorate in a referendum. The motion was unanimously adopted on 22 January. A motion to include union with Canada on the referendum ballot was defeated in the assembly by a vote of twenty-nine to sixteen. In the view of the assembly, the people of Newfoundland should be required to choose between responsible government or the continuation of the

[47] The Canadian representatives were as follows: St. Laurent, the Secretary of State for External Affairs; Ilsey, the Minister of Justice; Abbott, the Minister of Finance; McCann, the Minister of National Revenue; and Bridges, the Fisheries Minister. See Mackenzie, *supra*, note 40 at 186.

[48] Chadwick, *supra*, note 41 at 201.

[49] Mackenzie, *supra*, note 40 at 191.

Commission of Government. This result was reported to London on 29 January 1948, at which time the assembly was dissolved.

3. Consensus in the process

There was really no public or elite consensus about either the future of Newfoundland or the task of the assembly going into the process. Nor did the constitutional convention generate any such consensus. The division tended to be not so much along party lines (political parties had been dormant since before the war, when bankruptcy forced the government to hand over its power to Great Britain), but between those who wanted a return to responsible government and an economic association with the U.S. (the majority), and those who favoured union with Canada (the minority). Possibly, because of the radical differences between these two positions, the assembly was unable to produce a compromise solution. Instead, at the end of day the assembly remained badly divided and no consensus was created. This can be contrasted to both the German and the Spanish examples, in which final constitutional proposals were endorsed by very large majorities in the respective assemblies or committees. Indeed, in Newfoundland, the convention could not agree on a single set of proposals but merely opted to put two different options to the people in a referendum. Ultimately, neither of the proposals put forward by the assembly was acceptable to a majority of the electorate.

4. Public participation in the process

As in the Spanish example, there was public input at the beginning and end of the process. The public was able to select the delegates to the assembly and to pass judgment on the final outcome. However, unlike the Spanish situation, the proposal ultimately agreed upon by the assembly was modified by an external power before being put to the electorate. The British Governor changed the ballot to include the Canada option. More significant is the fact that this was the option which was narrowly adopted by the Newfoundland people in a referendum. Thus, a proposal which the constitutional convention would have blocked from even getting on the ballot proved to be the

most popular with the public. This demonstrates the fact that public sentiment diverged from the dominant view in the convention.

All plenary sessions of the assembly were broadcast on the radio, and public interest in the debates was high. This allowed the minority supporting Canadian union to put their case directly to the people and gain support there, in spite of their failure to sway a majority of the delegates.[50] The delegates to the assembly became fixed in their positions and were unable to discover a way to bridge the differences between them.

[50] See Hollohan & Baker, "Introduction" in Hollohan & Baker, eds, *supra*, note 42 at 8-9.

PART IV: CONSTITUENT ASSEMBLIES AND CONSTITUTIONAL CHANGE

This review of the experience with constituent assemblies in four countries permits us to draw out four general conclusions about the role of constituent assemblies in constitutional change. These general conclusions relate to the circumstances in which constituent assemblies tend to be convened and the conditions which promote a successful outcome from such a process.

> *First, Constituent Assemblies tend to be convened when there is general agreement on the need for radical restructuring of a country's constitution. This consensus is most likely to develop following some profound social or political upheaval.*

Three of the four case studies examined reflect this pattern. In Spain in the post-Franco era, in Germany following the war and in Newfoundland in the late 1940s, there was a broad societal consensus on the need for fundamental constitutional change. This consensus on the inevitability of fundamental restructuring was a product of the fact that the existing order had essentially broken down. In both Spain and Germany, the convening of the constituent assembly was preceded by a period of social and political upheaval which had shattered established interests and had swept away the old order. This period of upheaval contributed to the sense of urgency surrounding the need for reform and increased the pressure on various interests to achieve compromise solutions. Newfoundland had not suffered any such upheaval, but there was a widespread recognition that rule by the appointed Commission of Government was no longer justified. The economic situation had improved, and the prudent spending of the Commission of Government had turned the government's deficit into a surplus.

Thus, the Constituent Assembly was convened to determine the constitutional and political future of the small country.

Australia alone does not fit the pattern found in the other three case studies. Australia's constitution continued to be a going concern throughout the period of the constitutional convention. There was neither breakdown in the existing constitutional order nor any sense that fundamental reform was inevitable. Nor was there any "political vacuum" in the existing arrangements which the constituent assembly was designed to fill. This meant that there was neither a sense of urgency surrounding the deliberations of the constituent assembly nor any pressure on the parties to achieve compromise solutions. Instead, the convention became just one more forum for partisan debate and political games-playing. Ultimately, it had little impact on the evolution of the Australian constitution, with its deliberations being overwhelmed by partisan political squabbles.

> *Secondly, Constituent Assemblies have tended to be most successful where there is broad consensus on the direction in which constitutional change should proceed.*

In both Spain and Germany, there was a general societal consensus on the need for the establishment of democratic government. The task of the constituent assembly was to give effect to that societal consensus. This task was partly political, partly technical. On the political side, the assembly was called upon to arrive at a series of compromises which would take into account the views and interests of the main groups in society. The technical side of the task was to translate that political compromise into the form of a precise constitutional text which could be put before the people for ratification.

No such consensus on the broad direction of constitutional change existed in either the Newfoundland or Australian cases. In Newfoundland, while it was generally recognized that constitutional change was inevitable, there was very deep division over the desirability of union with Canada. In the Australian case, there was not even broad agreement on the necessity of fundamental change, much less on the direction which such change should follow. Instead, the constitutional convention was a government-driven exercise, with the

states seeing it as an opportunity to gain greater fiscal leverage. In neither the Newfoundland nor the Australian case did the assembly succeed in creating a consensus. Instead, it simply reflected the broader division of opinion within the larger society over the constitutional issue.

> *Thirdly, far from being an exercise in grass-roots democracy, the Constituent Assemblies provided a mechanism for the leaders of established political parties or groups to negotiate and achieve compromises. Private, closed-door negotiations between party leaders were essential to the success of the exercise.*

Many of the advocates of constituent assemblies in the current Canadian context suggest that the convening of such an assembly would provide an opportunity for ordinary Canadians, as opposed to politicians, to negotiate changes to the constitution. According to this way of thinking, the chief virtue of the constituent assembly is that it would remove constitutional reform from the hands of party leaders and their advisers; it would mean that the constitution would not be changed on the basis of negotiations behind closed doors; and it would mean that party discipline would not be the dominant factor in any formal voting on proposed amendments.

The case studies which we have examined suggest that these expectations are unlikely to be satisfied by a constituent assembly. Instead, a key factor in the success of constituent assemblies has been the fact that they have brought together the leaders of established political parties or organized interests in society. The constituent assembly provided a forum for these party leaders to undertake negotiations, usually behind closed doors, to achieve compromise or positions of consensus. These compromise solutions were then ratified by the assembly as a whole, with voting predominantly along party lines.

This pattern is particularly evident in both the Spanish and German examples. In Spain, the original draft of the constitution was produced by a seven-member committee meeting entirely in private. Then, when serious disagreements on this text emerged, the differences were resolved through an all-night meeting at a Madrid restaurant

involving the leaders of the main political parties. The framework of this compromise agreement survived throughout the remainder of the process, despite numerous attempts to secure amendments at later stages. Similarly, in the German case, the first draft of the proposed constitution was prepared by a small committee of experts, again, meeting privately. The points of disagreement over this text were settled by a five member committee composed of the leaders of the main political parties represented in the assembly. The compromises which were agreed to by the party leaders provided the basis for the document which was eventually adopted.

The same pattern is reflected, albeit less successfully, in both the Newfoundland and Australian examples. In Newfoundland, the proposed Terms of Union were negotiated in a series of private discussions between the leaders of the Canadian government and a small committee from the Newfoundland Constitutional Convention. While these proposed Terms of Union were not acceptable to the Constitutional Convention as a whole, they were eventually ratified by the Newfoundland electorate in a referendum. In Australia, the main problem appeared to be the inability of party leaders to put aside their partisan disagreements and settle upon compromise solutions. It was this failure which relegated the Constitutional Convention to a marginal role in the constitutional reform process.

> *Fourthly, the main points of entry for the public appear to be at the beginning and at the end of the process. Furthermore, public support for the proposals of the assembly is linked to the extent to which the assembly is able to produce a compromise or consensus outcome.*

In three of the four cases examined, members of the public selected the delegates to the assembly through democratic elections and were asked to ratify the results through a referendum. However, there was no opportunity for the members of the public to participate in the proceedings of the assembly itself or to directly influence the outcome. Nor was there any opportunity for non-politicians to participate. In all cases we have examined, the proceedings were dominated by elected officials, and party discipline played a key role in the securing of any consensus.

There is no guarantee that the proposals put forward by a constituent assembly will be able to secure broad public support. In fact, in both Australia and Newfoundland, the public was either indifferent or opposed to the proposals of the assembly. It is significant that, in both of these instances, the assemblies were unable to produce a compromise or consensus position. Thus, during the referendum campaigns in both Australia and Newfoundland, the political leadership in these societies was divided over the merits of the proposals. These divisions in the political leadership meant that it was extremely difficult to secure popular ratification for the proposals of the constituent assembly. By contrast, in Spain, all of the major political parties in the constituent assembly supported the consensus position which was agreed upon. The broad-based support of the country's political leadership was a key factor in securing ratification of the new constitution.

This reinforces the importance of securing representation for the leading political parties and other organized political interests in the constituent assembly. Without such broad representation, it is unlikely that the proposals of the assembly will be acceptable to the political leadership of the country. This, in turn, will render the task of securing popular support or ratification for the proposals all the more problematic. In sum, these case studies bring home the point that the constituent assembly cannot seek to bypass politicians or the political process. Instead, the assembly must provide a forum for the established political parties and interests to arrive at political bargains that are broadly acceptable to everyone concerned.

PART V: THE CASE STUDIES APPLIED — LESSONS FOR CANADA

This review of the comparative experience with constituent assemblies points up a series of practical but significant difficulties associated with employing such a procedure in the current Canadian context. Based on the analysis outlined above, a constituent assembly would appear to be an unlikely way to achieve a successful resolution of the current constitutional debate in this country.

The first difficulty is that there has not (yet) been any breakdown in the existing legal order. Despite the failure of the Meech Lake Accord, and the threat of a Québec referendum on sovereignty, there has been no break in existing legal continuity. Established interests and political incumbents remain entrenched in their positions. As we saw in the Australian case, where entrenched interests remain in place and the constitution remains operative, the incentive to reach compromise solutions is reduced. The relationship between the constituent assembly and existing political institutions is also unclear in this type of situation. Where the existing political institutions remain in place and functioning, as in Australia, the assembly tends to become somewhat marginalized and secondary. In these circumstances, there is a great danger that the assembly will fall victim to partisan squabbling. Precisely because the assembly has a secondary or advisory role only, there is less pressure on the assembly to agree on a compromise or consensus position.

Nor is there any agreement on the nature of the constitutional problem which Canada must resolve at this time. Within the province of Québec, there appears to be a strong desire for significant decentralization of powers in favour of Québec, or of the provinces generally. Within the rest of Canada (ROC), on the other hand, there appears to be relatively limited support for decentralization of powers; for the ROC, the constitutional agenda appears to be focused around a rights agenda, including the right of aboriginal people to self-

government, the idea of the equality of the provinces, reform of the Senate, and support for national standards in social and economic policy. Furthermore, within Québec, there are continued demands to deal on a priority basis with the fact that Québec did not sign the *Constitution Act, 1982*; in the ROC, on the other hand, there is the belief that any attempt to limit the agenda to the concerns of Québec is illegitimate. One of the lessons of the Meech Lake round for the ROC (although not for Québec) is that any future constitutional round must address all outstanding constitutional grievances at the same time. Any attempt to limit the agenda to a defined list of concerns will arouse intense opposition from those whose interests are not being addressed. The experience elsewhere indicates that, when there is no real consensus on the nature of the problem to be addressed or how to deal with it, the constituent assembly is unlikely to produce a compromise solution.

This review of the comparative experience with constituent assemblies suggests a third important conclusion: the current public expectations surrounding a constituent assembly are totally unrealistic. The calls for a constituent assembly in Canada are a reaction to the elitism and exclusivity of the Meech Lake process. As such, a constituent assembly is often proposed as a vehicle for involving "the people" in constitutional change. The assembly is also thought to be a means of ensuring that constitutional change is not negotiated behind closed doors by elected politicians.

There does not seem to be any precedent for a constituent assembly organized along these lines achieving success. Indeed, a key element in the success of constituent assemblies has been the central role played by elected politicians. Further, the success of the enterprise has depended upon the opportunity for private meetings at which political compromises can be formulated. If Canadians were to ignore the experience elsewhere, and convene a constituent assembly composed of non-politicians, the prospects for success would appear to be limited. Within such an assembly there would be no vehicle, such as organized political parties, to create realistic expectations and to produce compromise solutions. Instead, it can be expected that the assembly of non-politicians would try to achieve a consensus by seeking to recognize the legitimacy of all claims for constitutional recognition or

entrenchment. This inclusive approach would have the effect of expanding the constitutional agenda quite dramatically.

For this reason, the product of such a constituent assembly would be unlikely to find favour with existing governments. Nor would such an approach be workable. The more interests and rights that are recognized in the constitution, the more limited is the remaining flexibility, available to governments and legislatures, to respond to social and economic problems. Broadening the constitutional agenda in this fashion also dissolves the boundary between "ordinary" politics and "constitutional" politics. It transforms every problem into a constitutional problem, thereby ensuring that these problems will remain unsolved. The reality is that constitutional language alone will not eradicate child poverty, reduce crime, or protect the environment.

There is a final but overriding concern with the efficacy of a constituent assembly in the current Canadian context. This concern is the unwillingness of the government of Québec to participate in such a gathering. Québec has clearly indicated that it will not take part in any Canada-wide constituent assembly during the current round of negotiations. We have noted the importance of ensuring that the constituent assembly is broadly representative of all the established interests and groups in society. Thus, the absence of Québec from any constituent assembly must be regarded as a very significant obstacle to success.

Some commentators have maintained that this is not a decisive objection to the convening of an assembly, since the purpose of the meeting would be to create an "interlocutor" for the province of Québec. The first question which must be asked, however, is what type of proposals would be produced by an assembly which did not include representation from Québec?[51] The further question is

[51] We are assuming that the refusal of the government of Québec to participate will mean that the constituent assembly would be composed of delegates from the ROC only. We regard the suggestion of the CWF, that the assembly could go "over the head" of the Québec government and elect delegates from Québec, to be incendiary and impractical. The effect of this action would be to ensure that the Québec government would be unalterably opposed to any proposals which the assembly might produce. The convening of the assembly itself would be seen as a kind of affront to the elected representatives of the province. We believe that this would further widen the rift between Québec and the ROC and reduce the possibilities for achieving any kind of accommodation with Québec

whether the proposals that would emerge from a ROC constituent assembly would render the task of reaching an eventual accommodation with Québec even more difficult.

The most probable outcome of a ROC constituent assembly would be a set of proposals which either directly contradicted Québec's stated agenda or, at best, was merely indifferent to it. Thus, a constituent assembly convened in the ROC would likely produce a list of proposals along the following lines: a strengthening of the *Canadian Charter of Rights and Freedoms* through the addition of social and economic rights, or the removal of the notwithstanding clause; a Triple-E Senate; enhancement of constitutional protections for multiculturalism, gender equality, environmental rights, and disabled rights; entrenchment, in the constitution, of powers for municipal governments; recognition of the right to aboriginal self-government; and entrenchment of a Canada Clause in the constitution.[52]

It is relevant to ask whether this outcome would increase or decrease the likelihood of achieving a compromise with the province of Québec. At a minimum, it is difficult to see how the chances would be increased. The main effect of the constituent assembly would be to dramatically reduce the negotiating room available to political leaders in the ROC. Any attempt by political leaders in English Canada to amend or to reject the proposals of the ROC constituent assembly, in order to accommodate Québec, would be subject to charges of elitism and political manipulation. This would reduce the likelihood of achieving any accommodation with Québec, at least in the short-term, and increase the prospects of a "yes" vote in a sovereignty referendum that must by law be held in Québec by 26 October 1992.

It might be maintained that a "yes" vote in a Québec sovereignty referendum is inevitable anyway, and, on this basis, that the convening of a constituent assembly in the ROC would make no difference to the outcome. It should be pointed out, however, that the calls for a constituent assembly at the present time do not proceed from this premise. Instead, the assumption appears to be that the convening of

over the long term.

[52] The list reproduced in the text is not fanciful, but represents a summary of the views which have been expressed before the Ontario Select Committee on Confederation during its hearings over the spring and summer of 1991.

a constituent assembly will be a vehicle for generating a national consensus that includes Québec. Our analysis shows why there is little reason to believe that this would be the outcome of the process.

It may well be, however, that a different set of calculations would apply in the event that no "federalist" accommodation with Québec is possible. We assume that some sort of federalist accommodation remains a live possibility at the present time. However, it is possible that Québec may, at some point in the future, decisively reject the federalist option. If this were to happen, then we believe that the convening of a constituent assembly would become considerably more plausible and attractive. The considerations in support of this conclusion include the following.

First, if Québec is to become a sovereign state, there will necessarily be a comprehensive rewriting of the constitutional law of the ROC; the ROC would have to settle on a series of wholly new arrangements which would have to take account of the fact that Québec will no longer be a member of the federation. The status quo, or even incremental change, would no longer be viable possibilities. Constituent assemblies have typically been employed in the past in situations where there is widespread recognition of the inevitability of fundamental political change.

Secondly, if Québec declares itself sovereign, a kind of political vacuum will be created in the ROC. There would be no other political entity which could represent the ROC in these circumstances; the Parliament of Canada, at least as presently constituted, is premised on the continued membership of Québec within the federation. Moreover, the remaining nine provinces, even considered as a group, would not give expression to the collective or "national interest" of the ROC. This political vacuum would make it important to create some new institution or mechanism to fill the void. As we have demonstrated, it is precisely in such situations that constituent assemblies have been successfully utilized. A ROC constituent assembly would permit the new entity, to be known as Canada, to determine its political destiny.

Thirdly, within such a scenario, the incentives for compromise and consensus solutions will be very great. The greatest imperative will be to ensure the continued survival of ROC as a single political entity. It cannot simply be assumed that the ROC will maintain its political integrity, given the preponderant weight which Ontario would possess

within the new Canada. Because of the perceived threat to continued political survival, all the political parties and interests within the ROC would be willing to entertain compromise solutions; moreover, the general direction of the needed compromise (one that will maintain the political integrity of the ROC) would be apparent in advance of the meeting of the assembly.

Fourthly, the primary purpose of an assembly would be to devise a constitution for the ROC. This makes the absence of Québec from the assembly natural and appropriate; indeed, Québec *could not* attend any assembly convened on this basis.

However, while a constituent assembly in this context becomes more attractive, there would be certain important difficulties that would remain. In particular, one of main problems facing both Québec and Canada, in the context of a decision by Québec to opt for independence, would be how to minimize uncertainty. It would be imperative that negotiations be conducted in a timely and effective manner, thus minimizing the length of the transition period and the uncertainty that would be associated with it.

It is arguable that the convening of a constituent assembly, in least in this transition period, would add intolerably to this uncertainty. As we have seen, the convening of a constituent assembly is a process which typically takes anywhere from one to two years. It is difficult to imagine embarking on a such an extended process as a means of responding to Québec, unless Québec has agreed to place its demands for political independence in abeyance until the constituent assembly by the ROC has completed its work. However, this is highly unlikely, if Québecers have voted decisively in favour of sovereignty.

It may be, however, that there could be a role for a constituent assembly in Canada at some point later in the process. Assuming that Canada and Québec could manage to get through the transition period associated with Québec's secession (which is by no means a certainty), Canada would be able to consider its own political reorganization at a more measured pace. In this type of situation, a constituent assembly would seem considerably more practical and attractive than is currently the case.

PART VI: CONCLUSION

There is little reason to believe that a constituent assembly would serve to resolve Canada's current constitutional crisis. As we have seen, present circumstances make the prospects for a constituent assembly problematic at best. There is neither a national consensus on the nature of the constitutional problem nor on the direction which constitutional change should follow. There has been no social or political upheaval which has shattered or threatens to shatter established interests. Most importantly, the political authorities in Québec have indicated their unwillingness to participate in the assembly.

At the same time, a constituent assembly might well become more plausible or attractive at some point in the future, particularly in the event that Québec opts for independence. This potential situation appears much more analogous to cases in which constituent assemblies have been employed successfully in the past. The constituent assembly would fill a political vacuum and facilitate the articulation of a new "national" vision for the ROC. While the use of a constituent assembly during the transition period is probably impractical, there may well be a useful and necessary role that could be played by an assembly in a post-separation situation. Obviously, we have not yet reached this fork in the road.

The international experience with constituent assemblies provides some practical guidance as to the structure and operation of such an assembly. The assembly should *not* be designed so as to prevent politicians and established political parties from participating. As we have seen, constituent assemblies have worked in the past precisely because they have been dominated by organized political parties and their leaders. The opportunity for private negotiations behind closed doors between party leaders has been an essential element in the formulation of compromise solutions. This suggests that, in the event that a constituent assembly is to be convened, it should be an *elected* body not an *appointed* one. Furthermore, private negotiations between

party leaders should be seen as an entirely appropriate means of fashioning a consensus in the assembly.

The problem is that popular expectations surrounding the role and function of a constituent assembly are entirely at odds with this approach. Thus, if a constituent assembly is ever to make a positive contribution to Canada's constitutional development, we may need more than a fundamental change in the existing political order; we may also have to witness a revolution of sorts in popular expectations about the process of constitutional change itself.