THE STATE AND THE CONSTITUTION: THE CREATIVE EVOLUTIONARY PROCESS OF CONSTITUTIONS [1]

Jacques FRÉMONT

SUMMARY: 1. *Introduction;* 2. *Constitution-making Through Formal Amendments;* 3. *Judicial Constitution-making;* 4. *Constitution-making Through Practice;* 5. *Evolving Societies and Their Evolving Constitutions.*

1. INTRODUCTION

Foreign readers of the Mexican Constitution will be struck by many of its aspects. But for a Canadian, a very intriguing characteristic is the apparent relative easiness with which this constitutional text has been modified over the years: it would have been modified more than 350 times in less than seventy-five years. This fact is intriguing not the least because in Canada the Constitution has hardly been modified since its initial adoption in 1867, except once, and painfully so, in 1982. Similarly, the American Constitution has not been modified very often since its adoption, more than two centuries ago.

This observation raises interrogations about the life and evolution of Constitutions. How do Constitutions evolve and grow? Why are some Constitutions apparently easy to formally modify, while others, like the American Constitution, are, for all purposes, more or less "untouchable"? What do we know about the capacity of Constitutions to evolve in ways which take into account the changing characteristics of the societies they serve? The answers to these questions

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are admittedly not easy to provide with any degree of certainty. It is in fact surprising that so few writers have attemped to examine these questions which raise fundamental questions about Constitutions and their effectiveness as societal instruments. This paper seeks to propose some elements of answers to these questions abount the nature of the evolutionary process of Constitutions or, put simply, of the life of Constitutions.

The methods through which Constitutions evolve as time passes by will first be examined: the formal amending processes (# 2), the impact of judicial decisions on the evolution of Constitutions (# 3) and, finally, the means through which the political system attempts to bypass formal or judicial constitution-making (# 4) will be sucessively discussed. We will demonstrate that Constitutions change through "hard" as well as "soft" methods and that in many respects, the constitutional evolutionary process is probably more driven by non-formal adjustments than through formal amendments to the Constitutional texts.

However, since the simple examination of these evolutionary techniques would be insufficient *per se* to explain how changing societies influence their Constitutions, we will then attempt to provide a general theoretical approach to the constitutional evolutionary process (# 5) inspired from the theories of Bergson about the evolution of life.[2]

2. Constitution-making Through Formal Amendments

It is generally considered that the "normal" way to amend a Constitution is through the formal procedures established by the various constitutional texts. In fact, formal amendments to constitutional texts form the most visible and the conceptually easiest part of the evolutionary process of Constitutions. However, as previously mentionned, any comparative examination of the experience of various countries in this regard will show extremely different patterns.

How can this phenomenon be explained? Is it possible to identify the factors which will play in rendering formal constitutional changes more difficult or easier to accomplish? In attempting to answer these questions, we will examine the different amending procedures (# 2.1),

[2] *L'évolution créatrice,* 1907, 156e ed., París, P.U.F., 1986.

the subject-matter of the amendments (# 2.2), the relevance of the flexibility / rigidity debate (# 2.3) and, finally, what could be referred to as the ambient constitutional culture (# 2.4).

2.1 *Amending Procedures*

Much has been said and discussed about the characteristics of amending procedures for Constitutions. These vary from one constitutional regime to another and there are obviously no predefinite rules concerning what they must contain in order to be effective tools of constitutional change. However, one characteristic of amending procedures is that they have to possess some degree of rigidity as opposed to ordinary laws which can, in most cases, be modified by simple legislative majorities. This rigid character is usually conferred by specific requirements that qualified parliamentary majorities be achieved before a constitutional amendment can be made effective.

In a democratic age, the question of the participation of the public to the amending process can be of crucial importance in some countries. Such participation would surely be an interesting means of achieving a responsive evolutionary process.

Public input can be conferred some effectiveness at the level of the inception of a constitutional amendment. Switzerland is usually referred to as a model in this regard: it is a country where a certain number of citizens can initiate a constitutional amendment.[3] However, one can question whether such a possibility is realistic in larger democracies and in different cultural contexts, one of the dangers being that the whole process could become captive of special interest groups.

Public participation, when it is formalised within constitutional amending process, is usually conceived as a validatory exercise: a constitutional amendment otherwise approved by the political authorities must be confirmed by way of public ratification. Australia for instance, is a country where constitutional amendments have to be submitted to the people before they become effective.[4] The Swiss model is also regarded as the dominant example where citizens are called on a regular basis to approve or reject constitutional amend-

[3] Articles 120 and 121 of the *Constitution fédérale de la Confédération suisse de 1874*.

[4] Section 128, *Commonwealth of Australia Constitution Act*, 63 & 64 Vic., c. 12.

ments by way of referenda. The experience in each of these countries shows mixed results: while constitutional amendments have rarely been successful in Australia, the Swiss Constitution has bee modified on a more or less regular basis.[5]

To be effective, public participation does not, however, have to be formally integrated within the amending process. The recent Canadian experience demonstrates that it can be extremely difficult to conduct constitutional reform exclusively between political actors and without effective public input — even if the amending procedure does not call for such input. Any such process of public participation, whether meaningful or paying lip service, raises the difficulty of leaving the final decision to the political authorities while having, meanwhile, raised the expectations of the public in general and of special interest groups in particular.

On the other hand, the problem of the timing of such public debate around eventual constitutional amendments is serious and must not be underestimated: if consultations are held before the final draft of the proposed amendment is known, further debate is subsequently precluded; if, however, consultations are held after the text of the amendment is finalized, the public may complain of being put before a *fait acquis* and that the public input process is a bogus exercise. In this context, the solution of holding public consultations both before and after the final drafting of the proposed amendment might be considered. However, the Canadian experience in this respect is conclusive: the amending process can be drown under public consultations where the reaching of a consensus becomes very difficult.

Finally, it must be stressed that one of the obvious dividends of public involvement within the constitutional amending process is to raise the general expectations about the effective importance and symbolic value of the proposed amendments; the presure to achieve or to prevent the adoption of an amendment may in this context become a crucial political reality. In short, while public involvement within the constitutional amending process can be perceived in itself as a worthwhile objective, reality can be otherwise. The solution to balancing the need for public participation with the need for having

[5] *Op. cit., supra,* note 3, art. 123; for example, between 1973 and 1982, the Swiss Constitution has been amended in 17 instances, while 27 proposals have been rejected.

a relatively efficient constitution-amending process probably lies with allowing wide public involvement where its influence can be best felt and its impact most meaningful. Such a solution probably calls in turn for constitutional amending procedures which can vary depending on the subject matter of the proposed amendments.

2.2 *Adjustable Amending Procedures*

The U.S. and Mexican Constitutions do not propose differing amending procedures depending on the subject-matter of the amendments; such a uniform approach offers the advantage of suppressing any challenge about the adequacy of the amending method followed in any given case. However, it may submit more routine or matter-of-fact constitutional amendments to harsh procedural requirements.

The Canadian procedure proposes different amending methods according to the nature and subject-matter of the amendment. Most constitutional changes require the assent of the Federal Parliament and that of two thirds of the provinces representing 50% of the population.[6] However, for some constitutional modifications (like for the amendment of the amending procedure), the unanimous consent of all the provinces will have to be obtained;[7] for others, the consent of the Parliament and that of the provincial legislature concerned by the amendment will be sufficient.[8]

The flexibility gained by a differential approach to formal Constitution-making, however, does influence the attitudes adopted by the constitutional actors: in some cases, Canadian political actors will prefer to avoid having to achieve higher levels of provincial assent (like unanimity) and will make sure that their proposed modification is able to reach more realistic levels of provincial support.

Of course, constitutional amending procedures are generally easier to handle in the context of unitary states. In federal states such as Mexico, the United States, Australia or Canada, modification procedures can take a special importance within the context of the distribution of powers between the states and the federal authorities. Members states then have to give some measure of consent, and

[6] *Constitution Act, 1982,* Annex B, *Canada Act 1982 (U.K.), 1982,* s. 38.
[7] *Id., s. 41.*
[8] *Id.,* s. 43, 44 and 45.

experience shows the considerable political problems which can be associated with the achievement of this level of consent.

Of course, it is desirable in federal states that both the states and the federal authorities be able to initiate the procedure leading to a constitutional amendment affecting the distribution of legislative powers. This desirable bidirectionality, however, does not alter the fact that federal authorities have to be able to have a veto power in all cases of constitutional amendment.

In short, the presence or absence of such elements allowing some flexibility in the process used to modify the Constitution may have some influence over the evolution of Constitutions through formal amendments. The rigid character of Constitutions may have the same effect.

2.3 *Rigidity* versus *Flexibility: A False Debate?*

One can appreciate from the preceeding discussion both the numerous options available in terms of formal constitutional modification procedure as well as the considerable legal and political complexity the amending process can take in any democratic country. In this context, does the essence of the question become the resolution of the rigidity/flexibility alternative?

In general terms, a constitutional amending procedure will be considered rigid if its requirements are difficult to meet. Such rigidity is regarded as essential to the very concept of a Constitution, that is a supreme body of rules which will bind all the normative system of any given society. Fundamental rules, by their very essence, cannot be modified constantly or too easily at the capricious wish of any ruler or political instance. The rigid character of Constitutions is usually attained through processes which are more difficult to realize than for the adoption of ordinary laws or regulations.

In the American Constitution, this characteristic is achieved through a requirement that a proposal be approved both by a majority of two-thirds in each house of Congress and a majority of three-quarters of the States within a pre-set period of time.[9] Experience has shown that as a means of achieving constitutional amendments, this procedure is very demanding and that successful amendments are

[9] *Constitution of the United States of America,* Article V.

difficult to attain. This experience could indicate that the American amending procedure is, despite the appearances, very rigid.

The experience of Canada is somehow different: while Canada still had a colonial status (that is to say, before April 1982) about 14 amendments were made to the text of the then *British North America Act, 1867* by the Parliament of Westminster.[10] Most of these amendments dealt with technical details or with adjustments to the distribution of powers, and none was concerned with fundamental changes to the functioning of the country; only did the *Canada Act, 1982* which severed the ties between the Crown of England and Canada and added a human rights Charter had any substantial impact upon the Canadian constitutional order.

Since 1982, and despite astonishing attempts to do so on a grand scale, Canada has been unable to use its new amending procedure in a successful way except once, for a very technical detail.[11] It does not necessarily mean, however, that the existing amending procedure is too rigid; rather, it could indicate that it does effectively work very well and that the constitutional changes proposed were simply not wanted by the people of Canada.

It is interesting to note that the amending procedure of the Mexican Constitution appears, on paper, to possess the same type of rigidity than its American counterpart, except that the assent of a majority of States is sufficient to obtain an effective constitutional amendment. Still, the text of the Mexican Constitution has been regularly modifie. It thus appears that despite not dissimilar amending procedures, these two countries have had some very different success. We believe that the different success rates can be explained more in terms of "constitutional cultures", than from the explicit requirements or of the rigid or flexible character of the amending procedures involved.

2.4 *Formal Constitution-making and Ambient Constitutional Cultures*

Constitutions are regarded differently by the people and their representatives in different countries. In some parts of the globe, constitutional texts are more or less ignored and their existence is hardly

[10] *In Re Modification of the Canadian Constitution* [1981], 1 S.C.R. 735.
[11] *Constitution Amendment Proclamation,* 1983.

known; in these cases, they are generally ignored as an effective tools of social and legal engineering. At the opposite, in other countries, constitutional texts are regarded as "sacred cows", which should be revered and, ideally, not questioned; the latter are generally more or less immutable, at least in their explicit formulation. This raises the question of the role of a Constitution within a State. It can indeed have an exclusively nominal role with no real or immediate effects on the life (legal or otherwise) of a country. Or, on the contrary, it can have an effective normative function. Such normative function goes to the very heart of the concept of Constitution and of the preservation of the Rule of Law (or the État de droit).

But within the normative role played by Constitutions, may lie a symbolic value which can be far from negligible in cultural terms. This symbolic value does not have to be opposed to the functional role of the constitutional text: it exists (when it does) over and above the legal function of the constitutional order. Anthropologists would tell us not to underestimate the importance of such symbols in the national life of any country.

The symbolic value of a Constitution thus co-exists with its functional value and it would indeed be difficult to assess which dimension is more important in the life of a State (apart from the strictly legal dimension, of course). We could probably verify that, in this context, the more the symbolic value of a Constitution is important, the more difficult it will be to modify its wording. The level of symbolic value of a Constitution for a people will in turn be tied to the general attachment to the contents of the text, to what it represents, and to its relation with history. In fact, the more the people identify with the constitutional text, the more will they be attached to its symbolic value and the less will they likely be to accept any modification or tampering. The Constitution of the United States of America is, in this respect, a good illustration of this phenomenon of cultural identification.

The current and deep constitutional problems of Canada also illustrate the importance of symbolism and the relation between the translation of such values into effective constitutional amendments. For a very long time, and more accurately since the early days of what was called the quiet revolution of the sixties, the Canadian Constitution —otherwise know as the *British North America Act* — became identified by French-speaking Québécois as the target of dissatisfaction towards their role, place and status within Canada;

the symbolic value attributed to the constitutional text was so powerful in fact that in the years that followed, the Constitution of Canada has come to take a new and much more important symbolic value for the rest of Canada. This new importance was in turn symbolized by a fundamental change, the addition of a *Canadian Charter of rights and Freedoms* (since 1982). Ironically and not surprisingly, French-speaking québécois did not identify at all with the 1982 Constitution, in fact no more than it did with the old one which continued to be identified, in their collective imagination, as to the evil which has to be fought if their nation is to survive. The rest of Canada, to the contrary, has learned to love the new constitutional instrument at first sight and has since given it such a symbolic importance to such and extent, that it has become, for all practical matters, untouchable. In debating how to adapt the Canadian Constitution to satisfy the deep wishes of Québécois and Canadians alike, the current debate is constantly hung around issues that are pregnant with symbols (like the recognition of the "cultural distinctiveness" of Québec or of the principle of self-determination of aboriginal people) in an exercise where everybody is attempting to square the circles.

Culturally speaking, Canada has probably reached a point where the formal constitutional amending process has become completely paralysed, not because of the amending procedure itself, but because of the ambient constitutional culture which has developed. This situation may very well lead Canada to the breaking point except if canadians learn to attribute to their Constitution a less important symbolic value and replace it by a more functional approach.

In short, if the evolutionary process of Constitutions was exclusively limited to formal amendments, the Constitutions of some countries would hardly change, while others would continue to be amended on a regular basis, whatever the amending process, the presence or not of public input or the rigidity of the amending procedure. But, as a means of modifying a Constitution, we have to realize that "softer" ways of changing Constitutions do exist. Judicial Constitution-making is one of these.

3. Judicial Constitution-making

The role of the courts is traditionnally considered as that of the interpreter of the words and the sentences of the fundamental law.

Wheare in his work entitled *Modern Constitutions* said that it is the duty of the courts "from the nature of their functions" to "come to interpret a Constitution".[12] The question, in the context of the evolutionary process of Constitutions, is to determine whether court decisions do, in effect, modify Constitutions.

At first sight, the answer to this question would be that it is the courts' role to interpret the Constitution and that judges are not democratically responsible for their decisions. In this context, any assertion of judicial constitution-making therefore appears more or less acceptable. Wheare is more nuanced about this approach:

> It is well to ask first just what is meant by saying that judicial interpretation and decision can change a Constitution. Courts, it must be emphasized, cannot amend a Constitution. They cannot change the words. They must accept the words, and so far as they introduce change, it can come only through their interpretation of the meaning of the words. [...] [t]he fundamental point to remember is that the judge's proper function is to interpret, not to amend, the words of a statute or of a Constitution, and such changes as Courts may legitimately bring about in the meaning of a Constitution, spring from this function of interpretation, not from any inherent or secret function of law-making.[13]

The question to determine whether courts can modify a Constitution through their decisions might be considered as essentially semantical. The crucial observation is that courts do have a tremendous influence over the development of constitutional law in many countries; whether that function constitutes constitution-making or not can be the subject of much discussion. For the purpose of this paper, the function of determining the boundaries of the written (and unwritten) Constitution will be treated as Constitution-making.

The example of the United States is often mentioned concerning the considerable influence of the courts in their Constitution-making role. Such decisions as *Brown* v. *Board of Education*[14] or *Regents of the University of California* v. *Bakke*[15] or *Roe* v. *Wade*[16] are important examples of court decisions bearing on very important

[12] 2nd ed., Oxford, Oxford University Press, 1966, at p. 101.
[13] *Id.*, at p. 105.
[14] 347 U.S. 483 (1954).
[15] 438 U.S. 265 (1978).
[16] 410 U.S. 113 (1973).

societal issues. They all have had an importance at least equal to many formal changes made to the text of the American Constitution. In Europe, the same is true of Germany, for instance, where the constitutional court keeps an active and dynamic application of the German Constitution.

In Canada, the Supreme court has for long exercised the functions associated with constitutional courts, that is to determine in the last resort the constitutional issues submitted to its attention. For instance, it has rendered in the last ten years decisions which have literally changed the face of constitutional law whether in the *Patriation* [17] or the *Québec Veto* [18] cases, in Charter matters in general including abortion, *Morgentaler,*[19] and with regard to some other fundamental constitutional issues such as the Rule of Law, *Linguistic Rights in Manitoba,*[20] or the principle of the independence of the judiciary, *Valente* [21] and *Beauregard.*[22]

3.1 *Judicial Constitution-making Techniques*

It would be foolhardy to attempt to adequately describe the various situations in which the courts will engage in Constitution-making and thus participate to the constitutional evolutionary process. For the purposes of our discussion, let us be content to identify some of the means of judicial interventions.

The first and most traditional role of the courts is probably that of interpreting the standards set by the constitutional texts. Perfectly clear and unequivocal legal or constitutional texts, *per se,* probably do not exist. It becomes the role of the courts to interpret these texts in order to provide the meaning they should be given. Of course, some constitutional norms, by their intrinsic imprecision, vagueness or fuzziness almost by definition call for judicial intervention to define their scope and effective "official" meaning.

It is generally the case for many constitutional provisions concerning human rights. For instance, what is the extent of the meaning to be given to the expression "principles of fundamental justice" in

[17] *Supra,* note 10.
[18] [1982] 2 S.C.R. 793.
[19] [1988] 1 S.C.R. 30.
[20] [1985] 1 S.C.R. 721.
[21] [1985] 2 S.C.R. 673.
[22] [1986] 2 S.C.R. 541.

section 7 of the *Canadian Charter of Rights and Freedoms?* or else, what is meant by equality "before and under the law" and entitlement to "equal protection and equal benefit of the law" in section 15 of the same Charter? The answer to these questions is far from obvious and judicial guidance as to their meaning becomes an indispensable part of the Constitution of Canada.

What is interesting is that the meanings given to imprecise expressions by the judiciary have had a propensity to evolve as time passes by and as society changes. It has been the case for instance, in Canadian constitutional law with the general Trade and Commerce clause in the distribution of powers: this provision of the 1867 Constitution explicitly attributed the "Trade and commerce" power to the Federal Parliament, while all things of a civil or private nature as well as civil rights were attributed exclusively to the provincial Legislatures. The question was to determine which level or legislative power was competent for commercial matters in general. At first, the Judicial Committee of the Privy Council decided that all matters fell under the provincial jurisdiction except those of an interprovincial or international nature.[23] Indeed, many years later, the Supreme court of Canada more or less reversed that position in recognizing the Federal Parliament much larger powers to regulate trade and commerce matters even within provincial boundaries.[24] The remarkable thing is that, in the mean time, the formal texts of the Constitution were never modified by anyone. However, the revised judicial interpretation considerably changed the extent of the Federal power to regulate the Canadian Economic Union.

In fact, dozens of examples of a likely nature would demonstrate the crucial importance of court decisions for the evolution of the Constitution of Canada. Similar instances of creative or evolutive Constitution-making can be found in the American context.[25] Such interventions of the courts obviously introduce elements of flexibility and adaptability with regard to the scope and effects of Constitutions.

In other cases, courts are called not so much to interpret the provisions of the Constitution and their scope, but rather to apply the constitutional standards to the cases at hand. In such cases, the

[23] *Citizens' Insurance Co.* v. *Parsons* (1881) 7 App. Cas. 96.
[24] *General Motors of Canada* v. *City National Leasing* [1989] 1 S.C.R. 641.
[25] See, for instance, the evolution of the Interstate Commerce Clause, Wheare, *op. cit., supra,* note 12, p. 106.

difficulty lies with the relationship between the standards and the facts of the case. In some cases, the responsibility to arbiter the application of the standards is deliberately attributed to the judicial power. It is the case, for instance, in section 1 of the *Canadian Charter of Rights and Freedoms* which allows a violation of a substantive section of the *Charter* where it is within "reasonable limits prescribed by law" and is justifiable "in a free and democratic society". The very terms of this eminently fuzzy standard call for active judicial application to each individual factual situation at hand. Such process, in turn, has the effect of proposing not only a better understanding of the scope which should be attributed to the standard, but also to propose an evolutionary application adjusted not only to the facts at hand, but also to the societal values inherent to such value judgments by the judiciary. The end result is the development of complex and changing body of constitutional norms.

In some cases, courts have even manage to plainly invent standards or constitutional principles which are legally binding; per se, it constitutes a form of evolution. In a famous Canadian case, that of the *Reference Concerning Linguistic Rights in Manitoba*,[26] the Supreme Court of Canada decided that it was not possible to declare inoperative all the statutes adopted by the Manitoba Legislature since 1890, since it would create a state of chaos which would in turn violate the constitutional principle of the Rule of Law. The Court has since given this principle further substantive effects.[27] In doing so, the court transformed the principle of the Rule of law from a philosophico-political principle into a substantive legal rule, which is, one must admit a considerable addition to the Constitution of Canada.

Finally, one of the important functions of courts within the context of constitutional adjudication is that of imposing remedies. The extent of constitutional remedies available can vary greatly depending on the jurisdiction and the nature of the violations of the Constitution involved. For instance, courts are called, in the context of constitutional adjudication, to render decisions which may invalidate or render inoperative and of no force or effect unconstitutional statutes and other normative provisions. Courts will, in some circumstances, issue injunctive relief and, in some countries, will be

[26] *Op. cit., supra,* note 20.
[27] *B.C.G.E.U.* v. *A.G.B.C.*, [1988] 2 S.C.R. 214.

entitled (or decide that they are entitled) to issue mandatory orders forcing public authorities to modify their unconstitutional behaviour. Despite the difficulties inherent to any such form of constitutional remedies, the courts will have to consider, in reaching their remedial decision, the interests of those whose constitutional rights have been violated [28] as well as, in approaching a remedial strategy, the public interest in not ordering too radical remedies for the State (for which, ultimately, the public could suffer). In turn, this taking into account of the public interest necessarily involves an appreciation of the societal values at play; the constitutional evolutionary process becomes accordingly influenced.

3.2 *The Impact of Judicial Constitution-making Upon the Constitutional System of Government*

The width of judicial intervention within the Constitution's realm can, as we have demonstrated, be impressive. History as well as any comparative study of the life of Constitutions would show the tremendous impact of judicial decisions. They have a considerable impact in using, at least in common law countries, the technique of precedents. It is through the doctrine of *Stare decisis* that the courts' decisions will directly influence the other judicial actors. It is through the same doctrine that the State necessarily has to follow the courts' decisions in constitutional matters. The cost for the State of ignoring judicial rulings would, by definition, eventually carry the breakdown of the constitutional order. The evolutionary process brought by the decisions of the courts is therefore imperative for the State.

One of the fallacies, however, of constitutional law is the belief that under the Constitution, to each problem corresponds only to one single answer or, in other terms, that truth exists in constitutional law. Under that belief, the whole constitutional system would indeed have to be coherent and monolithic; the official interpretative theory is to that effect. A more realistic view of the process of constitutional judicial review specifies that this "official" vision does not sufficiently take into account the subjective aspect of adjudication or the influence of the consequences of the ruling upon the interpretative

[28] Dworkin, *Law's Empire,* Cambridge, Harvard University Press, 1986, pp. 389 et seq.

process.[29] In short, there is no single and truthful meaning to a text, constitutional or otherwise;[30] there are only possible meanings and the role of the constitutional judge is to choose the optimal solution at a point in time and for a specific set of facts.

Moreover, it must be pointed out that the role of the judge with regard to Constitution-making is in many respects more important than that of the other organs of the State. When through judicial review, courts choose to give a certain interpretation to the Constitution, it necessarily has to be followed by all the instances within the State; only a subsequent judicial ruling to the contrary effect can defeat the original judicial interpretation. In this context, the State has to follow the judicial statement about the contents of the Constitution; alternatively, it can always provoke a formal amendment to be adopted. The place of the judiciary thus becomes extremely important since it is situated in a hierarchal order, somewhere between the Constitution and the rest of the State.

In short, through their vast intervention powers, the courts have been major actors in constitutional evolutionary process in many countries. Their place within the constitutional order insure that they have the final say about the state of constitutional law at a given point in time; in this context judicial approaches to the evolution of the constitutional normativity are a most important aspect of the evolutionary process of Constitutions.

4. Constitution-making Through Practice

Constitutions can also evolve in ways which have nothing to do with formal amendments or the judicial interpretation of constitutional norms. They can, for instance, evolve through practice. Two example will be discussed to try to understand the importance of this informal evolutionary form of Constitution-making: the first is Constitutional conventions, while the second is the emergence of para-constitutional practices. The influence of both is extremely important for countries with British-type Constitutions; however, these phenomena are generally and for all purposes being ignored as a constitutional phenomenon.

[29] Côté, *Interprétation des lois,* 2nd ed., Cowansville, Les éditions Yvon Blais, 1990, p. 15.

[30] Carignan, P., *De l'exégèse et de la création dans l'interprétation judiciaire des lois constitutionnelles* (1986), 20 R.J.T. 27.

4.1 *Constitutional conventions*

Constitutional conventions form an essential part of the ways British-type Constitutions function. Despite their importance, constitutional conventions are not very well known, except perhaps by constitutionalists. Even politicians tend to ignore not their contents, but their existence. It probably has a lot to do with the fact that constitutional conventions *per se* do not generally take a written form. In short, despite the fact that constitutional conventions are rules of a *constitutional* but *not legal* nature, they nevertheless form compulsory rules of behaviour for actors of the political scene.

However, their main characteristic is that despite being constitutionally compulsory, these rules are not enforced into the judicial realm, but remain the responsibility of the political system. In other words, constitutional conventions are compulsory because politicians consider them as such and also because, in reality, they can hardly afford to ignore them.

Such a "strange" normative system would probably not work properly in most democracies; however, it does work satisfactorily for Britain which has no written Constitution and where the essence of the functioning of the State is regulated by conventions. Such essential aspects of the working of the State as the principles of responsible government, of ministerial responsibility or matters relating to the proper behaviour of the Sovereign with regard to Parliament are subject to well-established constitutional conventions. Indeed, political actors are *legally* free to violate any of these constitutional rules, but the political consequences are usually serious. One could imagine, as it almost happened in Québec in 1966, the crisis if a government which had just lost an election refused to handle its resignation to the Queen or else, if the Queen's representative ordered the dissolution of Parliament or a legislature without having been asked by the government of the day (as is effectively happened in Australia in the mid-seventies). In the first case, unwritten conventions dictated the only possible behavior for political actors in the circumstances; in the second, the conventions were actually violated by the political actors.

The fascinating aspect of constitutional conventions is that they find their roots in the past and that their effects are projected in the future. Their source is the behaviour of the political actors and not necessarily the texts they agreed upon. It effectively means that

by their very essence, constitutional conventions can be modified, can beginning or cease to exist in the most informal, ignored and almost unconscious way.

A systematic examination of the evolution of constitutional conventions over the centuries in countries like Britain, Canada and other Commonwealth jurisdictions would most likely show that some conventions hardly ever change and, for the best, have remained unchanged from the moment they were conceived. Other rules, to the contrary, have evolved in a more or less radical fashion. One thinks, for instance, to all the constitutional conventions which were designed specifically for the old British colonial system from late last century up to the middle of this century: these conventional rules have both appeared and in many cases disappeared in very short periods of time.

In the case of Canada, a recent Supreme Court of Canada decision has even taught Canadians about the existence of a constitutional convention which would have existed for more than a century, but which had been ignored by all.[31] Such conventional rulemaking by the Court illustrates both the importance of constitutional conventions and, of course, their aptitude to adapt to changing circumstances.

Of course, constitutional conventions do not necessarily evolve towards more complex or numerous rules in an incremental fashion. Many constitutional conventions do fall into obsoleteness; however, they are rarely declared as such since the sheer passage of time combined with ignorance and non-application of the conventions in circumstances where they could have been, are probably sufficient to ensure their disappearance.

Are we not experiencing with constitutional conventions the purest from of constitution-evolution, a sort of "anarchist" system of constitution-making? It would indicate, at least in a British-type constitutional context, that even let strictly to themselves and the behaviour of political actors, Constitutions would not necessarily tend to evolve more rapidly than under constitutional systems where imperative constitutional norms have to be expressed in written texts.

[31] *In Re Modification of Canadian Constitution, op. cit., supra,* note 10.

4.2 *Para-constitutional Practices*

"Para-constitutional practices" also constitute an important phenomenon of constitutional evolution through practice. Like constitutional conventions, such practices (called "para-constitutional, for lack of a more adequate expression) cannot be found within the texts of written Constitutions, nor are they usually discussed in our traditional constitutional law textbooks. Even though such practices are largely ignored by constitutional lawyers, their importance should not be underrated since they can constitute the bread-and-butter of the constitutional life of a State like Canada. It is thus a form of constitutional normativity which evolves and escapes the more traditional formal or judicial approaches.

For the sake of the present discussion, constitutional practices can be understood as ways of behaving imposed by attempts to circumvent the logic and the letter of Constitutions; in fact, many everyday acts or decisions taken by a State fall within this para-constitutional logic. Para-constitutional practices therefore tend to flourish at the margins of the constitutional order. Such practices are most of the time ignored by the general public; they are indeed not illegal nor unconstitutional, but consist of methods of proceeding which exist for reasons of commodity and greater expediency, as well as for allowing the State a greater margin of flexibility than that allowed by the "official" Constitution and its judicial interpretation.

Allow me to provide you with a few illustrations again taken from a Canadian context. They are mostly found around the question of the distribution of powers between the federal and provincial states. In the fifties, the apparent rigidity of the distribution of legislative powers called for the exploration of new solutions for old problems; the possibility of setting up a legislative scheme of inter-delegation between the various levels of legislative systems, however, was not allowed by the Supreme Court of Canada under the framework of the written Constitution.[32] It was subsequently imagined that if legislative interdelegation was not acceptable, then administrative interdelegation would probably be an interesting alternative solution (that solution was subsequently approved by the same Supreme Court).[33] A para-constitutional practice was thus successfully established.

[32] *A.G. N.-S.* v. *A.G. Can.* [1951] S.C.R. 31.
[33] *P.E.I. Potato Marketing Board* v. *Willis* [1952] 2 S.C.R. 392.

In Canada, the importance of such practices is in fact absolutely essential for all that concerns the financing of the Canadian federation since there are very few provisions in the formal text of the Constitution about that crucial issue. Early in the century, the Federal government started to use its power to spend money in order to intervene in fields of provincial jurisdiction; that approach became more systematic after the second world war and, since the mid-sixties, it has adamantly used as a tool of social policy-makin, even tough the federal Parliament possesses few explicit legislative powers in social matters. The use of this spending power was and is manifest through federal statutes which link the giving of federal money to the respect, by provincial authorities, of certain conditions or else, through the astronomical number of bilateral and multilateral intergovernmental agreements regulating the spending of federal earmarked money in return for some provincial compliance. The absence of any formal constitutional text keeps the constitutional validity of such a way of proceeding in the dark; the few judicial decisions on the topic are no more enlightening on this question.[34] The fascinating thing to notice is that despite of the importance of this practice, it has so far never been seriously questioned before the Canadian courts.

Whatever the final judicial word on the issue, the striking conclusion for our purposes is that somehow, this way of proceeding developed despite the formal constitutional texts, probably because of the efficiency and the flexibility it offered; it probably also flourished because of the state of relative economic submission of the provinces and the tremendous possibility it offered to the federal authorities to influence the very core of the exercise, by the provinces, of their legislative powers.

It is interesting to note that the development of such para-constitutional practices has led in turn the development of a corresponding para-constitutional normative system, that is a system which imposes a coercitive order of its own. The word coercitive is used in order to avoid having to use the word "legal", because the normative system thus created is not necessarily legal, but may very well be based more or less entirely on the existing "rapport-de-force"; it remains nevertheless coercitive.

[34] *Angers* v. *M.N.R.* [1957] Ex. C.R. 83; *YMCA Jewish Community Centre of Winnipeg Inc.* v. *Brown* [1989] 1 S.C.R. 1532.

However, in some cases, the normative system will be of a legal nature; it these cases, it will very likely raise some extremely difficult legal questions which will have to do with the articulation of the para-constitutional normativity with the ordinary constitutional and legal rules. For instance, intergovernmental agreements in Canada have no statuts formally recognized by the Constitution despite the fact that they are, as I indicated earlier, so numerous that it is impossible to keep track of their number. Such para-constitutional practices, when examined under the prism of the traditional legal order, raise some extremely difficult questions: what is the precise legal nature of these agreements? Are they enforceable by ordinary citizens, or exclusively by the governments concerned? Finally, up to what extent are they submitted to the Constitution? The answers to some aspects of these questions are now being debated before Canadian courts. However, as long as these practices are not, at least partly, integrated to the formal text of the Constitution, they will continue to be para-constitutional practices.

Finally, it is worth noting that this phenomenon of the emergence of para-constitutional practices is itself subject to an evolutionary phenomenon: these practices change over time in the light of the new needs of political actors and their priorities. Their evolution is also undoubtedly influenced by the fact that the dominant legal order has a tendency not to let them escape its influence; in others terms, once the articulation between the para-constitutional practices and the legal order are clarified (usually through court decisions), new or different practices might have to be found to circumvent the new relationship between the two normative orders. In this respect, a system of "va-et-vient" tends to establish itself between the official and the para-constitutional orders.

I have to admit that many of these phenomenons, although fascinating, are still largely unexplored by legal research or constitutional theory. We can nevertheless conclude from this rapid examination of para-constitutional practices that they constitute a non-negligible source of influence in the life of the Constitution of a State. In fact, these practices owe their existence to the fertile imagination of constitutional lawyers. This discussion demonstrates how far "living" constitutional systems can go, when compared with their formal written version, or their "judicial" version.

The life and growth of the constitutional order within a State depends on these various ways of changing. But this explanation of

the mechanisms of the phenomenon of constitutional evolution would be incomplete, if the influence of society (in all its respects) over the evolution of Constitutions was not discussed.

5. Evolving Societies and Their Evolving Constitutions

Our examination of the methods of evolution of Constitutions demonstrates how little we tend to know about the extent of this phenomenon. Is it possible, following this tentative analysis of the way Constitutions evolve, to try to identifiy more precisely not how Constitutions work, but rather how societies live and develop with their constitutional system and how this system is apt to reflect their society's evolutionary needs. The question is indeed extremely naive, but, I would submit, nevertheless most relevant if one is to thruly understand the whole evolutive system within a constitutional context. Before examining more precisely the issue, we have to agree on a certain number of premises for the sake of the discussion which will follow.

5.1 *Law as an Evolutionary Phenomenon*

As jurists, members of the legal profession and students of the law we have to agree that we generally know very little about the epistemological foundation of our science. Our ignorance extends also to our lack of understanding of the evolutionary phenomenon within the legal order. Despite these limitations, let us assume a certain number of premises on this topic for the purposes of the following discussion.

The first premise is that law as a system tends to grow and change in an ever more complex fashion. The legal system and the legal rules themselves are today infinitely more complex than twenty years ago and, of course, than last century. This complexification of the legal order is also true for constitutional law which year after year, tends to cover more ground and raise more dificult questions; I leave to sociologist the choice to provide explanations for this phenomenon.

Secondly, it appears —at least from a superficial and nonsystematic observation of the phenomenon— that law and, of course, constitutional law, tend to evolve in an incremental fashion, new "coats" of konwledge being added to former legal rules (or decisions, policies,

etc.) which, in many cases, retain their relevance within the evoluted (or modified) legal context. It therefore implies that the sheer knowledge-base of the legal system is bound to increase in a more or less exponential fashion. The end result of the preceding remarks is that the legal universe, and the constitutional universe, are ever more difficult to master and are more susceptible to generate access to information problems while rendering the resolution of problems more arduous.

The third premise is almost a truism: it is that law hast to have a rather intimate relation with the society it serves. It means that there cannot exist a state of complete "desincarnation" between the legal order (and even more so, a Constitution) and society, at the risk of a revolution. But staying within the framework of a working Constitution, a "va-et-vient" must and does exist between the legal rules and the "société civile".

If these premises are acceptable, they will constitute the background against which we will attempt to understand the relationship between societies and their Constitutions in an evolutionary context.

5.2 *The Phenomenon of Creative Constitutional Evolutionism*

As indicated before, any person attempting to explain the evolutionary phenomenon in law will be struck by the resemblance with evolutionary theories which exist in the scientific world. Despite all the methodological reservations one might have about such a borrowing to the hard sciences in a social science context, we submit that the comparison is indeed instructive, if not squarely stunning, in at least some respects.

In 1941, Henri Bergson, a french philosopher, published a little book entitled *L'évolution créatrice* (Creative Evolution) in which he sought to explain the evolutionary phenomenon in the natural sciences.[35] For him, the evolutionary phenomenon would be simple to understand if life adopted a unique trajectory, similar to that of a bullet. But, the path of life is, of course, not so simple and should rather be perceived as a bullet which once fired, immediately explodes into thousands of pieces, each piece subsequently exploding, and so on, for a long period of time. What we perceived at any point in

[35] See *supra*, note 2.

time is therefore essentially the scattered movement of pulverized bullet pieces; the epistemological challenge becomes that of getting away from the confusing directions taken by the parts of the bullet in order to understand the fundamental nature of what appears *prima facie* as diverging tendencies.[36]

Evolution, in this context and according to Bergson, has to be more than a series of adaptations to the circumstances or the realization of a vast overall plan: it results from the fundamental movement, from the initial thrust *(élan),* which realises the unification of the organized world.[37] That is not to say, according to Bergson, that external circumstances and the adoptive capacities are not relevant or important, quite the contrary. But they are not, according to him, the direct causes of evolution. In other words, the evolutive movement can be explained by the adaptation process, but the general directions of the evolutionary movement or the movement itself must be explained by some other phenomena.

On the other hand, Bergson demonstrates that life cannot be understood as a pre-conceived plan. Noting a growing tendency to disharmony between the species, he concludes that harmony does not lie ahead, but in the past which is precisely the contrary of organized plans where the more evoluted would mean the more harmonized. Moreover, he points out that evolution is not a unidirectional phenomenon pointing ahead. Some species stopped evolving and even disappeared in the past, resulting in a growing disorder.

We would submit that the evolutionary phenomenon described by Bergson applies in general to the evolutionary phenomenon of Constitutions. Initially, there is a formal constitutional text, which provides the initial thrust of the evolutionary system as well as the general direction it takes. This initial text is subsequently modified or adapted to the changing circumstances (a sort of Darwinian method), through wath I would call "hard" or "soft" methods of adaptation. Finally, where the breaking point is attained and when evolution becomes impossible, revolution (which is a phenomenon well known to constitutional lawyers) takes place. Allow me to express a few words concerning each of these steps.

[36] *Id.,* p. 99 to 104.
[37] *Id.,* p. 106.

5.3 *The Initial Thrust*

To take up Bergson's image, the evolutionary process could be seen as a road which goes from point A to point B: that road will turn and go up and down, depending on the land on which it is built or, in other terms, depending on the environment in which the road goes through. However adaptable to that environment, a fact remains: it is that this adaptation characteristic does not explain where points A and B are, nor the general direction taken by the road.

In this context, the function of the initial thrust is precisely to offer, over and above the evolution of the Constitution, the direction of the evolutionary process; the role of the initial thrust is to provide the basic direction for the subsequent evolution of the Constitution. Of course, in a constitutional context, this basic thrust, the fundamental rule which will form the basis as well as the point of reference of any subsequent evolution, do remain the constitutional texts themselves. During our examination of the evolutionary process of Constitutions, we have demonstrated how important constitutional texts can be as the original source of the constitutional order and the point of reference of further developments imposed by judicial decisions or para-constitutional practices; the *va-et-vient* between the written texts and such alternative constitution-making is a tribute to the importance of the fundamental initial norm.

Under this approach, any Constitution must possess an inherent evolutionary capacity that will influence its life and evolutionary record. This evolutionary capacity can be more or less important and will vary depending on certain characteristics which are both methodological and contents-oriented.

Methodological characteristics which will constitute the seeds of the evolutionary nature of a given Constitution will depend, for instance, on the drafting approach taken by the constituent. Is the constitutional text drafted in a precise or detailed fashion, or does it contain many explicit uses of fuzzy or undefined notions? It will also depend on the overall rigidity, as previously demonstrated, of the formal amending process. It might also depend of other factors such as the identity of the arbiter designed to solve constitutional problems.

The contents-oriented elements which will influence the evolutionary character of Constitutions will relate more to provisions in-

volving values than to those being value-neutral. For instance, provisions relating to the institutional aspects of Constitutions or to their "purely" normative effects are likely to suffer a slower evolutionary process than those which relate to the protection of human rights, for instance; their adjustments will usually be of a technical nature.

However, where concepts potentially involving societal values are present in the constitutional text, such as in the distribution of powers where the centralization / decentralization debate can be crucial, or in the human rights sector where the contents of the concepts are bound to evolve in parallel with the society, the chances that the evolutionary process will be important are greater. However, such evolution will remain within the general sense of direction given by the text of the original Constitution.

5.4 *The Adaptation of the Constitutions to Their Societal Environment*

While the influence of the initial thrust will continue to be felt, it appears obvious that the evolution of the Constitution will almost exclusively become an adaptive process, that is a movement which will seek to adapt as precisely as possible the constitutional instruments to the external societal factors. If this is true, Darwin's theory about the evolution of species could very well explain the evolutionary process of Constitutions.

All external factors are not necessarily factors which will point towards constitutional change. However, some societal factors will create substantial pressure for constitutional change, as we indicated in the third premise above. These can be of a cultural (including nationalistic), economic or social nature. The international nature of such pressures also have a growing importance these days.

That is precisely within the context of these pressures for change that constitutions become sensitive to their societal environment and strive to adapt accordingly. When such pressures are strong enough, constitutional change is likely to occur, at least through "soft" methods, such as judicial amendment or para-constitutional practices. In some cases where the societal pressures are even more important or where the process is more expedient, formal amendments to the Constitution will be preferred.

We have already demonstrated how the methods of evolution of Constitutions can be diverse. For the sake of the discussion, these methods of change could be identified as "hard" in the case of formal amendments and "soft" for judicial constitution-making as well as for para-constitutional practices. This distinction refers not only to the nature of the amending process, but also to the flexibility of the evolutionary process as well as to its sensitivity to pressures for change.

The "hardness" of formal changes to the constitutional texts first comes from the rigidity of the amending procedure with its substantial processual requirements. On the contrary, we have seen that alternative methods of constitutional change generally involve very few requirements relating to the process: for instance, judicial amendment of the Constitution only requires court proceedings and the obtention of a final judicial decision, while changes in para-constitutional practices or conventions, by definition, only involve changes in the way things are done by political actors. It is not surprising, in this context, that "soft" methods of constitutional change constitute a more important evolutionary phenomenon.

Flexibility and propriety for change in turn become a further characteristic of soft evolutionary methods which are (and by far) more adaptable, sensitive and responsive to societal pressures than the hard methods of constitutional change. The explanation of this phenomenon is probably partly due to those from which the initiative of reforming the Constitution comes. Indeed, the initiative for formal amendments necessarily has to come from (or at least, to commute through) the State, through its official organs; in this context, pressures for constitutional change indeed have to be very strong to convince the State to get into what can be perilous exercises of Constitution-making.

On the contrary, the initiative of soft methods of constitutional change belongs to members of the society, whether citizens for judicial Constitution-makin, or the political actors and Institutions for para-constitutional practices. In both cases, there are no pre-decided plans or concerted efforts in the evolutionary process: everything is left to the circumstances. In this regard, it is not surprising that changes are more frequent and tend to be more proactive than reactive to societal pressures.

5.5 *From Evolution to Revolution*

The limits —because there are limits— to this evolutionary process lie somewhere near the ultimate breakoff point, when the adaptative capacities of a Constitution are not able to absorb the pressures for change. That is the point where the gap between the two realities cannot be bridged. In those cases, the evolutionary process must replaced by the revolutionary process.

Although the word "revolution" does create some uneasiness in some circles, it is by no means an unfamiliar notion for constitutional lawyers. In fact, revolutions can and must be seen as necessary points of departure for Constitutions that obviously cannot fulfil properly their role. In this respect, a revolution probably constitutes the ultimate and the most radical form of evolution for Constitutions. They are never easy to realise and must be thought out carefully if they are to be successful, legally speaking, while respecting the parameters of the principle of the Rule of law.

However, the mere fact that revolutions have been successful and that the Constitutions that have resulted have survived over long periods of time despite considerable societal changes, shows that their capacity to adapt has indeed, been remarkable. It is the case, for instances, of the American Constitution which after more than two centuries seems to still have the ability to adapt to this rather challenging society. The same cannot be said for Canada, however: the Canadian Constitution might now have reached the breakoff point and it might very well be that Canada should finally have the revolution it has never had. The Mexican Constitution which has progressed and has served the Mexican people for three quarters of a century, has proved to be a most flexible instrument. The challenge which lies ahead is to render it as dynamic and successful as the society it serves.