McWhinney

CONSTITUTION-MAKERS AND THEIR ARENAS

Study of the different modalities of exercise of constituent power in different countries indicates a wide variety of options as to the arenas for constitutional drafting and enactment. The choice among these different options may be made casually or inadvertently, but it will never be value-neutral in its consequences. What looks like a simple, technical, machinery choice may in fact predetermine or influence the final substantive recommendations as to the content and direction of a new, or "renewed," constitutional system. The evidence would suggest that governments are very often aware of this truth, and shape their choice of the instruments of constitution-making accordingly.

The expert commission

Theoretically, an expert commission will be availed of by any government genuinely concerned with improving or modernizing its constitutional system. But the constitutional and the political domains are very close, and a government, through naming the members of an expert commission, is in a position to determine, or at least to decisively influence the commission's thinking in advance of its commencing its work. The distinguished French jurist, Georges Scelle has identified a certain professional bias or at least in-built intellectual disposition—a dédoublement fonctionnel—on the part of certain jurists, law professors, and even judges who, if they are not 'government' jurists in the crude sense of the word, are at least eminently predictable, on the basis of their past performance, as favouring their own government in adversary situations that cry out for an independent, objective professional scientific judgment. An expert commission, therefore, tends to become politically suspect, unless its members are selected on some genuinely independent, non-partisan basis, or unless its terms of reference are so precisely and narrowly defined in advance that it will be compelled to limit itself, in its work, to a purely technical, non-partisan, non-political function.

In the case of the countries that in recent years have used the expert committee or commission as an aid to constitution-making, the actual exercise of constituent power—to be made only after the expert commission report has been completed—has tended to remain under the firm control of the political decision-makers, and so the possibility of their being overwhelmed by the experts' opinions has never been substantial, even assuming the experts had wanted to play such a role.

The expert commission was used by the Supreme Soviet in its approach to enactment of the 1977 ('Brezhnev') Constitution of the USSR, the titular head of the constitution committee being, not inappropriately, L.I. Brezhnev himself. This was also the route taken by the Swiss Ministry of Justice in 1974 in naming an expert commission, composed of forty-six members, to take up the project for total revision of the Swiss federal constitution launched as early as 1965 by two federal deputies and continuing at measured pace—some might say, at deliberately leisurely pace—thereafter.

The British Commonwealth practice of using a royal commission of inquiry, or a public (as distinct from expert) commission or task force, raises much the same questions as already posed in regard to the expert commissions, and seems to offer some additional problems. The government of the day, in naming the royal commissioner or commissioners, or the members of the public commission or task force, is in a position to shape the final outcome, so that some parliamentary role to ensure independence in choice of the commission's members would seem desirable if public confidence is to be maintained.

In April 1969, the British government appointed a multi-member royal commission of inquiry to 'examine the present functions of the central legislature and government in relation to the several countries, nations and regions of the United Kingdom...[and] whether any changes are desirable in those functions or otherwise in present constitutional and economic relationships.' The last of the royal commission, in essence, was to examine regional alienation and disaffection in Great Britain and to recommend for or against some form of constitutional devolution for Scotland and Wales. The royal commission membership covered a wide range of public and professional experience, and it does not seem to have been viewed as partisan in character, either at the time of appointment or at the time of final submission of its report in October 1973.

In 1977, the Canadian government appointed the Task Force on National Unity, a multi-member public commission of inquiry to look into problems of regional alienation within Canada and particularly in the province of Quebec. The task force, to give it a non-partisan image, had two designated co-chairmen, one a former Liberal federal cabinet minister, Jean-Luc Pèpin, and the other a former Conservative premier of the province of Ontario, John Robarts, although the remaining members of the commission seemed to be members of the ruling federal Liberal party. The task force's terms of reference were rather more loosely drawn than those of the British royal commission, with the result that in its final report made early in 1979, it tended to run the gamut of constitutional change, thereby acting rather more as a constituent assembly than as an expert commission of inquiry. Since the task force members tended to be lay rather than professional in their training and experience, this, rather than any complaint of political partisanship, was perhaps what militated against the political persuasiveness of the report upon the government that had appointed it in the first place. The Trudeau government had not acted on the report in any way by the time of the government's defeat in the general elections of May 1979.
CONSTITUTION OF KENYA REVIEW ACT

PART III – FUNCTIONS, POWERS AND PRIVILEGES
OF THE COMMISSION AND COMMISSIONERS

17. The functions of the Commission shall be-

(a) to conduct and facilitate civic education in order to stimulate public discussion and awareness of constitutional issues;

(b) to collect and collate the views of the people of Kenya on proposals to alter the Constitution and on the basis thereof, to draft a Bill to alter the Constitution for presentation to the National Assembly;

(c) to carry out or cause to be carried out such studies, researches and evaluations concerning the Constitution and other constitutions and constitutional systems as, in the Commission’s opinion, may inform the Commission and the people of Kenya on the state of the Constitution of Kenya, and

(d) without prejudice to paragraphs (b) and (c), to ensure that in reviewing the Constitution, the people of Kenya -

(i) examine and recommend the composition and functions of the organs of state including the executive, the legislature and the judiciary and their operations aiming to maximise their mutual checks and balances and secure their independence;

(ii) examine the various structures and systems of government including the federal and unitary systems and recommend an appropriate system for Kenya;

(iii) examine and recommend improvements to the existing constitutional commissions, institutions and offices and the establishment of additional ones to facilitate constitutional governance and the respect for human rights and gender equity in Kenya as an indispensable and integral part of the enabling environment for economic, social, religious, political and cultural development;

(iv) examine and recommend improvements to the electoral system of Kenya;

(v) without prejudice to subparagraph (i), examine and make recommendations on the judiciary generally and in particular, the establishment and jurisdiction of the courts, aiming at measures necessary to ensure the competence, accountability, efficiency, discipline and independence of the judiciary;

(vi) examine and review the place of local government in the constitutional organization of the Republic of Kenya and the degree of the devolution of powers to local authorities;

(vii) examine and review the place of property and land rights, including private, Government and Trust land in the constitutional framework and the law of Kenya and recommend improvements that will secure the fullest enjoyment of land and other property rights;

(viii) examine and review the management and use of public finances and recommend improvements thereto;

(ix) examine and review the right to citizenship and recommend improvements that will, in particular, ensure gender parity in the conferment of the right;

(x) examine and review the right to the child and recommend mechanisms that will guarantee protection thereof;

(xi) examine and review succession to office and recommend a suitable system for the smooth and dignified transfer of power after an election or otherwise;

(xii) examine and recommend on the treaty-making and treaty-implementation powers of the Republic and any other relevant matter to strengthen good governance and the observance of Kenya’s obligations under international law;

(xiii) examine and make recommendations on the necessity of directive principles of state policy;

(xiv) establish and uphold the principle of public accountability by holders of public or political offices;

(xv) examine and make recommendations on any other matter which is connected with or incidental to the foregoing and achieves the overall objective of the constitutional review process.
Parliamentary enactment

A constitutional system committed to the principle of flexibility will normally choose the national legislature as the principal or sole arena for constitutional change, whether particular or general. The commitment to constitutional flexibility stems from the French revolutionary experience that to erect too many or too difficult barriers to constitutional change in the charter itself is an exercise in futility and an encouragement to the resort to force if all else fails. More ambitiously, however, the commitment to constitutional flexibility and the making of the legislature as the main repository of the processes of change, bespeaks a certain confidence in representative government and in the capacity of duly elected legislators to provide wisely for their country’s future. This is why—building on their own national experience—the constitution-makers in France, in the case of the constitution of the Third Republic in particular, but also the Fourth and the Fifth Republics, give such a large role to the legislature in the processes of constitutional revision. The situation in France, which might otherwise be viewed as a simple reflex of that occasional French constitutional emphasis on government-by-Assembly, is complicated by the existence of that other, and somewhat countervailing French constitutional principle of plebiscitarian democracy: the practical reconciliation of the two principles, built into the constitutional charters of the Fourth and the Fifth Republics, is to utilize both approaches—the legislative processes, albeit with extraordinary majorities and involving the two houses of parliament; and the referendum/plebiscite, as co-ordinate or alternative instruments of constitutional change.

The Bonn Constitution of 1949, after Germany’s own direct experience of plebiscitarian democracy in the Weimar and Hitler periods, entrusts constitutional revision to the federal legislature, but specifying extraordinary (two-thirds) majority votes in each house (Article 79). The Weimar Constitution of 1919 had had a similar provision for constitutional revision through two-thirds majority votes in the two houses, but accompanied by provision for a binding popular referendum vote in the case of disagreement between the lower and upper house or in the case of a popular initiative coming from ten per cent of the registered voters.

In 1973, the lower house (Bundestag) of the West German federal legislature voted unanimously on an all-party proposal to set up a commission of inquiry on constitutional reform. The membership of the commission was novel in that, while one-third of the commission’s twenty-one members were to be members of the Bundestag, another third were to be named by the governments of the member-states (Länder), while the remaining third were to be experts named by the different political parties in the Bundestag. Among the seven members thus selected from the ranks of the Bundestag, three came from the principal government party, the Social Democrats (SPD); three from the combined opposition forces, the Christian Democrats (CDU/CSU); and one from the tiny centre, Liberal party (FDP), which was currently a part of the government coalition. To a remarkable extent, the members of the commission, including those chosen from the Bundestag party ranks, were professors or doctors of law. The commission of inquiry, though initiating through the parliamentary processes, was thus, in its basic character, a ‘mixed’ commission—parliamentary, federal-state, and expert—with its claims to professional training and expertise accorded by the various political parties, government and opposition, in their actual selection of members of the commission. The commission produced, in a four year period, two separate reports, one on institutional interactions within the federal government itself and the other on Bund-Länder (federal-state) relationships. Perhaps in part because of the technical character of the commission’s membership—though in principal part, no doubt, because the Bonn constitutional system of 1949 is an evident operational success as it now stands—the commission’s conclusions and recommendations for future change have tended to be rather modest and technical in themselves.

It may, indeed, be suggested that when the constitutional system is already a going concern, so that what is wanted is considered to be incremental changes that build on existing constitutional values and constitutional institutions, without any perceived need for radical restructuring, then other modes of constitutional change, involving large-scale, direct popular participation like the constituent assembly, may become not merely expensive and time consuming but functionally unnecessary or irrelevant. The strictly technical, scientific, expert committee or commission as an aid to legislative drafting then comes into its own as, for example, in the case of the Brezhnev Constitution of 1977. But, it may be suggested, it is in this type of situation, that the parliamentary committee finds its special role: either a wholly intra-legislature group, or else a cabinet sub-committee, utilizing expert advice of necessity but on a largely non-public basis. In a general sense, and making appropriate allowances for certain basic structural differences applying in the case of a Socialist, eastern European state, we could say this has been the case with the successive, post-Stalin constitutional systems of the Socialist Federal Republic of Yugoslavia—of 1963 and 1974 especially.

The British constitutional system, in embracing the constitutional principle of the sovereignty of parliament, renders the constitution totally flexible, and makes the legislature the instrument of such flexibility. The Anglo-Saxon federal systems, among which the United States and the main commonwealth countries may be numbered, make use of the national (federal) legislature, too, but as part of the larger constitutional machinery of federalism; and they are perhaps better dealt with separately and in that special context.