

acceptable under constitutional law and convention? Nothing in law prevents the Parliament of Canada from adopting the present resolution, nothing prevents the British parliament from giving its assent. Yet is it the case when it comes to convention? First what do we mean by convention? It is a government practice which does not carry the weight of law, which cannot be referred to in a court of law, but which politicians consider as politically necessary and mandatory. I think it is actually based upon the assent of public opinion, the ultimate recourse in this area. In "The Law and the Constitution", Jennings says, and I quote:

[English]

Conventions keep the constitution in touch with the growth of ideas.

● (1640)

[Translation]

And that is very important, I might add, not only—

[English]

—in touch with the growth of ideas but also, one might add, with the growth of sentiments.

[Translation]

Mr. Speaker, such a convention is an instrument of government which has great flexibility but which is also very imprecise. The convention, in Canada, as far as constitutional amendment is concerned, is that the British parliament must accept a resolution put to it by the Canadian Parliament asking for an amendment to the Canadian Constitution. Even a legal expert like Brossard states that:

In theory, nothing prevents it from amending the BNA Act by itself or even at the request of a province, but the British parliament feels bound by constitutional conventions. It considers itself merely a recording mechanism.

That is convention. Therefore, the problem is not there, at least I hope so. The problem is here in Canada. So we must ask ourselves: what does convention say as far as the provinces' power to amend is concerned? Can Parliament seek to amend the constitution without the consent of the provinces, especially in matters which affect the division of power, especially in the matters reserved in the 1949 amendment which concerned in part the division of power, the right to education and the institutional use of languages?

But, Mr. Speaker, this is a question I have been considering for quite a while and I have noted that opinions vary, and convention is unspecified and it is well known that in only five out of 18 cases provincial consent was deemed necessary. Even those who believe that such convention exists express their views differently and always very cautiously. For instance, in the dictionary of the Task Force on Canadian Unity, volume 2, we can read the following, and I quote:

Legally speaking, Parliament is not absolutely forced to obtain the prior consent of the provinces. However it did so when in its view the provinces were directly concerned.

Then any dissertation on the state of convention in Canada should insist on sentences such as "according to the judgment

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of federal authorities", "directly affects the power of the provinces". Some people will certainly state that such convention does not make unanimous consent compulsory. This is where the uncertainty of convention lies in this matter.

Mr. Speaker, there is something much more important, namely, the very nature of convention as it is being discussed. Brossard states the following. I chose my authors carefully to avoid being accused of partisanship. Brossard states the following: "The federal Parliament could even, if it dared do so, amend some constitutional conventions." You see the imprecision surrounding convention. And in a key part of his book Jennings states the following:

[English]

—the real question which is presented to a government is not whether a rule is law or convention, but what the House of Commons will think about it if a certain action is proposed.

[Translation]

Of course, it amounts to stating very clearly and forcefully the supremacy of policies over "what is conventional and over law itself". And Jennings states further:

[English]

Conventions are political decisions. Political antecedents and political consequences prescribe their creation, existence and dissolution.

[Translation]

So, Mr. Speaker, we can see that in the end political circumstances are what justifies unilateral action and convention itself. It is therefore a political problem. That is where the problem lies; I repeat that however important philosophy, laws and convention may be, what is at issue is practical politics, the art of governing which is the art of doing what is possible and also the obligation to choose according to a conception of the common good. At this point I refer to what was said by my colleagues who spoke about political necessity, particularly the Minister of Justice and Minister of State for Social Development (Mr. Chrétien) who has made some very important statements on that subject. They said that the federal Parliament must act for all kinds of reasons; efforts have been made over a long period of time to get the consent of the provinces without success; the party that now forms the government has been defending the ideas contained in the resolution for years and its leader, for 12 years at least; on the other hand, some provincial leaders agree with some parts and even the form of the present resolution; some who were in agreement in the past, some who reject it do so for reasons that have absolutely nothing to do with the amendments asked for, and finally some others would like to give their consent but dare not do so. Other points have been argued since October 6, promises were made, there was soon to be action, a breakthrough, a way out of the deadlock. Commitments were made that must be fulfilled at the reasonable moment. The benefits have been stated. The Minister of Justice and Minister of State for Social Development says that patriation and the amending formula