

SOME MISSING ELEMENTS IN THE QUEBEC CONSTITUTIONAL DEBATE

by

Filippo Sabetti

Whether the constitutional and political future of Quebec and the rest of Canada will take on radically different sovereignist turns, or fall back on the status quo, it will not be for a lack of talks, public symposia and reports of one kind or another. Yet for all these talks and activities, there has been little or no public debate informed by covenant theory, and its relation to the Canadian admixture of federal principles with a parliamentary, majoritarian system. This is the missing element in the constitutional debate. From both a sovereignist or status quo position, serious consideration of covenant theory and its relation to Canadian federal arrangements is not important. Indeed, the logic of each position requires not to address this issue. But any attempt at creating or recreating self-rule and shared rule among ourselves – in Quebec as in Canada – must of necessity address or be concerned with this question. This is what I wish to argue here.

Daniel J. Elazar and his colleagues at the Center for the

Study of Federalism at Temple University, Philadelphia, have done much in recent years to advance knowledge of the relationship between covenant and politics (e.g., Covenant, Polity and Constitutionalism, vol. 10 of Publius, Fall 1980). Generally, they see a covenant as a morally-informed agreement or pact between people or parties having an independent and sufficiently equal status, based upon voluntary consent and established by mutual oaths or promises witnessed by a higher moral force, traditionally God. In its original Biblical form, covenant embraces the idea that relationships between God and humanity are based upon morally-sustained compacts of mutual promises and obligations. In politics, covenant connotes the voluntary-creation of a people and body-politic. The American Declaration of Independence is an example of the political application of covenantal ideas.

The emergence of covenant as a political language and factor is, in fact, closely associated with periods when people find themselves faced with problems of reconstituting human relationships on the basis of mutual respect and reciprocal obligations. The spread of covenant ideas in the lands of the Reformation, first, and in American settlements, later, is a novel reiteration of the Sinaitic tradition of the Hebrews. But people can discover, without recourse to the revelations and prophetic teachings of Moses, covenantal ideas and concepts and apply them in the constitution of commonwealths. The chief point is that the covenantal and the contractarian traditions in

politics are not mutually exclusive or antithetical to one another. As Daniel Elazar and others have made clear, in, among others, Covenant, Polity and Constitutionalism, covenant, compact and contract are related terms. Both covenants and compacts differ from contracts in that they are constitutional or public in character and contracts are private. But a covenant differs from a compact in that the former's morally binding dimensions take precedence over the latter's legal dimensions. A federal constitutional order or compact (and I don't mean here Confederation) has been viewed as the most appropriate effectuation of a prior covenant. It may be worth recalling that the word "federal" is derived from the Latin foedus, which means covenant, and that the expression "federal theology" was originally used to refer to covenant precepts. The practical utility of such a "federal theology" and such a constitutional federal order lies in linking power and justice, politics and ethics, and self-rule and shared-rule, by pushing the logic of politics understood as power or domination off the stage of political discourse.

It is not entirely clear whether covenant ideas and concepts were critical factors in the creation of Confederation. The major institutional arrangements of the original colonies and territories were Crown and executive dominated, as they remained in post-Confederation Canada. The colonial masters were gone, but were replaced by a new indigenous set, consisting of provincial and Dominion elites. The persistence of this

executive centered system of government has led Mark Sproule-Jones to refer to Canada as "the Enduring Colony" (in Publius 1984). He further suggests that much of the writings of Canadian political science reflect and rationalize the operative assumptions of this executive centered colonial type of government system.

What is clear, and less subject to dispute, is that covenant ideas and concepts emerged fully – but with unique twists – in political discourse only after Confederation, in response to basic problems resulting from the logic of executive dominance of the legislative process at the Dominion and provincial level. Not one but two antithetical covenant languages emerged: "the compact of provinces" and "the compact of peoples."

The very parliamentary nature of the executive-dominated government system contributed in a significant way to the predominance of the "compact of provinces" as "the" political formula for settling or resolving questions of constitutional choice in Canada. As a result, much of the history of Canadian federalism is the history of successive efforts to adjust, reform and reorganize the structures of government in order to assert and strengthen the authority of provincial governments and executive dominance of legislative assemblies in general. While the compact-of-provinces language emerged as an attempt to check and minimize the federal government's tutelage over provincial governments and affairs, the compact-of-peoples language emerged as an attempt to check and minimize the consequences of the

compact of provinces for the Francophone communities outside Quebec.

The emergence of "the provincial rights theory" provided powerful incentives for a strict application of majoritarian legislative rule outside Quebec. The linguistic and educational rights of the various French communities were challenged by majoritarian rule. In an effort to prevent this tyranny of the majority, Francophone lay and religious leaders turned to another kind of covenant language - the compact of peoples. Henri Bourassa, a Catholic thinker and founder of the influential Montreal newspaper Le Devoir, emerged as the most eloquent user and defender of covenant language as the compact of peoples. He regarded - correctly - the compact of provinces as an erroneous conception of the covenant idea, for it gave precedence to the legal dimensions rather than to the spirit of Confederation. He advanced the proposition that Confederation was, in the final analysis, based on a moral compact of peoples. The spirit of Confederation was for Bourassa best exemplified by what was taking place in Quebec. His words may be worth quoting:

The vast majority of its people speak French, but they grant to the English-speaking minority the right to speak English freely, and they accord them in the local administrations, municipal or provincial, those facilities which we ask in federal affairs, not merely as a matter of right - I would never put the question on that narrow basis - but as a matter of common sense, and true Canadian spirit, so as to spread out into every province of Canada the same spirit of Canadian citizenship which exists in Quebec, and should exist everywhere in the Dominion. (Quoted in Cook, Canada and the French Canadian Question, 1966: 39)

Bourassa's appeal was not heeded, however, as it carried none of the powerful influences that were behind the acceptance of the theory of the compact of provinces. What became known as "the Anglo-Saxon Kulturkampf" or cultural struggle followed, to sweep away French-language rights outside Quebec – and to give credence to Tocqueville's observation in Democracy in America that "the extension of judicial power in the political world ought ... be in the exact ratio of the extension of elective power; if these two institutions do not go hand in hand, the state must fall into anarchy or into servitude." It has been suggested that, with the anti-French campaign outside Quebec, French Canadians now had the proof that the English Canadians did not accept French Canada as an equal partner. Yet, at least until World War II, most French-Canadian nationalists clung to the hope that some day they would receive more equitable treatment in the rest of Canada. It is fair to recall another item of "proof": Quebec's failure to adopt the compact of peoples in any consistent fashion gave English Canadians "proofs" that the Quebec governing class was like that of all other provinces.

The "triumph" of the compact of provinces as the formula for resolving constitutional problems has served to undermine not only the linguistic and educational rights of French communities outside of Quebec, but also Confederation itself. Three different but interrelated manifestations of the crisis of Confederation can be observed today in Quebec constitutional

debate.

First, French Canadian nationalists have been led to identify their country with the province of Quebec alone - Quebec as the political expression of a nation as well as a distinct society. This appears to have ended, in Michel Brunet's words, "the French Canadians¹ long search for a fatherland."

Second, the triumph of the compact of provinces joined by renewed concern about natural resources has had the effect of strengthening the preemptive advantages given to the eleven Westminster-type parliamentary systems. In Quebec the distinctiveness of French culture has served to increase reliance on the Quebec government as the presumed universal problem solver in Quebec society and to create the potential for what Tocqueville called democratic despotism:

an immense and tutelary power which takes upon itself alone to secure their gratification and to watch over their fate. That power is absolute, minute, regular, provident and mild.... It chooses to be the sole agent and the only arbiter of [their] happiness; it provides for their security; foresees and supplies their necessities, facilitates their pleasures, manages their principal concerns, directs their industry, regulates the descent of property, and subdivides their inheritance: what remains, but to spare them all the care of thinking and all the troubles of living.... It compresses, enervates, extinguishes and stupifies a people, till each nation is reduced to nothing better than a flock of timid and industrious animals, of which the government is the shepherd. [Democracy in America 1945: II: 336-337]

A third, and perhaps most important, consequence is that contemporary political discourse in and beyond Quebec has little

or no reference to a language of sharing and joint action and obligation. The language of sovereignty has, in effect, pushed the language of covenant properly understood off the stage of political discourse as well as discredited almost any version of the compact theory of Confederation.

In sum, covenant language itself is now viewed simply as an evolving term of political controversy. Yet, covenant ideas and concepts properly understood are a critically important set of tools for organizing human relationships in Canada and Quebec. A retrieval of this tradition of ideas and scholarship is thus urgently needed in Quebec in order to link power and justice, politics and ethics and self-rule and shared rule – in essence, to provide the moral and metaphysical base for whatever emerges out of the status quo. Of course, recourse to covenantal language is not by itself an assurance of covenantal arrangements rightly understood. First, a critical problem in the use of covenant ideas is to translate those ideas into lasting political arrangements. It would seem that covenant ideas and concepts, in order to become operational, need to assume "positive," and hence contractarian, characteristics. In this sense, then, covenantal and contractarian paradigms need not necessarily be mutually exclusive. The value of a written covenantal base is that it gives one the basis for making enforceable claims, and thus gives citizens or groups of citizens a basis on which to resist the tyranny of the numerical majority or privileged minorities. Second, as a mode of political association, covenant contains a

strong primordial element of kinship and communitarianism. The danger here is that this element of ethnicity or distinct society may rule out of the constitutional order people who do not share these kinds of covenants. For all the talk about the value of asymmetrical federalism, we are still left with the following question: what understanding and considerations apply to the covenantal base of asymmetrical federalism inside a plural society like Quebec? An initial answer would be that a covenantal base does not have to apply to all considerations and all values of life and there can be a limited covenantal base that allows diverse communities to share in more general communities of interest and a common political nationality. The American political experience, with all its shortcomings, suggests at least that. But a chief stumbling block for such a limited covenantal base to emerge in Canada, as in Quebec, appears to be the executive-centered system of government based on majoritarian representation.

In sum, it is hard to avoid the conclusion that the present constitutional impasse - or the Quebec constitutional problem - is much more serious than is realized, for it involves some very basic ideas about federalism as they clash with the logic of executive dominance in government. The Canadian and Quebec political experience suggests that it is exceedingly difficult to fashion a limited covenantal base or community of agreement among communities of people who, driven by the logic of parliamentary majority rule or power, have not maintained a continuing dialogue

with one another. A language for understanding one another is a precondition for a language of covenant and, ultimately, for a common political nationality. And it is no accident that this perplexing problem is at the root of the Canadian and Quebec dilemma. A new language of constitutional choice is needed in Quebec, as in Canada. Yet this is nowhere to be found in the current political debate.