PREFACE

THE UNFOLDING OF FEDERALISM

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Within the two-year period, October 1989 to September 1991, dramatic political changes and events took place instigating changes in constitutionalism and federalism worldwide. It may be that internal political developments or struggles asked for changes in, or extension of existing constitutions; or that the break-up of enforced federations necessitated the creation of new constitutions and alliances; or that the expansion of supranational communities demanded the transfer of constitutionally guaranteed rights.

In November 1989 the Berlin Wall came down and the way to German unity was opened; yet there were heated arguments about the appropriate legal procedures and their constitutional foundation for the unification of the two German states.

After the unification on 3 October 1990, there was the strange situation that one-quarter of the citizens in the new Federal Republic were bound by a constitution they had never voted for—not even indirectly through their representatives—and that contradicting laws concerning basic human rights were in force side-by-side. The question still unanswered was whether the problems could be solved by amending the "*Grundgesetz*" (Basic Law) or whether what was needed was a new constitution acclaimed by the whole nation (in a referendum, if necessary).

In Canada the failure of the Meech Lake Accord in June 1990 rekindled the old dispute over the status of Québec and raised public concern about the continuation of the federation, sparking off intense efforts of the government resulting in new proposals for constitutional reform which were presented for public discussion in September 1991. A new note was added through the voice of indigenous people who are no longer content with financial compensations or cessation of land, but

demanding acknowledgment of their right to self-government in a new Canadian constitution.

The policy of *Perestroika* which had led to the independence of the states of the former Warsaw Pact also nourished aspirations and encouraged the struggle for autonomy of republics within the Soviet Union itself, eventually resulting in the dissolution of the Soviet empire. It was clear then that the creation of a legal basis for the new republics and the design and realisation of new federal structures would be vital tasks to attempt in the near future.

The preparation for a still closer economic and political unity of the European Community demanded quick implementation of the resolutions of the European Council of Ministers implying the integration of European laws into national law and jurisdiction and, to a certain extent, the transfer of sovereign rights to supranational institutions.

The loss of balance between the superpowers through the decline of the Soviet Union posed serious challenges to international law; as did the global ecological crisis.

The Gulf War caused a clash between U.S. and other demands for a greater military involvement of Germany in the war and German constitutional law which does not allow the deployment of German troops outside the borders of NATO countries—and even then for defensive purposes only. In the aftermath of this public conflict there was an intense discussion in Germany about a possible change of the Basic Law which would allow for the world-wide participation of German soldiers in UNO peace missions—another example for the impact of international political events on a national constitution.

At the Canada-Germany conference on Federalism, there was much admiration expressed for the German constitution—the Basic Law which—although being intended and expressly declared a provisional constitution—had served its purpose so well over more than forty years. There was also great interest that the German constitution-makers of 1949 went about the task of creating a new constitution so pragmatically, and that they drafted, codified and adopted it within only nine months. It might be suggested that this pragmatism and efficiency were not altogether self-induced and voluntary; that the three Western powers had urged the Minister-Presidents of the administrative units within their occupation zones to convene a constituent assembly and kept rushing and influencing the drafting of the new constitution. It was also true that the worsening of the Cold War pressed the German politicians to form a closer union of the three Western occupation zones, and made

necessary a legal basis for a new federal structure. Only the urgent political and economic problems at that time assuaged the concern of many German politicians that the unification of the three Western occupation zones could deepen the division between East and West Germany and preclude the option for a reunification of the Western and Soviet occupation zones. The fact that the new constitution was meant as a temporary solution certainly made it politically easier to adopt it. In effect, the Basic Law was accepted so readily and used as a working instrument not in spite of, but because of the fact that it was provisional. It is easier to agree on regulations which are provisional and to leave open the possibility of alterations or replacement, than to accept the seemingly perfect, definitive, unchangeable solutions. Such an insight could be a valuable guideline for the task of adjusting existing or making new constitutions, created for so many nations after the dramatic political changes in the past few years. The political challenge, then, is not to demand ultimate perfection but to achieve the politically sensible and possible at any given time. The Basic Law was deliberately kept open to amendments and alternations—apart from the Basic Rights which have never been negotiable. Strangely enough, now that the mandatory goal set out in the Preamble of the Basic Law—the accomplishment of German unity and freedom in self-determination—has been achieved, there is little inclination in Germany to replace the provisional Basic Law by a new constitution. One does not easily give up what has worked so well for over four decades.

There was also much praise offered for the *Bundesverfassungsgericht* (The Federal Constitutional Court) as an institution, and for the way it has fulfilled its mandate and used its power. The criticisms focussed on a problem which not only figures on a national level but is even more complex and threatening on a supranational level; the question where and to what extent new law is made by the interpretation of positive law—which necessarily is general and therefore need application to the particular case—through the jurisdiction of Supreme Courts, and how far this implies an infringement on the rights of the legislature. In other words, the question is whether a strict observation of the principle noted by Francis Bacon, "Judges ought to remember that their office is *jus dicere*, and not *jus dare*; to interpret law and not to make law, or give law" is always feasible. Although there is no doubt that legislation is the prerogative of the parliament the discussion at the Canada-Germany conference revealed different views about the role of courts, depending in fact on the particular training or professional experience of the proponents of such views.

The problem of judge-made law becomes more troubling if the decisions of international courts directly affect national laws, thereby overruling the positive law of a country and further undermining sovereign powers which may have been transferred to supranational institutions or alliances by the respective governments (normally in very general terms). This practice can be a serious source of conflict for federalism, as the member-states of federal systems are mostly excluded from the negotiation of international treaties and alliances; although the political and economic ramifications of such agreements between governments of different countries normally put heavy burdens on the member-states of federal systems. It is, furthermore, a dilution of democracy insofar as bodies which are not directly elected by the citizens of the member-states of federal systems can take decisions and introduce laws which are binding at the national level and yet can have serious impact on the everyday life of the citizens of those member-states of the federal system.

In addition to adjustments of constitutions to rights and functions of supranational institutions and international alliances, the demands of ethnic groups or races for self-determination or for a "special status," put a strain on existing constitutions or call for reform of those constitutions. For a neutral observer, the claim of Québec to be granted a special status within the Canadian constitution involves two major communication problems, a logical or ontological one, and a linguistic one:

> The difficulty of Québec in making clear what is meant by "distinct society." Nobody/nothing can be distinct (in itself); it can only be distinct from somebody/someone else! Therefore it is hard to explain or prove that you have a claim to a special status as a distinct society and to deduce special rights from this status. Every "distinct" feature you enumerate characterises, inevitably, your counterpart as being distinct as well. Since the point of reference for Québec is not other provinces of Canada, but Anglo-Canada as a whole, distinctness must be mutual.
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> The different connotations of "distinct society" and "*société distincte*," account for misunderstandings and for emotional, even hostile, reactions on part of the English-speaking Canadians for whom "distinct society" implies an arrogant claim to be something special, to be better than the rest of the Canadians. On the other hand, "*société distincte*" for Québec simply means different in language, culture, tradition, civil law.

The radical political changes which overturned the world balance of power and threatened the process of disarmament and the control of nuclear weapons, plus the enormous ecological challenges, call for quick and thorough adjustments in international law which cannot be achieved or implemented without infringing on national or sovereign rights. As pollution does not stop at national borders, only international agreements can prevent the worst. National egotism, "cleverness" in negotiating advantageous conditions for one's own nation, are obsolete, narrow-minded attitudes that will only speed up the ecological catastrophes which will hit the "clever people" as well.

It seems that constitutions—once a matter of purely internal affairs, the legal and political order of a nation, given and adopted in free determination according to generally accepted values and traditions—will no longer be adequate to the requirements of international political co-operation unless they also take into consideration international commitments and provide the prerequisites and options for joining supranational communities.

Similarly federalism, in the long run, cannot be restricted to the internal political and administrative structure of a national state, but will also play an increasing role in transnational political unions.

Finally, an increasing interaction and interchange of national law and international law will be necessary in order to meet the global challenges of the future.