



Book Reviews • Revue Bibliographique

***The Court and the Constitution*, Peter Russell, Robert Decary, William Lederman, Noel Lyon, Dan Soberman, Kingston: Queen's University Institute of Intergovernmental Relations, 1982. Pp. viii, 81, \$14.95 (cloth).**

This book contains a series of essays or comments on the Supreme Court of Canada's *Reference Re Amendment of the Constitution*.¹ All are good essays but I am rather ambivalent about the book.

How, it may be asked, can a book of essays, all of which are good, not be a good book?

Well, first of all, as a book, it lacks balance. The court basically answered two questions, first did the federal government have the legal right to submit the patriation package to the British Parliament, and secondly, was this course consistent with convention? Inherent in the second question is the further issue whether the court ought to have gotten into that question, since its answer predominantly lies in the political field. The essays are essentially critical of the majority decision on the first question, *i.e.* that the federal government's course was indeed legal, but favour the majority decision on the second, *i.e.* that such a course is contrary to constitutional convention. They, on balance, also appear to favour the view that the court was right in answering the second question, though Peter Russell has reservations. Each of these positions is defensible, of course, but each is very much debatable as a recent comment by Peter Hogg in the *Canadian Bar Review* amply demonstrates.²

Whether or not the court should have answered the question on convention, it is generally conceded that the court's overall decision did lead the federal and provincial governments (with the exception of Quebec) to

¹(1981), 125 D.L.R. (3d) 1 (S.C.C.).

²P. W. Hogg, "Constitutional Law — Amendments to the British North America Act — Role of the Provinces" (1982), 60 Can. Bar. Rev. 307. I had given a similar view before reference to the court was contemplated; see *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada* (1980-81), Issue 34.

arrive at a compromise, a result that prompts Peter Russell, in the first essay, to categorize the court's action as "bold statecraft". Though many will question a number of his conclusions, Professor Russell presents a thoughtful discussion of the interaction of law and convention.

Robert Décaré discusses the manner in which the court exercised this "statecraft". He notes the various ways in which the credibility of the court (particularly in Quebec where some spokesmen have described it as a federally leaning tower) might have been jeopardized, and the astute way in which the court avoided these dangers by the straightforward manner in which it faced its responsibility.

Professor William Lederman finds the majority decision "narrowly positivistic and historically static". It does not respond to what he conceives as a balanced federalism. As usual his views are convincingly presented, but it seems to me that in this essay he himself sins by a too legalistic approach to the Constitution. The fact that a federal power is legally absolute may, at times, be necessary in effecting a workable balance in real life where political forces simply make it impossible to exercise that power without federal-provincial negotiation. Essentially the continuance of a balanced federalism is more strongly dependent on political than legal forces — that, I suspect, is true in all federations. This is not to say, however, that it has no need for legal buttresses. But whether it should in a particular case is the question that really warrants consideration.

Professor Noel Lyon, in his discussion of the Martland-Ritchie dissent, essentially shares Professor Lederman's perception. He carries his view beyond the issues directly in question and argues for limitations on other federal powers, notably the spending power. I am rather surprised that as fine a policy-science, legal scholar as Professor Lyon so categorically attaches himself to a legal conceptual model of federalism without an accompanying consideration of the political processes that undergird and surround the exercise of legal power. A policy oriented approach clearly requires a more comprehensive theoretical model to permit adequate assessment of the issue.

Finally Professor Dan Soberman deals with the unanswered questions. One of these, whether Quebec has a veto over constitutional amendments, has now been authoritatively answered by the Supreme Court. Nonetheless he has interesting things to say on law, convention and morality as well as the role of the British Parliament in Canadian Constitutional Law.

The comments of these writers on this important constitutional decision merit examination by scholars of the Canadian Constitution. Which brings me to my last comment.

I wonder if this kind of material should be in book form at all. Being essentially articles, one tends to look for such material in periodicals. So

one could easily miss them. That would be too bad because some of them are excellent and contain interesting discussions of at least one subject seldom dealt with in Canadian legal literature, namely, the interrelationship of law and convention at the practical level.

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