THE COURT AND THE CONSTITUTION: COMMENTS ON THE SUPREME COURT REFERENCE ON CONSTITUTIONAL AMENDMENT. Institute of Intergovernmental Relations, Queen's University, 1982. Pp. viii, 81. ($14.95)

This is a collection of essays published within a few months of the September 1981 decision of the Supreme Court of Canada in *Re Resolution to Amend the Constitution*,[1] to provide an analysis of that decision. Authors of these essays are Professors Russell, Lederman, Lyon and Soberman, and Me Robert Décary. The latter is a lawyer and frequent commentator on constitutional events. They are all distinguished writers in the public law field.

When first asked to undertake this review at the time of publication of the book, I was hesitant to do so because of my own long association with the federal position and my role as a member of the federal team of counsel involved in the case itself. I finally accepted on the understanding that, although writing in my personal capacity, I would inevitably and openly bring to the task a perspective gained from my professional experience.

Having now read the book, I am less diffident about reviewing it on this basis, since it appears to me that the essays overwhelmingly approach the issues from a provincial perspective. It is therefore not amiss for someone with a confessed federal perspective to raise a few questions about the analysis it presents.

For those readers who have other preoccupations or for whom the memory of September 1981 has now somewhat dimmed, it may be useful just to recall the main elements of that famous decision. The Supreme Court held by a majority of seven to two that the procedure employed by the federal government for patriation and amendment of the constitution was legal, but by a majority of six to three held that it was not in accordance with constitutional conventions. The latter required that there be "a substantial measure of provincial consent" which in the view of those six judges was not present in this situation. Professor Lederman refers to these two judgments as "Majority I" and "Majority II" and I shall adopt that usage.

The recurring theme of these essays is that the Majority I (legal question) judgment in favour of the federal position was wrong because the seven judges who subscribed to it were not sufficiently imaginative in seeking sources of law outside the texts of the governing statutes in order to modify or negate the application of those statutes. As for Majority II (the question of constitutional conventions), among the four essayists who discuss it (all except Lyon) there is general satisfaction that the Court found the issue justiciable and general enthusiasm for the result, but no serious examination of the implications for the future.

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[1] [1981] 1 S.C.R. 753, 125 D.L.R. (3d) 1 (hereafter referred to as the *Patriation Reference*).

It seems to me truly remarkable that the editors chose five commentators who were all surprised and concerned by Majority I and seemingly so lacking in curiosity about the implications of Majority II. Majority I, in upholding the continuing legal authority of the United Kingdom Parliament to legislate for Canada, was, after all, acknowledging a situation which we have accepted in this country since at least 1774, the year of the adoption of the Quebec Act as the first Canadian constitution enacted by the British Parliament. Westminster's legal authority has been exercised regularly ever since and was implicitly recognized by the Supreme Court of Canada in *Re Authority of Parliament in relation to the Upper House*[2] as recently as 1979. Even since the *Patriation Reference*, and notwithstanding the publication of this book in the meantime, the Vice-Chancellor sitting in Chancery in London and the English Court of Appeal have had no difficulty in confirming the validity of the enactment by Westminster of the Canada Act, 1982.[3] On the other hand, the declaration by the Supreme Court of a constitutional convention (howsoever undefined) and of its violation, in Majority II, was without precedent in Canada or elsewhere in the Commonwealth. Whatever the merits of that decision, I should have thought its novelty and its future implications would have been irresistible subjects for at least one academic commentator who might have been invited to contribute to this volume.

I cannot begin to analyze every point raised by the essayists, but I can subsume many of them under two broad themes in the case which I think are fundamental: the sources of law and justiciability. Even this division is arbitrary because these issues form part of a continuum. I shall, however, try to analyze the book more precisely by considering separately the questions of sources and justiciability.

Sources of Law

As to sources of law, there are various expressions of regret in the book concerning Majority I's adherence to the underlying legal authority of the British Parliament, an authority which has been exercised since at least 1774, and which was clarified by section 2 of the Colonial Laws Validity Act, 1865,[4] and preserved by sections 4 and 7 of the Statute of Westminster, 1931.[5] Because Majority I essentially kept this legal issue separate from the political issue of who in Canada should request such British legislation, it is chided as unduly "positivist" (Russell, Lederman). We are told that the Court should, as a matter of law, have rewritten the Statute of Westminster on the basis of customs and usage in a manner analogous to the practices of international law (Lederman), or because of

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[2] [1980] 1 S.C.R. 54, 102 D.L.R. (3d) 1 (1979).

[3] U.K. 1982, c. 11. *See* Manuel v. A.G., [1982] 3 All E.R. 786 (Ch.D.), *aff'd* [1982] 3 All E.R. 822 (C.A.).

[4] 28 & 29 Vict., c. 63 (U.K.).

[5] 22 & 23 Geo. 5, c. 4 (U.K.).

the "federal principle" (Décary, Lyon), or because we would in any event have been entitled under international law to refuse to recognize British amendments to our constitution (Russell, Soberman).

If "positivism" is used here to connote a belief in law as a "command" in the literal sense, I do not think that it is appropriate since I doubt that any Canadian would argue that we are subject to the "command" of the British Parliament. But in this context "positivist" seems to be a pejorative term for those who prefer, in their domestic legal system, a determinate source of law — who expect courts to apply written law, where it exists, instead of customs and usage. If this is so I would have to admit to being a "positivist". Even in the interaction between ordinary statutes and common law, it is expected that courts will have to apply statutes to overrule common law, not *vice versa*, because our system attributes paramountcy to the express decisions of democratically-elected legislatures reached after lengthy public debate and in accordance with various procedural safeguards. *A fortiori* where the conflict is between constitutional statutes and random political practices (or a court's-eye view of political practices). This is not a mere quibble. It goes to the question of how, in our society, decisions are to be made and by whom. If the essayists are right we must expect the new amending procedure, for example, to be revised by the courts in the future if it does not accord with their view of the political proprieties. For example, even though we adopted the Canada Act in 1982 on the basis of a national consensus (or the closest thing to it possible), will it be open to the Supreme Court in 2002 to decide that the consent of seven provinces as required by section 38 is not a "substantial measure of provincial consent" and thus declare some different constitutional rule on which the public and the politicians could never agree?

As for resorting to custom and usage as a source of law in the manner of international law, I do not find that reassuring either, in terms of knowing who is deciding what. It is true that in international law, where other formal sources are lacking, general consent may create a law and custom may be proof of that consent. But for most lawyers I suggest that this is a second-best system which domestically is the least satisfactory way of translating the consent of the people into laws by which they would be governed. Do we want to move toward the relative anarchy of the international community in our domestic legal system?

What of the "federal principle" as the guiding light which Majority I, it is said, should have followed in rewriting the Statute of Westminster, 1931? First, I looked in vain in the book for an interpretation of the two following statements to which four of the judges (Dickson, Beetz, Chouinard, Lamer JJ.) subscribed:

> There is not and cannot be any standardized federal system from which particular conclusions must necessarily be drawn.[6] (Majority I).

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[6] *Patriation Reference*, *supra* note 1, at 806, 125 D.L.R. (3d) at 46.

> The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities.[7] (Majority II).

Two essayists apparently prefer the second approach. But what is the "federal principle"? Whose federal principle are the essayists talking about? That of Australia, where, in law, amendments are initiated solely by federal authorities and where neither state governments nor state legislatures have any legal role; of the United States, where amendments are normally initiated by Congress which can, if it wishes, exclude state legislatures from the process; of the Federal Republic of Germany, where amendments are made by the federal Parliament alone (albeit with a state-appointed *Bundesrat*); or of Switzerland, where they are made without the participation of cantonal authorities? Surely every federation is different, and one of the striking differences about the pre-1982 Canadian system was that it had an incomplete constitution because no internal system of amendment had been provided. One of the corollaries of that was that federal authorities had been left with certain political responsibilities for constitutional amendment and Westminster had been left with the legal responsibilities. Strange as that might seem among modern federal states, undesirable as it might be, the essayists fail to demonstrate that it was contrary to any objective test of federalism which the Court was obliged to apply as a rule of law.

Even if there were such a legally mandated principle of federalism to apply, what would it mean in specific cases? The potential confusion is obvious. For example, Me Décary says that "le principe fédéral . . . comprend, au Québec, la reconnaissance de la dualité et de son corrollaire, le véto québecois".[8] Notwithstanding the publication of this book in the meantime, the Supreme Court of Canada has since unanimously come to the conclusion[9] that a Quebec veto was not guaranteed by the constitutional conventions which, in the *Patriation Reference*, were linked to the federal principle. What other requirements might be embraced by the "federal principle"? It could be argued, for example, that the opting-out provision in subsection 38(3) of the Constitution Act, 1982, by which individual provinces may decide that certain amendments agreed to by a majority of provinces and of Canadians are not to apply to them, is inconsistent with the federal principle. Whatever the merits of this arrangement may be, it does not resemble any federal system of which I know. Not even the Articles of Confederation of the loose pre-1789 American Confederacy had such a provision! Nor did the Constitution of the Confederate States of 1861-65, although that confederacy was created, and fought an unsuccessful war, for the assertion of states' rights! Might our commentators argue in a few years that the courts should ignore subsection 38(3), just as they would have had the Supreme Court ignore the clear language of the Statute of

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[7] *Id.* at 905-06, 125 D.L.R. (3d) at 104.

[8] P. 41.

[9] A.G. Que. v. A.G. Can., 140 D.L.R. (3d) 385 (1982).

Westminster, and say that there is no legal power to opt out because this is contrary to the "federal principle"?

Our essayists might also have explained why the federal principle is the only principle of our system of government that should have been of concern to the Court. What of the democratic principle? That principle might have suggested that none of the governments should have agreed to constitutional changes without an election or a referendum. Or what about the principle of responsible government? In this regard I find it strange that our commentators did not exhibit some interest in the role of provincial legislatures, as contrasted to the role of provincial governments. Although there was a great deal of concern expressed to it in argument about the powers of provincial legislatures being affected without their consent, the Court did not spell out a necessary role for legislatures in the expression of a "substantial measure of provincial consent". Nor can it have escaped the notice of our essayists that although the agreement of 5 November 1981 was signed by the heads of ten governments, only two of those governments subsequently put the agreement to their legislatures for approval.[10]

As I noted before, it is also argued by Russell and Soberman that in international law we were no longer obliged to obey the British Parliament and that therefore, seemingly, the Court should have treated Westminster's legislative power over our Constitution as dead. This, however, is to treat a hypothetical event as if it had already happened. It is true that in international affairs legal relationships may be altered by consent or by acquiescence. These can be evidenced by practice and formalized by declarations and agreements. No doubt the long standing practices between Canada and Britain in the enactment of constitutional or other legislation, as reinforced by the Balfour Declaration of 1926 and the Statute of Westminster, 1931, had established in international law that we were subject to new British legislation only on a very specific condition: namely that we would first ask for it. If the British had ever acted unilaterally to legislate for us, it would have been open to the proper authorities in Canada (those responsible for our external relations) to have declared "independence" from this last vestige of British control. The world would hardly have taken notice, and to the extent that it did it would have applauded. Under the circumstances a Canadian court would have been quite justified in refusing to recognize the British statute. But none of that happened. The *Patriation Reference* was argued in a context where Britain had never broken the terms under which it exercised formal law-making authority for us and we had never had to repudiate that authority. The Statute of Westminster was still part of Canadian domestic law. So I see no basis for arguing that the Court could have gone to international law as a justification for ignoring formal domestic law. It

[10] The agreement was approved by the Parliament of Canada and by the Legislative Assembly of Alberta. Quebec's opposition to the settlement was also the subject of a resolution in its National Assembly.

was certainly not for the Court to anticipate events and issue a Unilateral Declaration of Independence.

In summary, I suggest that Majority I did not fail to use other sources of law, because there were no others available to it. With the greatest respect to the commentators, I believe they are confusing law and politics. What Majority I was concerned with was the legal legitimacy of the constitutional proposals, and it properly found that legitimacy to be well established. What the commentators apparently wanted Majority I to do here was to explore the political legitimacy of the proposals. But the two issues are not coterminous nor should we expect them to be determined by the same institution. All of which leads me to the question of justiciability.

Justiciability

Here we are dealing with the question of whether the Court should have answered the questions put to it about the existence and content of a constitutional convention requiring provincial consent. Majority II, of course, held that the Court could and should answer the question and several of our commentators expressly approve that decision.

Some of their reasons I find curious:

> Russell: To have refused "might reasonably have been regarded as threatening greater damage to the constitutional fabric of the country than would stretching the notion of justiciability to embrace what the Court regarded as a constitutional question of a non-legal kind".[11]
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> Décary: "la population . . . n'aurait pas compris, et encore moins accepté, que le plus haut tribunal du pays ne cherchât pas à éclaircir l'imbroglio juridique qui entourait le repatriement. . . ."[12]

Are they saying that we should expect our courts to undertake the definition of non-legal rules, heretofore undefined, because failure to do so will have political consequences or disappoint the public?

Professor Lederman, if I understand him correctly, approves of justiciability of conventions because he does not accept a clear demarcation between law and convention in constitutional affairs and therefore holds that judicial review should apply to both.[13]

Both Lederman[14] and Russell[15] argue that merely because conventions are unenforceable by the courts is not a sufficient reason for the courts to deny their justiciability. I would agree with this, even though lack of practical benefit from a decision might be a basis for a court refusing to hear a constitutional issue. But the two professors do not address here the more fundamental questions of the nature and source

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[11] P. 7.
[12] P. 33.
[13] Pp. 51-52.
[14] P. 52.
[15] Pp. 23-24.

of conventions. These are the factors which are fundamental to justiciability.

In determining whether an issue is justiciable, a court should ask at least two questions:

(1) Are there any objective criteria on which the court can adjudicate this matter?
(2) Is this an issue which is primarily the function of other persons or institutions, and not of the courts, to decide?

Taking the first question, I think Professor Russell gave a very good description of conventions when he said that they "are fundamentally about 'good politics' in that they embody standards of political conduct that have come to be required by the prevailing sentiment of the political community".[16] However, I think it was incumbent on him and his colleagues to show by what criteria a court is to determine proper "standards of political conduct". If it is the conduct "required by the prevailing sentiment of the political community", how is a court to judge that sentiment? Is it the argument of those who see no problem with justiciability here that political sentiment can be ascertained with such precision from selective quotations from politicians and government white papers? And if a court is to judge prevailing political sentiment as to how legal powers are to be used in matters of constitutional amendment, why not also in matters such as the exercise of the criminal law power?

On the second question, that of whether someone else instead of courts should decide on "standards of political conduct" and "prevailing sentiment of the political community", I find the silence of the commentators even more surprising. It will be recalled that Majority II found that while "a substantial measure of provincial consent is required" they felt that they need not and should not define the nature or scope of that consent. "Conventions by their nature develop in the political field and it will be for the political actors, not this Court, to determine the degree of provincial consent required."[17] I think it would have been helpful for the commentators to have explained this concept, since some readers will still have difficulty in understanding it. The Court has said, in effect, that some sort of conventional rule exists, and that it has been broken. The Court said further that while it may declare the rule and its violation, it is for others to define that rule. Moreover, it did not consider whether circumstances existed in which a modification of the rule was warranted. Professor Soberman embraces this result without hesitation:

> To decide on the rightness or wrongness of the proposed unilateral procedure it is necessary to examine any countervailing reasons, even if that examination begins with a presumption against those who break the convention, leaving them with the burden of persuading the political actors and the electorate that they were justified. The Court has fulfilled its role when it has described the convention, the reasons for it, and whether or not it has been departed from.[18]

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[16] P. 16.
[17] *Supra* note 1, at 905, 125 D.L.R. (3d) at 103.
[18] P. 74.

Perhaps I am missing something, but it seems that Professor Soberman's assertion is like saying that it is in order for a court to try a case of negligence on the basis of the plaintiff's evidence, without considering the defendant's evidence of contributory negligence or his defence of *volenti non fit injuria*; or to try a case of theft without allowing a defence of colour of right, or of murder without regard to provocation. I think that Professor Soberman has overstated his case. He says that the declaration of the rule and its breach are justiciable but that the questions of justification of the breach "are quintessentially political questions". This is a fine distinction whose subtleties need explanation.

Consider by way of contrast what the Judicial Committee of the Privy Council said in 1968 in *Madzimbamuto v. Lardner-Burke*,[19] the leading case on non-justiciability of conventions prior to the *Patriation Reference*. (I find it remarkable that only one of the essayists, Professor Soberman, thought it necessary even to make reference to this case although it is clearly inconsistent with Majority II).[20] In *Madzimbamuto*, there had been a recognized convention prior to 1965 that Westminster would not enact legislation for Southern Rhodesia in certain matters without the consent of its government. After the Unilateral Declaration of Independence in 1965, Westminster did just that. When the validity of that law was challenged the Privy Council declined to *declare or apply* the convention:

> It may be that it would have been thought, before 1965, that it would be unconstitutional to disregard this convention. But it may also be that the unilateral Declaration of Independence released the United Kingdom from any obligation to observe the convention. Their Lordships in declaring the law are not concerned with these matters. They are only concerned with the legal powers of Parliament.[21]

Surely this approach deserved consideration by our essayists. We all are familiar with conventions of government which have evolved over generations. Their modification through practice has sometimes caused political controversy and the propriety of their modification has been judged by legislatures and by the electors. The courts have not been asked to decide whether it was "time for a change". That involves a political value-judgment which our courts normally eschew.

Consider, for example, the evolution in the permitted length of term of an American president. Dicey said in the nineteenth century that it was a convention of the constitution that no president could serve more than

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[19] [1969] 1 A.C. 645, [1968] 3 All E.R. 561 (1968 P.C.).

[20] In fairness to Professor Lyon, it should be noted that he takes his position, here (p. 59 *passim*) and elsewhere (*see, e.g., The Central Fallacy of Canadian Constitutional Law*, 22 McGILL L.J. 40 (1976)) that to apply the British model is the "central fallacy" of our constitutional law. Perhaps then he would, consistently with that, argue that *Madzimbamuto* is irrelevant. But the other commentators, as did all the courts who heard these references, accept the British model for the very concept and definition of conventions and *Madzimbamuto* is germane to both.

[21] *Supra* note 19, at 723, [1968] 3 All E.R. at 573.

two terms.[22] This convention probably cost Ulysses S. Grant the Republication nomination in 1880. But everybody generally accepted it until Franklin Delano Roosevelt sought a third term in 1940. There were political outcries then but no court told him he could not. In the ensuing election the people told him he could, and further modified the convention by re-electing him to a fourth term in 1944. It was not until the adoption of the Twenty-Second Amendment in 1951 that the earlier convention of two terms became reduced to a law which a court could interpret and apply. Imagine what would have happened if the courts had tried to anticipate that amendment by declaring it to be the rule in 1940! In fact the Supreme Court of the United States has found it possible to resist declaring constitutional conventions, even in respect of the proper procedure for amending the Constitution.[23]

Several of the essayists (Russell, Décary, Lederman) seem to suggest that the Court's decision on justiciability was justified because of the circumstances of the case. I make no comment on that issue. But will their views be the same if on another day a government puts to a court specific questions such as whether a vote lost by the government in Parliament or a legislature involved a matter of confidence, whether a resigning Prime Minister may advise the Governor General as to his successor, whether a Governor General may refuse his Prime Minister's advice for dissolution of Parliament, or even whether a provincial government should have sought the consent of its legislature before agreeing to the constitutional accord of November 1981 on which the Constitution Act, 1982, is now based? I think it would have been helpful to have their comments on this possible consequence of the Majority II judgment. I suppose they might argue that none of these issues involve the "federal principle", but it is not apparent without further explanation why the courts should apply only this "principle" of government in the declaration of conventions and not such "principles" as "responsible government" or "democracy".

Conclusion

Given the rather narrow focus of these essays in relation to the decision, it is perhaps understandable that these questions were never asked. There are many other questions arising from the case that could equally have been considered in this volume but were not. All of which leads me to my conclusion that, given the eminence of its contributors, I find this book disappointing. While each essay individually is of good and readable quality, collectively they tend to be repetitious, selective in their perspective, and certainly not exhaustive of the implications of the judgment. I do not criticize the authors for this, but considering that on

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[22] A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 29 (10th ed. 1959).

[23] Coleman v. Miller, 307 U.S. 433, at 450-56, 459 (1939).

the issues involved there was strongly divided opinion among the public, politicians, governments and the courts, I should have thought that the Institute of Intergovernmental Relations at Queen's University could have obtained a wider range of comment.

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INTEREST ARBITRATION — MEASURING JUSTICE IN EMPLOYMENT. Edited by Joseph M. Weiler. Carswell, 1981. Pp. iv, 290. ($37.50)

Arbitration has long been the favoured method of settling labour relations disputes in Canada. Two different forms of arbitration have evolved to satisfy two separate needs. The system of rights or grievance arbitration is employed to deal with disputes which arise during the term of a collective agreement between an employer and a trade union. The imposition of discipline by the employer or a disagreement as to the interpretation of a clause in the agreement are typical subjects of a rights arbitration proceeding. Interest arbitration occurs where the parties are unsuccessful in negotiating the terms of a collective agreement and the issues on which agreement cannot be reached are referred to a third party for resolution.

The principles and procedures of rights or grievance arbitration are relatively well known. Major rights arbitration awards are published in Labour Arbitration Cases, Western Labour Arbitration Cases and *Sentences Arbitrales Grefs*. The law of rights arbitration has been comprehensively summarized in two texts.[1] However, interest arbitration awards have received far less attention,[2] even though the arbitrator's decision may involve the expenditure of substantial amounts of public funds.[3] It is in this context that the publication of a collection of papers dealing with interest arbitration is most welcome.

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[1] D. BROWN AND D. BEATTY, CANADIAN LABOUR ARBITRATION (1977); E. PALMER, COLLECTIVE AGREEMENT ARBITRATION IN CANADA (1978).

[2] The editors of *Labour Arbitration Cases* included several of the key interest awards issued in the 1960's. Space limitations have prevented this in recent years. Summaries of the awards in particular fields can be found in specialized publications, *e.g.*, LABOUR RELATIONS BULLETIN published by the Ontario Hospital Association.

[3] *See, e.g.*, the decision in Kingston General Hospital v. Ontario Nurses' Ass'n, (unreported, O.L.R.B., 12 Jun. 1979), established a settlement pattern in other hospitals throughout the province of Ontario and resulted in the expenditure of more than one half billion dollars in public funds.