

have a definition to propose or if there is a definition that you absolutely dislike? For example, La Fédération des Femmes du Québec, in testifying before the joint committee, took a definition from the so-called beige paper. Is that one that you like or do not like?

Mr. Binavince: I, personally, feel that it is not a problem of definition but is a problem of vagueness. I think that we could all live with some kind of definition, if it were given now and we could improve it in the future. However, it is undemocratic to leave it as vague as it is now and to delegate the courts or the governments of the future to provide an interpretation, which would be subject to tremendous political pressure or even court litigation.

What is essential in constitutional law-making is to debate the issues and to decide. Ethnic minorities in Canada are willing to accept any kind of definition provided that the uncertainty is removed.

Senator Marsden: Thank you, Mr. Chairman.

Mr. Corn: You were talking about a definition of "distinct society." We feel we should leave it to Quebec to state what is meant by that and that we should consider it. We feel that it is better that they, rather than we as outsiders, try to specify what it means.

The Chairman: Thank you, Senator Marsden. The next questioner will be Senator Stewart, followed by Senator Frith.

Senator Stewart: I have two questions; the first one has been anticipated somewhat by Senator Marsden. It relates to the expression "distinct society." I am hoping that Mr. Binavince will be helpful with regard to this expression because of his experience as a constitutionalist.

It is complained that this expression, "distinct society," is very vague and that it has no generally accepted meaning, at least in common law. Is that accurate? Is it not true that the expression "society" has a long and honourable meaning in the history of what is sometimes called "natural law jurisprudence," and that normally the expression "society" in that context means a group of associates who normally would proceed to become what was called a "civil society?" In other words, if you were a genuine society, you would be entitled to your own distinct, separate and independent government. Is that not an accurate history of at least 500 years of natural law jurisprudence? Wouldn't you, if you were a judge of the Supreme Court of Canada, have to take into account that long and honourable tradition of interpretation?

Mr. Binavince: The amount of material that one has to study in order to give meaning to the word "distinct," not simply the word "society," is probably impossible to enumerate today.

The point concerns not so much the ability of defining something. I am absolutely certain that we can define anything and that the courts will ultimately give us the definition that they feel like giving. The problem concerns the considerations that will go into the definition, and constitutionalizing it, by way of the decision or the authority of the court, is ultimately

[Senator Marsden.]

a decision of the people. This is an opportunity for the Canadian people to define the term and to define themselves. We should not be afraid of doing that. If there is any difficulty in doing that, then at least we should make an attempt to provide some guidelines in that search for a definition.

For instance, in section 1 of the Charter there is at least a standard of reasonableness—the question of how it will be justified in certain other societies, and so on and so forth. I can think of language and religion, for instance, as being two elements of a distinct society. The question relates to the exclusion of other elements which will go to the distinctiveness. It is not a question of whether we are afraid of a future definition. You can only be afraid of a fact. There is an opportunity to do this now, and an enlightened debate can contribute to that, because, after all, constitution-making is the people's job, but we are not doing that today.

Senator Stewart: We are told that we are being paranoid when we ask for definition, and that really this is a very innocuous expression and that everyone who drives through the province of Quebec knows that it is a distinct society and that that is what it means. I am suggesting to you that that kind of assurance is really unfounded, and that the term could be interpreted as having great importance, and so interpreted, not by some wilful, irrational judge but, rather, by a judge taking cognizance of a wide body of jurisprudential literature.

Mr. Binavince: As we said, it is not the man on the street, driving through Quebec, who will give the definition. When I walk down the streets of Montreal I can see things which make me say, "That is Quebec. It is beautiful." I can assure you that another person with a different kind of philosophy and a different racial and cultural background might read more into it than I would.

The question very simply is: Whose view will become the language of the Constitution?

Senator Stewart: I now come to my second question, which concerns the quotation from Oliver Wendell Holmes that a constitution is what the judges say it is.

Perhaps I ought to preface this question by saying that senators are sometimes a little bit uneasy in this day and age when they are reminded that they are merely appointed. Are you satisfied to have the judges, who are going to say what the constitutional law of this country is, merely appointed, and, moreover, are now to be nominated under the Meech Lake arrangement by provincial premiers, their nominations being confirmed by the authorities in Ottawa? Does it seem suitable to you that this kind of constitutional law-making power—for that is what it is according to Holmes, who was an experienced man in this field—should be lodged in the hands of persons not only appointed but appointed by this particular process?

Mr. Binavince: I will probably be giving you a personal view rather than the council's view in answer to that question, because I do not think that the council has debated that very difficult question.

My personal view on that is that judges will have to be appointed. I do not think that the American way of electing