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## SOVEREIGNTY IN FEDERAL STATES – DIFFERING APPROACHES

*Charles Caccia* \*

Starting from a political perspective, let me approach this awe-inspiring subject of sovereignty in three parts: first, by talking about Niccolo Machiavelli, whom I had to study at high school in Milan, and about sovereignty in general; second, by talking about federal-provincial relations in Canada today; and, finally, by talking about sovereignty in Canada.

We are profoundly indebted to Niccolo Machiavelli for severing, some six centuries ago, the deeply rooted medieval belief in the bond between the government on earth and what goes on in heaven. Machiavelli's belief was that the earthly and divine realms are not a unified cosmos when it comes to governance. It was a statement requiring courage and independence of thought. The fact that a century later a French philosopher, Jean Bodin, followed by Hobbes, Rousseau, and Hegel, also wrestled with the concept of sovereignty just helps to put things into an historical perspective and provides a sense of proportion. The concept and application of sovereignty has been with us for some time, and it has come a long way. It no longer identifies with the principal or the monarch of the day, but, as all of you no doubt already know, sovereignty in modern parliamentary democracies is vested not in the sovereign, but in the Parliament.

Today in Canada, sovereignty is embodied in a Parliament consisting of the House of Commons, the Senate, and the Queen of the British Empire. It is of a coming together of the legal authority and the executive authority through a democratic process which makes this magic word, sovereignty, so powerful in our ears and in our values.

At this point I must express deep gratitude to the organizers of this conference for having forced me to rethink about sovereignty, a term I have taken for granted during nearly thirty years and nine elections in Parliament. Like democracy, sovereignty is a term one feels no urgency to explain. Those who spend considerable time with it, one thinks, must be slightly deranged or must be ivory-tower dwellers, or both. In practical political life, the term is

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heard only at the occasional international conference, and then it is not heard again until the next international conference.

But just a moment. That is not quite so. There is such a thing, as Bodin teaches us, as internal sovereignty. Here I am indebted to Roger Scruton, the author of the *Dictionary of Political Thought*, who writes that internal sovereignty is an attribute possessed by a political body in relation to a society that falls under its government; it is "command over a civil society."<sup>1</sup> That is until, of course, a civil society rebels and takes to the streets. This concept of civil society and its relationship to sovereignty is one which is still relevant today. In many cases, it is causing the citizens to question the efficiency and even the legitimacy, or the sovereignty, of the state.

Let us move to the Canadian scene, where internal sovereignty becomes complicated because of the federal system. Canada's approach to federal provincial relations today is quite different from our approach forty years ago, and from our approach twenty years ago. I would not say it is evolving, but rather, it is adapting to changing political circumstances. Sovereignty in the case of federal-provincial relations in Canada is a delicate policy area these days, not just because of the situation in Quebec, but also because of the alienation being felt in the western provinces vis-à-vis Ottawa. I am tempted to add that this alienation is mostly instigated by provincial governments seeking greater influence and power in the shaping of national policies. That alienation is fueled by provincial politics, rather than by popular movements and individual feelings.

Today, Ottawa treats federal-provincial relations very, very carefully in order to minimize this alienation, whatever its causes. Some underlying structural causes of federal-provincial conflict have always been present. While most important areas of jurisdiction in 1867 were given to the federal government, the provinces were given responsibility for virtually all of the policy areas which have unexpectedly become more important in the last forty years in creating the welfare state, health care, social assistance, and education, to name a few. Yet, the provinces were not given the ability to raise significant revenues because no one thought this would be important for financially demanding areas of public policy when the Constitution was drafted. So, the federal government had the broader power of taxation under the Constitution, and the provinces had important responsibilities that they could not finance.

Because we also had no amending formula until very recently, our solution was to do administratively what we could not do by constitutional amendment. And so, for nearly forty years we have had a series of federal-

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<sup>1</sup> ROGER SCRUTON, *DICTIONARY OF POLITICAL THOUGHT* (Macmillan 1996).

provincial cost-sharing arrangements to finance social policy in Canada. While this worked quite well as long as the economy was healthy, it became problematic in the past decade, when the federal government felt it had no choice but to cut back on its provincial transfer payments in order to balance its books. Not surprisingly, the provinces were not happy about that.

Unfortunately, this all happened at the same time as many other problems were emerging, some due to the effects of globalization on regional economies, and others due to the dramatic reversals of fortune taking place in the resource-based economies of western Canada. In many cases, the result of this decade of economic turmoil has been a stepped-up level of provincial demands for greater autonomy in a wide range of economic policy areas.

Now, faced with these demands and two failed attempts at constitutional reform, Ottawa is trying a third option. Ottawa wants to prove that federalism can be flexible, even without constitutional reform. The approach to federalism it has chosen is one whereby they are administering measures. It is actually withdrawn, in the words of the February 1996 speech from the Throne, "from its functions in such areas as labor market training, forestry, mining, and recreation that are more appropriately the responsibility of others, including provincial governments, local authorities, or the private sector." A further withdrawal has taken place in the form of so-called "partnership." I quote again from this piece from the Throne, "[f]ocussing on such priorities as food inspection, environmental management, social housing, tourism, and freshwater habitat." This announcement is now public policy. In the case of mining, as an example, it has been received with great elation by industry and provincial governments. Of course it has, since they can now practically do what they want. Ottawa's environmental guiding hand has been removed, but aboriginal people, environmental NGOs, and the public at large have reacted negatively. They see in Ottawa a government which cannot easily be pushed by industry, which is safely distant from sectorial interests, and which can pursue, better than provincial governments, policies in favor of the public good.

The same can be said for the broader environmental policy area. On January 29<sup>th</sup> of this year, the federal-provincial territorial policy came into place, under an agreement for environmental harmonization. The policy is that Federal, provincial, and territorial environmental laws and regulations are to be applied in a cooperative manner; that is to say, in a manner whereby only one order of government takes action in a given situation. At the same time, there is the stated principle that "nothing in the accord alters the legislative or other authority of the governments or the rights of any of them with respect to the exercise of their legislative or other authorities under the Con-

stitution of Canada.’<sup>2</sup> This agreement, which can be suspended by any participating government with six months’ notice, is to be implemented through a number of sub-agreements, of which only three have been ratified thus far.

Is the public interest going to be better served by harmonization? It is too soon to say. It is likely to work out well in provinces where the political will for protecting the environment is equal to or greater than Ottawa’s. Since few provinces fall into this category, the answer is probably no.

As to other significant areas where jurisdiction has been transferred, a decline in the quality and standards of services offered to people in search of labor market counseling and placement has taken place at least in Ontario, while the transfer of social housing shows a spotty record, it has been successful in Saskatchewan, but fiercely resisted in Ontario. It may well be that, in a few years, these administrative arrangements will be revisited and changed in areas where they have not worked well. However, will the provinces acquiesce without a fight or without demanding quid pro quos where Ottawa tries to reclaim its jurisdiction?

Of course, internal sovereignty in Canada today cannot be discussed without also devoting time to the situation in Quebec. In recent weeks, we have seen the Quebec provincial government in disarray on the question of whether a referendum on sovereignty, or on Quebec independence, will be held after the next provincial election. The disarray has been caused by a young and energetic new candidate for the leadership of the provincial liberal party, Jean Charest, who has said simply that there will not be another referendum with him as Premier. Instead, he says that he intends to focus on the economy and jobs.

Contrast that with a statement a few days ago by the former Premier of Quebec, Jacques Parizeau, a separatist, or a sovereigntist, depending on where you stand, referring to the disarray. “What is this panic? This is just a futile debate, it should have been obvious a long time ago that there won’t be sovereignty if there is no referendum, and there won’t be a referendum if the *Parti Québécois* isn’t re-elected.” Whether this is disarray or panic is beside the point. The political fact, it seems to me, is that the days of Premier Lucien Bouchard and the separatist government appear to be numbered if Jean Charest continues to enjoy a high level of popularity in his own province.

Finally, allow me to turn to the issue of international sovereignty. Here I must preface my remarks, and in a way echo briefly what Jonathan Fried said earlier. Nothing has been so offensive and unfair in recent years as the attack by the United States on the sovereignty of other nations by the Helms-Burton

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<sup>2</sup> *Id.*

legislation. Not only has it offended many friends and admirers of the United States, but it has also soured relations at international gatherings. In fact, it has cast a dark shadow on the credibility of U.S. foreign policy. One can only hope Helms-Burton will soon become a museum piece.

Having gotten that out of the way, I would like to add that, by organizing this conference, the Canada-U.S. Law Institute has rendered a great service to the concept of international sovereignty. Let me explain. After World War II, many fervently believed in the formation of new structures of government, possibly federal, which would ensure peace and prosperity, bring an end to famine, and prevent wars. The United Nations was formed in the belief that the time had come to transfer sovereignty from the nation-state to a higher authority. In reality, we did not transfer sovereignty at all, and we know that. But, we were inspired by the idea of building institutions which one day could lead to a form of world government by consensus, or at least a federation of some sort.

Western Europeans, also determined to prevent conflicts once and for all, created the European Union, a most remarkable political feat, which implies the gradual and impressive transfer of sovereignty we are witnessing these days. And believe me, when the monetary union becomes a fact next year, volumes will be written on how that step in sovereignty transfer will affect the powers of individual Member States and their citizens. As sovereignty is transferred, motivated by highly desirable economic and social goals, an interesting question arises – is the transfer of sovereignty accompanied by an adequate transfer of accountability to the public?

In the European Union, they talk about a “democratic deficit.” It results from the fact that the Commission in Brussels has far greater powers than the European Parliament, whose members cannot answer fully to their electorates for the actions of their commission. Could it be that accountability is the other side of the sovereignty coin?

It may well be that there is a danger of a crisis ahead in the public confidence in sovereignty, in the real validity of elected institutions as we continue to create agreements such as NAFTA, the Multilateral Agreement on Investment (MAI), and the Kyoto Convention,<sup>3</sup> or institutions such as the International Monetary Fund, the European Union, and the World Trade Organization, which transfer a certain degree of sovereignty to bodies whose appointed executives are hardly accountable to the public. It is true that governments appoint them, and governments are accountable. But this linkage is easily overlooked, is nebulous, and is quickly forgotten.

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<sup>3</sup> United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (1998).

In our national newspaper, the glorious *Globe and Mail*, there was, on the front page of the business section, a report on MMT.<sup>4</sup> It discussed the action taken by the Ethyl Corporation to this dispute panel, to make recommendations on the question of the elimination of MMT, which is an additive to gasoline. The automotive industry – General Motors, Ford, and Chrysler – has asked to have it removed, in order to protect the initial control mechanism in new models of cars. The Canadian Parliament passed legislation two years ago banning MMT, but this legislation has stalled because of the original trade agreement.

To conclude, it seems to me the notion of sovereignty is very complex and interlinked, more interlinked than ever before. The old terminology is becoming rapidly less meaningful. The importance of the civil society is rapidly and strongly emerging. The trend in sovereignty transfer is not matched by accountability to ensure the proper functioning of the democratic system. Distant technocrats are becoming more powerful than elected governments. Therefore, if we are to move with the times and yet retain sovereignty, as it has been advocated earlier, then we must deal with the trend of declining accountability. If we ignore this trend, existing and emerging non-elected institutions will fail to earn the confidence of a public increasingly skeptical about responsive government. They will be uneasy with the powers given to distant bodies who make decisions which can dramatically affect communities, citizens, and their social cohesion. If we ignore this trend, then the belief in and support of our democratic institutions could be seriously eroded. We must not allow that to happen.

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<sup>4</sup> See Shawn McCarthy, *Provinces Attack MMT Ban*, *GLOBE & MAIL*, Apr. 16, 1998, at B1.