Constitutionalism, Legality and Legitimacy: a Canadian Perspective

Warren J. Newman,

B.A., B.C.L., LL.B., LL.M., Ph.D. Candidate, Ad. E.

Adjunct Professor of Comparative Constitutional Law, University of Ottawa, Queen's University, York University

Member of the Bars of Quebec and Ontario

Senior General Counsel,

Constitutional, Administrative and International Law Section

Department of Justice of Canada

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WARREN J. NEWMAN[1]

Introduction

Madam Chair, I am honoured to accept your invitation, on behalf of the Constitutional Affairs Committee of the European Parliament, to participate as a speaker at your public hearing into the important issue of the relationship between legality and legitimacy in the European integration process. I bring to the discussion the perspective of a Canadian jurist who has practiced constitutional law within the institutions of the Canadian government for thirty-five years and who teaches courses in public law and comparative constitutional law at several Canadian universities.

Some features of the Canadian state

Canada is a federal state, a constitutional monarchy and a parliamentary democracy ruled by law, including the law of the Constitution, the supreme law of the land.

Canada's constitutional framework combines elements of the British tradition of limited monarchy, parliamentary sovereignty, unwritten constitutional principles and conventions, and the rule of law, with those of the American (and to a varying degree, the French and European) tradition of a supreme, written constitutional text, an entrenched bill of rights, a demarcation of legislative authority, and a separation of executive, legislative and judicial powers.

In its evolution and transition from a French and then a British colony to a fully independent state, freely associated with other sovereign states and former colonies in the Commonwealth and La Francophonie, and similar international treaty organizations, associations and institutions (not the least of which are those of the United Nations), Canada has continued to develop, refine and implement key principles of democratic governance.

Canada's geographical size, the distribution of its people over a vast territory, and the diverse make-up of its population in terms of historical, social, religious, ethnic and linguistic origins, its largely resource-based economy and its federal system are amongst the many factors that contribute to the challenges and complexities of governance. Yet Canada remains a relatively youthful, dynamic, egalitarian, tolerant and optimistic society, rooted in legal continuity and stability, with legislative powers committed to maintaining the "peace, order and good government" of the Canadian nation-state and its citizens.

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[1] Senior General Counsel, Constitutional, Administrative and International Law Section, Department of Justice of Canada; Adjunct Professor and Doctoral Teaching Fellow, Faculties of Law of the University of Ottawa, Queen's University and York University. Despite these affiliations, the views expressed in these reflections are done so in my personal capacity and should not be attributed to the Department of Justice, the Government of Canada, or the foregoing universities.

This is not to suggest that Canada has achieved a perfect balance or stasis. It is still working out a renewed and more positive relationship with the aboriginal peoples of Canada, based on principles of reconciliation, respect for constitutional guarantees, and the implementation of the UN Declaration on the Rights of Indigenous Peoples. It has sought to respect more fully the equal status of Canada's official languages, to protect and promote the English and French linguistic minority communities of Canada, and to recognize the distinctiveness of the province of Quebec, home to the majority of Canada's French-speaking population, and Quebec's specificity within a united Canada. It also seeks to maintain and enhance the multicultural heritage of Canadians, while respecting our broader commitment to human rights and gender equality.

Legality

The rule of law is a foundational principle of Canada, and is recognized expressly in the preamble to the *Canadian Charter of Rights and Freedoms*, itself part of the Constitution of Canada. The rule of law may mean many things, but at its heart is the idea of a knowable and relatively stable, orderly and predictable body of laws which generally govern all persons equally within society; and within which framework of laws every person may exercise their autonomy, make personal choices, and plan for the future. The rule of law has often been contrasted historically with the rule of men, in the sense of the arbitrary, capricious and often harsh personal rule carried out by the fiat of absolute monarchs, autocratic strongmen or totalitarian dictators. Of course, law-making bodies, even when they debate legislative measures and promulgate them, may sometimes be prone, in the heat of the moment, to take arbitrary and irrational action, but by and large, the political compromises necessarily involved in democratic law-making processes act as a leavening agent (especially in bicameral legislatures).

In Canada, our Supreme Court has adopted to date what some might term a 'thin' version of the rule of law, but that is to misapprehend the true state of affairs: the Court has not attempted to make the principle of the rule of law do all of the conceptual work, but rather has distinguished matters that are better considered within the scope and operation of principles of democracy, the separation of powers, substantive equality and the protection of minorities, for example.

In the *Quebec Secession Reference*, the Supreme Court set out the key elements of the rule of law. (1) That "the law is supreme over the acts of both government and private persons. There is, in short, one law for all." (2) That the rule of law "requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order". (3) That "the exercise of all public power must find its ultimate source in a legal rule." In other words, that "the relationship between the state and the individual must be regulated by law."[2]

[2] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 71 (citing *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at pp. 747-7752, as well as the *Provincial Court Judges Reference*, [1997] 3 S.C.R. 3 at para. 10.)

The Court emphasized that the rule of law "vouchsafes to citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action."[3]

Legitimacy

The Canadian legal tradition is, as one constitutional scholar has put it, deeply legitimist. By that we mean that the Canadian polity has been traditionally law-abiding, that by and large it has valued law-making and law-making institutions, including the Parliament of Canada and the provincial legislatures and territorial assemblies, and that the resolution of disputes by resort to law, and respect for the decisions rendered by courts of justice, have been enduring characteristics of our system and of our legal and political culture.

Of course, Canadians are less deferential to formal embodiments of authority than they may have been in former years, and there is a healthy questioning of the public policy decisions of political actors, as embodied in legislative initiatives and measures.

For legal and political institutions, and the laws that they enact or enforce, to remain legitimate in the eyes of the public, they must win and maintain loyalty, adherence and trust; they must be free of corruption and preserve their integrity (and in the case of judicial institutions, their impartiality and independence); and increasingly, they must be subject to mechanisms and standards of accountability and transparency that are consonant with the roles they play.

They must also, within the framework of the separation of powers, be alive to performing their respective constitutional roles without overstepping their natural bounds. For example, in a parliamentary system, the elected legislative chamber is expected to hold the executive to account, but not to micro-manage the day-to-day administration of the affairs of ministries and departments, and this is facilitated by principles of representative and responsible government. And the courts, too, govern themselves by principles such as justiciability, which, as the Supreme Court has put it, may make it advisable for the Court to decline to answer a question where "(i) if to do so would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government", or "(ii) if the Court could not give an answer that lies within its area of expertise: the interpretation of law." [4]

Finally, it is helpful to examine the fundamental structure of our institutions—in Canada and elsewhere—when one is determining the essential characteristics of those bodies, in accordance with what our Supreme Court has chosen to call the "internal architecture" of the Constitution. For example, in its opinion rendered in the *Senate Reform Reference*, the Court underscored the role and functions of the Senate as a complementary legislative chamber of "sober second thought" in the study of proposed legislation. Establishing a system of consultative elections to govern the appointment of

[3] Para. 70.
[4] Para. 27.

Senators would, in the Court's estimation, endow the upper house of Parliament with "a popular mandate and democratic legitimacy" inconsistent with its fundamental nature and role, thus altering the Senate's place within Canada's basic constitutional structure.[5] The decision of the framers of the Constitution in 1867 to confer upon the executive branch the power of Senate appointments was aimed, amongst other objectives, at ensuring that the Senate would become a complementary legislative body and not a "perennial rival" of the elected chamber, the House of Commons.[6]

Constitutionalism

The concepts of legality and legitimacy are reflected, in turn, in the over-arching principle of constitutionalism.

In Canada, the Supreme Court has stated, the "essence" of the principle of constitutionalism finds its expression in subsection 52(1) of the *Constitution Act, 1982*, which provides: "[t]he Constitution is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." In this, constitutionalism is similar to, but not identical with, the rule of law: "Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution."

In the *Quebec Secession Reference*, the Court underlined that the Constitution "binds all governments, federal and provincial" in Canada, and that those governments "may not transgress" the provisions of the Constitution: "indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source."[7]

Constitutionalism, stated in terms of the supreme law of the Constitution, may be properly described as *legal* constitutionalism. However, the Canadian tradition also embodies a strong, underlying current of *political* constitutionalism. Political constitutionalism is generally concerned with the legitimacy of legal action taken pursuant to the authority granted by the provisions of the Constitution. Sometimes referred to as a system of constitutional morality, political constitutionalism as an ethos came largely from our British constitutional heritage, and the desire of the federating provinces that Canada should be endowed with, as the preamble to the *Constitution Act, 1867*, affirms, "a Constitution similar in Principle to that of the United Kingdom".

A web of unwritten constitutional conventions and understandings, notably those protecting the principle of responsible government—such as the requirement for the executive to maintain the confidence of the elected house, and the political neutrality of the public service—help to buttress the legitimacy of political decision-making and the exercise of legal authority. Constitutional conventions are normative rules of conduct that

[5] *Reference re Reform of Senate*, [2014] 1 S.C.R. 704, at paras. 54, 63.
[6] *Ibid*., paras. 58, 60.
[7] Para. 72.

bind political actors, not legal rules enforceable by the courts. "The main purpose of constitutional conventions", stated the Supreme Court in the *Patriation Reference*, "is to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period." The Court also emphasized that "some conventions may be more important than some laws", depending on the constitutional principle or value that they are designed "to safeguard".[8] In a later case, the Court noted that "[u]nderlying this distinction between constitutional law and constitutional conventions is the contrast between legal and political constitutionalism."[9]

Constitutionalism, Law and Democracy

As in the *Patriation Reference*, in which the Supreme Court dealt with questions relating to the law and the conventions of the Constitution, respectively, so the Court, in the *Secession Reference*, did not limit its analysis exclusively to the law and ignore the broader constitutional framework in which political action may be undertaken. "In our constitutional tradition", the Court observed, "legality and legitimacy are linked".[10]

Democracy is, as the Court stated, "a fundamental value in our constitutional law and political culture", and a principle that "has always informed the design of our constitutional structure".[11] Democracy may be said to express the sovereign will of the people, through elected and representative institutions at both the federal and provincial levels in Canada, acting within the spheres of power allotted to them by the provisions of the Constitution.

Democracy, the Supreme Court continued, "in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the 'sovereign will' is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people." Furthermore, "[o]ur law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the 'sovereign will' or majority rule alone, to the exclusion of other constitutional values."[12]

The Court also emphasized that the principles of constitutionalism and the rule of law, on the one hand, and the principle of democracy, on the other, are not in conflict with

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[8] *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, at pp. 880, 883. See also: *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793.
[9] *Osborne* v. *Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at p. 87.
[10] *Reference re Secession of Quebec*, *supra*, at para. 33.
[11] Paras. 61, 62.
[12] Para. 67.

each other. "Constitutionalism facilitates—indeed, makes possible—a democratic political system by creating an orderly framework within which people may make political decisions. Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy: rather, they are essential to it."[13]

Conclusion

Constitutionalism, legality and legitimacy are principles and values that are essential to democratic governance and to the permanency and stability of public institutions, in Canada as elsewhere. It is hoped that the brief reflections and observations outlined above will assist the Committee on Constitutional Affairs of the European Parliament in its deliberations on the relationship between legality and legitimacy as a central element of the European integration process. I look forward to our discussion.

W.J. Newman

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[13] Para. 78