

# Minorités linguistiques et société Linguistic Minorities and Society



*The Judicial Role in a Diverse Federation: Lessons from the Supreme Court of Canada*, Robert Schertzer. Toronto, University of Toronto Press, 2016, 338 p.

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## **Book Review**

### ***The Judicial Role in a Diverse Federation: Lessons from the Supreme Court of Canada***

Robert SCHERTZER. Toronto, University of Toronto Press, 2016, 338 p.

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The role of the federal arbiter in the management of diversity and conflict in diverse societies and how the decisions made by that arbiter impact the legitimacy of the federation for all parties involved are the central issues of Robert Schertzer's book. The main argument is that the Supreme Court of Canada (the Court) should seek, through its decisions, to maintain the federal system's legitimacy and ensure the recognition of various, competing perspectives regarding the federal character of the country, as the Court actualizes particular perspectives on the federation through its decisions. This recognition is important in a diverse polity, as it creates "buy-in to the process and outcome" (p. 263) of the arbitration process and fosters unity. In the book, Canada is portrayed as a plurinational state where "various groups hold conflicting views about the national character of the country" (p. 210), and these views are reflected in the cases brought before the Court. Schertzer aims to demonstrate how the Court has managed these conflicts over time and how its various representations of the Canadian federation speak to the role the Court sees for itself within the federation.

The first and second chapters lay the theoretical groundwork for the following chapters' empirical demonstration. Chapter one discusses federalism as a method of resolving the *problem* of the existence of national minorities in nation-states. Three main approaches to the management of diversity in federations are discussed: the "trimming," "trading" and "segregating" approaches (p. 40), to which correspond different normative and institutional federal models – respectively, a pan-state nationality with symmetric, centralized institutions; a pan-state nationality with symmetric, decentralized institutions; and, lastly, a

multinational state accommodating national identities through asymmetric, decentralized institutions. Schertzer argues that different actors have different, competing understandings of the Canadian federation, following these three federal models.

Chapter two explains the different roles for the judiciary, flowing from the three conceptions of the federation: the Court as “umpire,” implementing the constitution in a neutral, independent manner (tied to the “trimming” model); the Court as a “branch of government,” implementing checks and balances with the different orders of government (tied to the “trading” model); and, lastly, the Court as “guardian,” protecting the federal arrangement and the institutions by which the different groups are segregated (tied to the “multinational” model) (p. 77). Schertzer posits that these three conceptions of the Court’s role all “fail to appreciate that this role is linked to a particular and partial understanding of the federation” (p. 81). The ideal role of the Court should instead be “the *management* of conflict within and over the federation with an explicit purpose of *generating legitimacy* for the system (while rejecting the imposition of any particular federal model as the law)” (*ibid.*).

The following chapters focus on the empirical analysis of the Court’s “federalism jurisprudence, that are “cases [that] deal *explicitly* with the recognition of identities and the distribution of power and resources *via the federation*” (p. 112). Over 130 cases decided between 1980 and 2010 are examined. Chapter four is devoted to the 1998 *Reference re Secession of Quebec* decision, presenting this decision as a benchmark or “exemplar,” as it “most closely adheres to the ideal-type of a decision that recognizes and reinforces the federation as the process and outcome of negotiation between the subscribers of legitimate federal models” (p. 139). The author then divides the remainder of the cases according to whether the Court is seen as imposing and reinforcing the legitimacy of a specific federal model in its decision (chapter five), or as recognizing the legitimacy of more than one federal model (chapter six). As for the first category, 55% of decisions and 65% of reference cases since 1980 belong to it, whereas 43% of decisions belong to the second. The 1998 *Reference* decision is seen as a turning point; since then, 71% of the cases analyzed correspond to the recognition model of jurisprudence elaborated by the author. This would signal a change of the Court’s “understand[ing of] the federation, how it manages conflict and how it views its own role within the process” (p. 259), despite many problematic (imposing) cases remaining.

The neo-institutionalist approach of this research to the jurisprudence is original and presents a strong analytical methodology, by focusing on both the process and outcome of each decision to uncover the Court’s understanding of the federation. It fills a gap in the literature on the role of the judiciary in the process of conflict management in Canada and offers insights for other federal systems, notably Spain and India. However, we note that the entirety of the language rights jurisprudence has been omitted from the author’s analysis. This could be due to the fact that the three models of federalism identified fail to recognize

the full range of competing narratives that exist regarding contemporary Canadian federation. One of these “forgotten” narratives is that of official-language minorities in Canada – an issue Will Kymlicka himself has highlighted regarding the Canadian multinational model, in the first publication of this journal in 2012 (“A New Deal for OLMCs? Three Challenges”). This, in turn, likely altered the choice of decisions to be analyzed, leaving open the possibility that the results presented in this research do not paint a complete picture. Claims presented by official-language minorities to the Court since 1980 have posed a serious challenge to the Canadian federal system, notably in the domain of education. An integration of these decisions into the corpus would have built a stronger case for an exhaustive and definitive analysis of the Court’s view of the Canadian federal system and of its role as federal arbiter.

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