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Paribault Theory of External Sovereignty Flowing from Internal Competence

The theory of external sovereignty based on internal competence does not stand up to a serious analysis of its alleged juridical basis. The arguments used in a recent article to support such a theory are:

1) In a federal state the constitution is the only place where the legal international capacity of the member states and of the federal one is to be found. This proposition is valid, although it ignores the key role of international law on matters of recognition of international status; It appears, however, to be based on the assumption that "the constitution" is wholly contained in the BNA Act, and does not take account of the considerable body of Canadian constitutional law which is not contained in the BNA Act.

The exposition of this leg of the theory argues, somewhat irrelevantly that international status or "capacity" follows "whenever the constitutional states have the right of withdrawal." (This right is not contained in the BNA Act nor has it developed as part of the Canadian constitution through the process of convention, custom or practise.) T

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argument is then made that "member states have the original authority, power, autonomy, independence or sovereignty (whatever word one wishes to use) possessed by the entities which together become confederated". There may be some basis for this proposition on the precedents of some of the older federal states, but obviously it cannot be asserted as an invariable rule, ~~however~~ if the consititution otherwise provides. In any event, it would not appear to advance the provincial position very far, ~~however~~, since the provinces would then have merely the rights of a colony of Great Britain prior to confederation.

The argument makes the valid point, however, that the component units of a federal state have the requisite power "to discuss, elaborate and settle the terms of the federal union". Indeed, this proposition seems far preferable to one advanced later in the thesis, in support of an alleged power to amend the constitution by fait accompli.

2. <u>The written Canadian constitution is silent on all matters of international relations</u>. This proposition is substantially correct. The argument admits that the inclusion of such classes of subjects as "militia, military and naval service and defence", "navigation and shipping" and "naturalization and aliens" are suggestive of external powers, (but argues that the list

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of subjects assigned to the provinces must all be considered "to ascertain the authority of the legislature." The argument dismisses Section 132, providing for the necessary powers for the Parliament to perform the obligations of Canada arising under empire treaties, as being obsolete. It does not give consideration to the intent reflected in this section; (i.e. the powers in question were clearly passed to the "Parliament and Government of Canada" and not to the legislatures") The argument admits that Section 9 of Section 91 clearly provides that the Executive Government and authority of and over Canada is declared to continue and to be vested in the Queen, but dismisses the section as without significance on the basis that the Crown acts in right of Canada in matters of federal jurisdiction and in right of the province in matters of provincial jurisdiction. The argument also dismisses the clear devolution of the prerogative power contained in the 1947 Letters Patent as being a "subordinate document", which is referred to as "Instructions to the Governor-General, etc."

The argument dismisses the "peace, order and good government" clause of section 91 on the grounds that all governments have such powers (i.e. in other words it is permissible to read into the BNA Act some things but not other things.) Up to this point no basis is postualted for the

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possession of external powers by either federal or provincial authorities. It then goes on to dismiss the residuary of the federal government powers "in the face of the clear allotment of education to the provinces." At this point, it becomes clear that the argument is, in essence, that the government of Canada has no external powers on matters touching on educational powers in the light of the "clear allotment" of education to the provinces; that the government of Canada could claim such powers only as residuary powers; and that since education is allotted it cannot be residuary; Thus the logical extension of the argument is that in every case where a province has under the BNA Act exclusive powers within the provinces, it also possesses external powers relating to the subject matter. No authority within the BNA Act or in Canadian constitutional practice is cited for this proposition.

3. No reference to customs and usage is admissible as against the foregoing paramount principle. The basic premise of this argument is that the only valid precedent "would be those of a federal country and not those of a unitary country against a federal one." The argument is then made that in all federal constitutions that can be found, the matter is not settled by "customs or usage" but "by a text in the constitution". This would seem

to imply that since Canada's constitution is unwritten on this point neither the country as a whole nor the provinces have external powers. Yet, having denied custom and convention as having filled the gap in the written constitution, the argument goes on to make the point that it is as permissible for the provinces as for the federal government to create precedents and, presumably, thereby amend the Canadian Constitution. The argument at this point is the reverse of the first two propositions, since it appears to accept that foreign affairs' powers are or cannot be a part of the unwritten constitutions of Canada (i.e. that part developed by custom, convention and practice) in spite of the fact that in other federal constitutions the matter is settled by written provisions. Thus the theory falls between two stools, as it denies custom as the basis for the federal government's external power, ~~On the one hand, it contended that~~ while it invokes custom as the basis for the provinces' attainment ~~encroachment~~ of these powers. On the one hand, it is contended that the Government of Canada has not acquired external powers by custom, convention and practice (in the face of three decades of regular exercise of such powers by the federal government in direct treaty relationships, participation and membership in international organizations and in a variety of other activities)

while on the other hand it is maintained that it is legitimate for the provinces to "amend the constitution and acquire these very powers by custom, convention and practice. (It is not clear whether the amendment would consist of filling in any gap in the written constitution, or changing an existing customary principle by new practise.) As a matter of simple logic as well as historical accuracy, it would be more understandable if the argument were that even though the government of Canada has acquired the powers in question (through custom, convention and practice), these powers ought now to be taken over by the provinces by means of the same constitutional process whereby the federal government acquired the powers. (This argument is in fact made by other theorists).

The conclusion of this line of argument is that a procedure for amending the constitution is required either through discussion or "indirectly by acting in such a way that a precedent is created to which there will be a reaction culminating eventually in the same constitutional process of amendment". This conclusion is, in effect, an admission that: (a) it is settled constitutional doctrine that the Canadian constitution is in part written and in part the result of custom convention and usage; (b) that the federal government has used "the same" custom and convention to acquire

external powers, and (c) that the provincial authorities should be permitted to begin to use the same constitutional process of custom, convention and practice that the federal government has used in acquiring the powers in question as a means of encroaching on such powers.

4. The existence of a formal amending process is fundamental and essential to any federal constitution. This proposition is unexceptionable, although the corollary that a constitution not containing an amending process ought to be re-written altogether is open to question.

5. No mere reference to international personality is a valid one. The basic premise of this argument is that "personality may not be divided between national and international". The essence of this argument is that the component parts of federal states have the same status in international law as does the state as a whole. The point is made explicitly: "Even if it be called a province, when the regime is a federal one, it remains a state and has a personality. It is only under a unitary system that provinces are just that and not states because they are dependent on a unitary government as mere departments thereof". These propositions have absolutely no legal basis either in the recognized principles of federalism nor in the accepted principles of international law. On the contrary, they are

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completely incompatible with the practice and principles of federalism whereby several component parts enter into a federation in order to become one state; they are contrary also to the fundamental principles of international law, in particular the juridical quality of states, whereby a federal state has no more power than a unitary state. There is no doubt as to what is intended by this argument since it is stated in explicit terms that the governor of the state of New York

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or that of Sao Paulo in Brazil are important personages because their respective states are important and are represented by them. They may therefore be invited as heads of state and received as such although there would be divergencies of treatment given a small power compared to the honours and respect for the big ones, all declarations to the contrary notwithstanding. It is difficult to take such pronouncements seriously, even as statements of political aspirations. As statements of purported constitutional or international law, they are completely without foundation. They are, moreover, so far-reaching that they raise the question of credibility of the proponents of such theories when they maintain they are "federalists".

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. References to "international relations" or to "foreign affairs" must be used very cautiously.

The basic argument is stated very clearly, namely, that "if they (the terms referred to in quotes in the proposition) be taken in their traditional sense of treaties of alliance, war and peace, theories of equilibrium or forces of influence, the exchange of ambassadors, the protection of citizens in foreign countries, well and good"; (i.e. it is permissible for the Government of Canada to exercise powers in these restricted fields.) The argument goes on to say that "international relations per se, are not a matter of states but of nations". The meaning of this proposition is obscure, but it appears to be a direct contradiction of the recognized principles of international law of sovereignty, and equality of states. The remaining arguments make clear the intention to suggest that there are "states" composed of more than one "nation". The justification for this argument is that international activities include 'the whole gamut from action of an individual to that of any kind of a state upwards to joint action of many states such as has become the case of the United Nations". Taken literally, the proposition implies that individuals

"any kind of state", (private corporations, persons) can act on the international level with effects under international law on the same juridical basis as states. But more simply, it means that individuals as well as parts of a federal state, and even, perhaps, regions of unitary states should be allowed in and out of international organizations and treaty relations as conditions suggest.

The argument goes on to recognize the traditional distinction between "international private law" and "international public law" but asserts that the distinction no longer applies. The argument, if it can be so termed, goes on to say that "nations have recognized that the old-fashioned war and peace, and therefore public matters, have become to a certain extent mixed in with private matters thereby acknowledging that the mass of the people is interested in a certain uniformity of action, etc." It is difficult to know what this statement is intended to mean. Perhaps it suggests that "mass" organizations, such as labour unions or student movements, have a status in international law. The argument is made more specific, however, in its application to UNESCO in the statement "UNESCO has had to be much more flexible than the United Nations themselves, much more aware of regional blocs and interests, and much less intent on formality and protocol." This proposition cannot be supported in practice or in law. UNESCO has a constitution and rules of procedure, and

the last U.N. Conference devoted a great deal of time to amending both the constitution and the rules of procedure, not with a view to blurring the provisions or making them more flexible, but in order to make the terms more clear and precise. UNESCO has not become a kind of friendly club open to all. Certain non-governmental international organizations have consultative status under strictly regulated provisions of the constitution, but this appears to have little relevance to the question of provincial representation in UNESCO. It is, nonetheless, of considerable interest that this line of argument concludes with the statement "the whole argument raised by Canada today may well rest with the question of the kind of representation a federal can have at UNESCO".

7. No simple reference to foreign policy is admissible either.

The argument is made that the mere existence of the Department of External Affairs does not entitle the federal government to carry out foreign policy. (This ignores the fact that the 1909 Act setting up the Department of External Affairs provides that the Minister for External Affairs is the official channel of communication between the Government of Canada and other countries, and that no province, either then or since, has taken exception to this provision). The argument at this point becomes rather more political than legal. It is stated that "the tendency is then clearly towards a totalitarian

approach and towards settling all discussions through war, or a show of force, and to prepare for such an event. It is a carryover from the assertion that 'might is right'." This characterization of the policies of the Department of External Affairs on federal-provincial matters seems a little extreme. The fact that it is said in jest is perhaps indicative of the essentially emotional basis of the theories discussed. Nonetheless, this particular argument concludes quite correctly that "matters of internal policy cannot altogether be severed from nor subordinated to matters of external affairs. Again one is thrown back to the constitution and to the setting up of some mechanism whereby the component states can put forward their views on the consequence of a given matter. It is unfortunately too clear that the lack of consultation of the provinces has of late been one of the greatest stumbling blocks to the Canadian economy and constitution." The validity of this conclusion ought not be obscured by the fuzzy and unfounded theories advanced to support it.

8. <u>Economy, efficiency and competence are the real touchstones of any federal system.</u>

The basic premise of this line of argument is that "while ... it is less expensive to have one foreign representative of a foreign country nevertheless if this detracts from efficiency and competence it ought not to

be considered as the sole determinant". This is a point which Treasury Board would do well to heed. The argument goes on to make the valid point that in a federal state there must be a consistent preoccupation with the just representation of several regions. His notion is spelled out, however, in a somewhat unfortunate choice of language, "it becomes clear that either the delegation from Canada would have to be federally appointed, in which case there is really no assurance of any competence, or that it would have to be done after consultation with the component authorities."

At a later point it is stated the question thus arises whether or not efficiency, competence and economy do not at this point conjoin with the distribution of powers to refer all matters of education to the provinces only". It is then attempted to justify this political proposition legally by referring in parenthesis to the basis of the "pith and substance" argument, but the argument is not developed. This policy argument is followed by some confused reasoning about exchanges of professors and the inadmissibility of professors whose views are objectionable. It appears to be based on some particular case. The argument seems, however, to stray over into the suggestion that even universities should have some kind of external sovereignty, but it is difficult to follow the reasoning of this part of the argument.