

**CANADIANS ARE A SOVEREIGN PEOPLE: HOW
THE SUPREME COURT SHOULD APPROACH
THE REFERENCE ON QUEBEC SECESSION**

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This article, and its companion, were commissioned by the CBA as contributions to the questions raised presently in the constitutional Reference to the Supreme Court of Canada.

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Introduction

In referring to the Supreme Court of Canada questions concerning the legality of Quebec secession¹ — questions that implicate the very foundations of political society — the federal government is not only acting within a long-standing Canadian tradition, but also in a manner increasingly common throughout the liberal democratic world.

Throughout Canada's history, the Supreme Court has played a central role in providing legal guidance with respect to controversies that at one and the same time involve basic issues of political theory and matters of high statecraft. In decisions such as the *Patriation Reference*,² the *Manitoba Language Rights Reference*,³ the *Quebec Veto Reference*,⁴ and many others the Court has not hesitated to grapple with the basic principles of Canadian political, social and economic life; and, indeed, contrary to the fashionable view that only with the Charter of Rights and Freedoms did Canadian politics become judicialized,⁵ the Court has, for a century, articulated a normative vision of Canada as a federation,⁶ ensuring the coincidence of legitimacy and legality necessary to stable liberal democratic governance.⁷

This kind of judicial statecraft is increasingly common in liberal democracies throughout the world — from Germany to South Africa. Referring to the decision of the German *Bundesverfassungsgericht* concerning the constitutional implications of Germany's adhesion to the Maastricht Treaty, Professor Joseph

¹ 1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?

2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

Order in Council P.C. 1996-1497.

In this article we attempt to set out the normative foundations for answering the first two questions posed to the Court; consideration of the third question is outside the scope of this article.

² *Re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

³ *Re: Manitoba Language Rights*, [1985] 1 S.C.R. 721.

⁴ *Re: A.G. Quebec and A.G. Canada*, [1982] 2 S.C.R. 793.

⁵ F.L. Morton, "The Charter Revolution and the Court Party (1992) 30 Osgoode Hall Law Journal 648; W.A. Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Toronto: Oxford University Press, 1994).

⁶ See K. Swinton, *The Supreme Court and Canadian Federalism* (Toronto: Carswell, 1990).

⁷ See, generally J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (tr. W. Rehg) (Cambridge, MA: MIT Press, 1995), especially Ch. 1, "Law as a Category of Social Mediation Between Facts and Norms".

Weiler describes what is almost always entailed when the high court of a liberal democracy confronts issues that are foundational to that country's political order: "A decision of a Court at this level to an issue of this magnitude is always more than a simply doctrinal elaboration of positive law and its application to some set of facts. It inevitably involves a construction of deeper principles and displays the constitutional ethos and sensibilities of the Court and its judges."⁸

In articulating basic principles in cases that address the foundations of political society itself, the Canadian Supreme Court, like constitutional and similar courts today in most other liberal democracies, has refused to hide behind what is often referred to as a "political questions" doctrine⁹ — that is, the Court has consistently rejected the view that there is a point at which "public law stops"¹⁰ and at which legal normativity is completely eclipsed by unconstrained political struggle.

As Robert Yalden has shown, the strong Canadian rule of law tradition has long been shared between civilians and common lawyers.¹¹ Even a sovereigntist premier, René Lévesque, did not hesitate to refer to the Supreme Court fundamental questions concerning the constitutional place of Quebec in Canada.¹² And, despite its political disagreement with the enactment of a constitutional settlement in 1982, the Bourassa government generally respected not only the legality but legitimacy of that settlement, applying the *Charter* subject only to very occasional use of the s. 33 override.

At the same time as playing a role of statecraft not unfamiliar to it, the Court will however also be deciding the Secession reference in the shadow of a new and alien outlook in the Canadian political landscape. This is an outlook, reflected in statements of the current Quebec government and of many separatist officials and academic commentators, that pits democracy against the rule of law, and legality against political legitimacy (the latter albeit defined exclusively in terms of populism). According to this outlook, a display or expression of popular will places the leaders of a secessionist movement beyond normative restraint — beyond the jurisdiction of courts or the reach of any set of rules or norms shared by the movement and the broader community affected by its

⁸ J.H.H. Weiler, "The State "über alles": Demos, Telos and the German Maastricht Decision", Harvard Jean Monnet Working Paper 6/95, Harvard Law School, 1995.

⁹ See in the Canadian case, the rejection of this approach in *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 and *Re: Canada Assistance Plan*, [1991] 2 S.C.R. 525.

¹⁰ "Here is where public law stops" is a comment of Gerhard Anschütz, cited by the fascist political thinker Carl Schmitt in one of his main polemics against liberal legalism, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. G. Schwab (Cambridge, MA: MIT Press, 1985) especially at 13-15.

¹¹ R. Yalden, "Unité et Différence: The Structure of Legal Thought in Late Nineteenth-Century Quebec" (1988) 46 U.T.Fac.L.Rev. 365.

¹² See *Quebec Veto Reference*, *supra* footnote 4.

actions.¹³ In this State of Nature, unbounded struggle will alone determine the outcome.

This notion of democracy as something akin to populist dictatorship was a familiar theme in movements of the extreme Right and the extreme Left during the first part of the 20th century; by the end of the Second World War, it had been largely discredited everywhere that democracy had a real meaning at all — appropriately, it was rejected most unambiguously in post-war Germany, where a constitutional doctrine developed that some norms are so fundamental to the very idea of a legitimate liberal democratic order that no measure of popular consent can authorize a constitutional amendment that would abolish them.¹⁴ As Thomas Franck notes, the conception of democratic governance that has evolved in the post-War democratic world, sees democracy as a process of legitimation that is fundamentally based on “subjecting the political process to rules, often *immutably* entrenched in an intrepid constitution.”¹⁵ In the international law context, the high water mark of the tendency to conceive democracy as a form of legitimation within a set of rules was the decision of the Yugoslav Arbitration Commission that subjected the hitherto purely political prerogative of recognition of Statehood — of sovereignty itself — to a set of legal norms including fundamental human rights.¹⁶

¹³ See for example, statement by former Premier Parizeau in response to the decision of Lesage J. in *Bertrand v. Quebec (P.G.)*:

“Quebecers want to vote, they have the right to vote, they will vote. We cannot submit Quebecers’ right to vote to a decision by the court. It would be contrary to our whole democratic system.”

“Lawyer wins first round in bid to block referendum” *The Gazette* (1 September 1995) A11. See also statement by Quebec Intergovernmental Affairs Minister Jacques Brassard: “It is clear that for us democracy rules over constitutional provisions...” quoted in “Political Crisis Brewing over Quebec Court Case”, Rhéal Séguin, Hugh Winsor, *The Globe and Mail* (Saturday, 11 May 1996) A-14.

¹⁴ Because it was in Nazi Germany that the idea of elected dictatorship had become most intimately entangled with extreme nationalism: see, particularly, the discussion of the relationship between the democratic basis of dictatorship and the struggle between peoples in the work of C. Schmitt in R. Howse, “From Legitimacy to Dictatorship and Back Again: Leo-Strauss’s Critique of the Anti-Liberalism of Carl Schmitt” (1997) 10 *Canadian Journal of Law and Jurisprudence* 77. See also W. Scheurman, “Revolutions and Constitutions: Hannah Arendt’s Challenge to Carl Schmitt” (1997) 10 *Canadian Journal of Law and Jurisprudence* 141, interpreting Schmitt’s gloss on the French Revolution as displaying clearly “the attribution of “the exercise of arbitrary, supra-legal constituent power to the “nation”, the sovereign *peuple*: a “people” conceived at the outset in an ethnically particularistic fashion. . . the absolutely pivotal role in every constitutional system of the omnipotent, legally and normatively unregulated *Volk*, . . .” at 143.

¹⁵ T.M. Franck, “The Emerging Right to Democratic Governance” (1992) 86 *The American Journal of International Law* at 46 at p.50. Emphasis added.

¹⁶ “Arbitration Commission of the International Conference for Peace in Yugoslavia”, Opinion No. 9 [hereinafter, cited as Opinion of the Arbitration Commission and by number] in (1992) 31 *International Legal Materials* 1494.

In deciding the legality of unilateral secession, whether under constitutional or international law, the Supreme Court of Canada will thus be confirming the inseparability of democracy and a gapless legal order where general norms are subject to impartial interpretation — whether by domestic or international tribunals. In this article we attempt to show how this task might be undertaken, in a manner that avoids driving a wedge between legality and legitimacy and thereby destabilizing the crucial value of the rule of law itself in a moment of fundamental political crisis. Such a wedge might be easy to drive, if the Court were to confine itself to narrow textual analysis or to settled doctrine and were not to engage broader and emerging norms, whether of constitutional or international law. But the Court would also drive such a wedge if it were to attempt to distil the relevant norms into formal legal rules on the one hand and political conventions or agreements on the other.¹⁷ Law's normativity has generally been resilient against the attempts of positivists, both domestic and international lawyers, to neatly separate the real *law* (the “rules”) from other normatively significant material, which then becomes “non-law”; it is on this very resilience that depends the possibility, vital to liberal democracy, that even fundamental political crises will not produce a vacuum where force of will or arms fills the space left by positivist legal reason's abdication.

Part I *Question #1: Unilateral Secession and the Constitution of Canada*

1. *Introduction*

The first question that the Federal Government has posed to the Supreme Court is: “Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?” The Government, while not defining the concept “unilaterally”, appears to intend this concept to imply an absence of consent or agreement among non-Quebec actors, in particular the federal Government and other provinces.¹⁸

The text of the Constitution Act 1982 is silent on the rules and procedures governing secession from Canada. Given this silence, it has been possible to argue either that secession is implicitly permissible or that it is implicitly impermissible. Neither proposition is, in the abstract, compelling — each depends on unspoken assumptions about the character of the Canadian union.

¹⁷ See the critique by Pierre Trudeau of certain features of the plurality judgment in the *Patriation Reference*: P.E. Trudeau, “Convocation Speech at the Opening of the Bora Laskin Law Library” (1991) 41 U.T.L.J. 295.

¹⁸ Factum of the Attorney General of Canada in the Matter of a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, as set out in Order in Council P.C. 1996-1947, No. 25506, para. 57ff [hereinafter federal Factum).

The federal Government suggests that the absence of secession procedures in federal constitutions generally can be explained in terms of an intention that such unions will normally be perpetual.¹⁹ However some commentators have pointed to the absence in the Canadian Constitution of any language that declares the Canadian union “indissoluble”, when other federal constitutions, including that of Australia, contain such language.²⁰

In the presence of textual silence on secession itself, the predominant tendency of academic commentators has been to analogize secession to a change or amendment in the Canadian constitution, and therefore to examine the legality of secession through the lenses of Part V of the Constitution Act, 1982.²¹ The approach is to ask what set of changes to the Constitution would be necessary in order for the Constitution to be rendered consistent with the secession of Quebec. If these changes require, under Part V, the consent of the federal Government and/or other provinces, then the act of secession without such consent, is deemed to be unconstitutional. Thus, the federal Government’s argument in its factum that unilateral secession is unconstitutional is based largely upon an analysis of the scope of Section 45 of the Constitution Act, which provides that a province may amend unilaterally its own constitution. The federal Government, invoking a number of dimensions of the changes involved in secession, including alteration of the powers of the Lieutenant-Governor, claims that these changes cannot be undertaken under Section 45, but that some other amending formula must apply. The Government declines, however, to speculate on which provision of Part V, is in fact the appropriate one.

This approach, shared in broad terms by the federal Government and most academic commentators, simply conflates, or fails to distinguish between the legality of the act of secession itself and the legal mechanisms for constitutional change required, in the wake of secession, to make the Canadian constitution operable again, albeit without Quebec. But consenting to constitutional changes in the wake of secession is not the same thing as consenting to secession itself. Even in the extreme case of the secessionist movement establishing a state through force of arms alone, it would still require amendments to the Constitution for the rest of Canada to put its house in order thereafter — but no one could say that these amendments legalize the act of secession itself as opposed to its consequences for the remaining state of Canada. It still, then, lies to be determined how and whether such an act could be constitutional.

It must first of all be admitted that the Constitution *assumes* the existence of Canada as a political society all of whose members are bound to the

¹⁹ Federal factum, para. 65.

²⁰ See N. Finkelstein and G. Vegh, *The Separation of Quebec and the Constitution of Canada* (North York, Ontario: York University Centre for Public Law and Public Policy, 1992) at 9-10.

²¹ See, for instance, P. Monahan, *Cooler heads shall prevail: assessing the costs and consequences of Quebec separation* (Toronto: C.D. Howe Institute, 1995).

Constitution as the Supreme Law — it does not require the existence of Canada as a political society, nor could it. Any interpretation that grounds the bindingness of the constitutional order as a whole on the Constitution's self-assertion of its own supremacy is, in the end, tautological.²² Given the assumption of the existence of Canada as a political society, the best interpretation of Part V is that it applies to changes, howsoever motivated, in the way in which the given political society of Canada is governed. Part V, then, is not addressed to a situation where the existence of Canada as a political society is itself the question. Ascertaining therefore the constitutional implications of an act of unilateral secession depends upon facing directly the basic difference between such an act and the kinds of changes contemplated by Part V; there is a basic difference between nation-building, which Part V was designed to permit, and nation-breaking.

How then to begin a normative inquiry into what the Constitution has to say about secession that recognizes this difference? One must first of all recognize that Part V is not, even as a matter of the Constitution's textual structure, an exhaustive statement about constitutional change. While there have been statements made by courts which might suggest that the power to amend the Constitution under part V is limitless,²³ a careful reading of the text of the Constitution in light of Canadian constitutional jurisprudence shows otherwise. Section 52(3) of the Constitution Act, 1982, reads: "Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada."

The phrase, "only in accordance with the authority contained in the Constitution of Canada" has received little attention; those who have considered it at all have assumed it refers to the procedures for amendment contained in Part

²² This problem with positivistic accounts of the bindingness of the constitutional order as a whole is already evident in the attack on Kelsen's liberal legal positivism by Carl Schmitt, the fascist legal theorist; see Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. G. Schwab (Cambridge, MA: MIT Press, 1985) at 20. If the constitution can only defend itself through self-assertion of its bindingness then this invites an opposite self-assertion of those who seek to reject the constitutional order as a whole, and the matter cannot but be resolved except through an implicitly violent struggle of wills. This is the dangerous and fateful implication of the positivistic approach adopted by the federal Government in its factum.

²³ In *Sibbeston v. Canada* (A.G.) (1988), 48 D.L.R. (4th) 691 (NWTCA) the Court said: "In principle, the question of whether Canada and the provinces repatriated the Constitution from the Imperial Parliament only to concurrently shackle its timely and necessary modification to endless judicial review must be answered in the negative." (at 697).

In *Penikett v. Canada* (1987), 45 D.L.R. (4th) 108 (YTCA) at 114, "We find no limitations in the 1982 Act upon the scope of the power to amend the Constitution conferred by ss.38 to 43. To decide otherwise would be to deny to the elected representatives of Parliament and the several legislatures the ultimate power of amending the Constitution." In the context of that case, a Charter challenge to the constitutional amendments embodied in the 'Meech Lake Accord', this statement can be understood in a more limited sense to mean merely that the Charter imposes no limits on constitutional amendment.

V.²⁴ But if section 52(3) were intended to refer only to Part V, why use the broader phrase “Constitution of Canada”? It seems evident that the phrase “in accordance with the authority contained in the Constitution of Canada” contemplates the entirety of the ‘Constitution of Canada’ as defined in the subsection immediately previous.²⁵ The formal procedures for constitutional change are shaped by the Constitution as a whole.²⁶

What this means is that, however it may be possible to *normalize* secession by making specific changes of the kind contemplated explicitly by various provisions of Part V, the sum total of these changes may not confer constitutionality on the act of secession itself. The Supreme Court of Canada has consistently held that powers conferred under the Constitution cannot be used so as to run counter to or destroy foundational constitutional principles: Legislatures cannot legislate so as to abrogate the freedom of expression necessary for the continued existence of parliamentary institutions;²⁷ the power of a legislature to reconstitute itself cannot be used to remove the principle of

²⁴ See *Penikett*, *supra* at 114: “subsection (3), in our opinion, must refer to the method of amending the Constitution contained in Part V.” See also P. Hogg, *Constitutional Law* (Toronto: Carswell, 1992) at 1-8 and 1-9.

²⁵ 52.(2) The Constitution of Canada includes

- (a) the Canada Act 1982, including this Act
- (b) the Acts and orders referred to in the schedule; and
- (c) any amendment to any Act or order referred to in paragraph (a) or (b).

In *New Brunswick Broadcasting Co. v. Nova Scotia*, [1993] 1 S.C.R. 319 the Supreme Court of Canada held that the definition in s.52(2) is not exhaustive; that unwritten doctrines such as that of parliamentary privilege should be included in the definition.

²⁶ Indeed, Courts have held that no part of the constitution is pre-eminent; that by virtue of section 52, paramouncy is in the Constitution as a whole. *Reference re an Act to Amend the Education Act* (1986), 25 D.L.R. (4th) 1 at 54 (Ont. C.A.) appeal dismissed by the S.C.C., 40 D.L.R. (4th) 18; see also *Penikett*, *supra* footnote 23 at 114: “Subsections (1) and (2) of s.52 when read together make it clear that it is the Constitution of Canada as a whole which constitutes the supreme law of the land.” To argue that the amending power is limitless is to deny the supremacy of the Constitution as a whole; but rather, to assert the paramouncy of one part — the amending power (and in particular, the provision allowing for amendment of the amending power, section 41(e)) *over* the whole. This is contrary to the supremacy of the Constitution of Canada as stated in section 52(1) and defined in section 52(2).

²⁷ *Re Alta. Statutes* [1938] S.C.R. 100 (*Alberta Press Case*): the Court held that a province could not require newspapers to give the government a right of reply to criticism of provincial policies. Duff C.J. suggested that implicit in the British North America as a whole is the prohibition against legislatures curtailing free political speech, which is “the breath of life for parliamentary institutions” (at 133-134). See also *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299 at 331, 353-4 and 373-4 and *Switzman v. Elbling*, [1957] S.C.R. 285 where the Court held that a province could not prohibit the use of a private home to propagate communism. Abbott J., quoting Duff C.J.’s statement in *Alberta Statutes*, added that “Parliament itself could not abrogate this right of discussion and debate” at 328. See also Rand J. at 307.

responsible government underlying parliamentary institutions:²⁸ constitutional powers cannot be used to subvert the democratic principle presupposed in the very provisions which confer those powers. Similarly, the Constitution itself cannot be used in a way that subverts its animating principles. In the *Manitoba Language Reference* the Supreme Court held that the Constitution, which has as its fundamental postulate the principle of the Rule of Law,²⁹ cannot be used to create that principle's antithesis — disorder and chaos.³⁰ In effect, what the Court is saying in these cases is that the Constitution is coherent. Built on certain structuring principles, the Constitution, including its amending formulae, must be read consistently with these principles.

If the Court were not given a mandate by S. 52 (3) to examine the legality of secession in light of the constitution as a whole, then it would have either to be silent on the broader issues of legitimacy raised by unilateral secession, or engage in the questionable role of interpreting political conventions and possibly elevating them to constitutional status.

The possibility that constitutional legality can be divorced from constitutional legitimacy is of course a part of the legacy of the *Patriation Reference*.³¹ There, it will be recalled, the Court had to decide whether the package of constitutional reforms proposed by the Trudeau government in view of 'patriating' the Constitution could be enacted by the United Kingdom Parliament absent provincial consent. The Court decided that as a matter of strict law no provincial consent was required, but that as a matter of convention a substantial degree of provincial consent was necessary. The reason for the convention was the federal principle; unilateral action by the federal government could not be reconciled with that principle.³² But the conditions which might have explained a separation of law and convention in that case no longer obtain. In 1981 the only

²⁸ *OPSEU v. Ont.*, [1987] 2 S.C.R. 2 at 47, per Beetz J.: "The fact that a province can validly give legislative effect to a prerequisite condition of responsible government does not necessarily mean it can do anything it pleases with the principle of responsible government itself. (...) [T]he power of constitutional amendment given to the provinces ... does not necessarily comprise the power to bring about a profound constitutional upheaval by the introduction of political institutions foreign to and incompatible with the Canadian system."

²⁹ *Supra* note 3.

³⁰ *Ibid.* at 766.

³¹ *Supra*, note 2. See for example, G. Rémillard, "Legality, Legitimacy and the Supreme Court" in K. Banting and R. Simeon eds., *And No One Cheered: Federalism, Democracy and the Constitution Act* (Methuen, 1983) 189 at 193: "...for the first time in our constitutional history the court expressly erects an impenetrable barrier between law and its practice, between legality and legitimacy." See also D. Soberman, "The Opinions of the Supreme Court: Some Unanswered Questions" in Russell *et al.*, *The Court and the Constitution: Comments on the Supreme Court Reference on Constitutional Amendment* (Kingston: Institute of Intergovernmental Relations, 1982) 67 at 71 where Soberman notes that many commentators interpreted the Supreme Court's ruling on convention as a statement that provincial consent to patriation was 'morally required', and thus equated rules of convention with moral rules — as distinct from, and opposed to, legal rules.

³² At 905-906.

way the Canadian Constitution could be amended was by statute of the Parliament of the United Kingdom.³³ Because sovereignty of the United Kingdom Parliament is unlimited, that Parliament was not legally bound to exercise this power in accordance with the federal principle which limits exercise of constitutional powers in Canada. In other words, the power to amend Canada's constitution could be exercised in a way which was irreconcilable with a fundamental principle of the constitution. The conventions that emerged surrounding the process of constitutional amendment, identified by the Supreme Court in the *Patriation Reference*, evolved in order to redress this problem: the power exercised *for* Canada was not governed by principles which would have governed were the power exercised *in* Canada. This is no longer the case. The constitution has been 'patriated' and all constitutional powers are exercised in Canada. All are therefore governed by the principles that underly and inform the Constitution — whether these principles prior to patriation were embodied in common law, in Imperial constitutional conventions, or Canadian conventions, they are now part of the Supreme Law of Canada.³⁴

In sum, the reversion by the Court to fundamental constitutional principles is sharply distinguished from the convention-hunting role that the Court engaged in the *Patriation Reference* — unlike conventions, constitutional principles are the basic cement of a gapless normative order. At least four such principles have direct applicability to the legality of unilateral secession. These are: the democratic principle; the principle of the rule of law; the federal principle and the principle of the protection of minority rights.

The applicability of these principles, however paradoxical that may at first seem, is entirely compatible with the specific character of secession as an attempted break with the constitutional order itself.

To claim that once the will to live together in one society is no longer there, Canadians or some part of them can destroy without limit the institutions and rights that have been brought into being by their union, is to conceive of secession as a reversion to a Hobbesian state of nature, where there is no effective law, and therefore no justice; and when men come together in a society it is reasonable to imagine this as a choice to permanently renounce the state of nature, and so to observe some principles of justice even as they reconstitute themselves under two separate societies. And yet, apart from international law, from where can such principles come if they are not implicit in the generalities of what has already been agreed? And precisely because secession is not like other typical kinds of constitutional change — precisely because it is not in itself, in the case of a free society, a wish to change the form and manner of government but rather to whom a given government applies — the principles of the constitution can guide secession. The choice not to live together with others

³³ This was because section 7(1) of the *Statute of Westminster, 1931* [22 Geo. V, c.4 (U.K.)] maintained the exclusive power of the United Kingdom Parliament to repeal, amend, or alter the British North America Acts.

³⁴ *Re Manitoba Language Rights*, *supra* note 3.

under one constitution does not entail the rejection of all the principles that underpin that constitution. A shared normative order therefore can be said to subsist in the presence of an attempt to destroy the shared *political community* that is currently informed by that order. There is thus no gap between legality and legitimacy created by the continuous application of constitutional principles.

2. *The Democratic Principle*

From the inception of modern democratic legal and political theory, the legitimacy of the regime has been derived from the free will of the people to be governed as a single political community under law.³⁵ This is not necessarily a historical statement about the origins of actual societies — rather it is an ideal conception that allows us to imagine the submission of the individual to the law as legitimate and obligatory as long as the constitution itself, and the institutions and laws the people create, reflect in adequate fashion this ideal conception.³⁶ The democratic principle has clearly been recognized as a constitutional principle by the Supreme Court of Canada.³⁷

Nevertheless, the manner in which the democratic principle operates to form Canadians into a political community under law has been a matter of ongoing disagreement among jurists and political philosophers. One conception of a political community that is at least apparently consistent with the democratic principle is that of a people or nation that expresses collectively its will to self-determination; this conception finds the answer to the question of why a particular group of people decide by consent to govern themselves in a pre- or sub-political identity such as language, culture or race. The democratic political community is, then, “a nation demanding to be united in a State”.³⁸ This is the conception of democratic political community that underlies most forms of Quebec nationalism; it is also the conception that was recently affirmed by the German constitutional court (*Verfassungsgericht*) in its decision on the process of ratification of the Maastricht Treaty, and it informs a wide range of opinion in Europe that the European Union, unlike the member nation-states that constitute it, can never aspire to be a genuine *demos* of democratic community.³⁹

³⁵ Madison, Hamilton and Jay, *The Federalist Papers*, #22; Locke, *An Essay Concerning the True Original, Extent and End of Civil Government* [Second Treatise], ch. VIII; Rousseau, *Du contrat social*, ch. VI “du pacte social”.

³⁶ Rousseau, *ibid.*, ch. 1; Locke, *ibid.*, ch. XIX. See also, Rawls, *A Theory of Justice*. (Cambridge: Harvard University Press, 1967)

³⁷ *OPSEU v. Ont.*, *supra*, note 28 at p. 57 per Beetz J. See also *Re Alta. Statutes, Saumur v. City of Quebec*, *supra*, note 27 at 331 per Rand J.; *Switzman v. Elbling*, *supra*, note 27 at 307 and at 328; *RWDSU v. Dolphin Delivery*, [1986] 2 S.C.R. 573 at 584-6, per McIntyre J.

³⁸ Lord Acton, “Nationality”, in *Essays in the Liberal Interpretation of History* (Chicago: University of Chicago Press, 1967) at 136.

³⁹ See, for instance, the argument of P. Thibaud in J.-M. Ferry and P. Thibaud, *Discussion sur l'Europe* (Paris: Calmann-Levy, 1992) and in the Canadian context J.

As paraphrased by Professor Joseph Weiler, this view suggests that “Long-term peaceful relations with thickening economic and social intercourse should not be confused with the bonds of peoplehood and nationality forged by language history, ethnicity and all the rest” — only the latter are capable of forming a demos, a democratic people.⁴⁰

The other main conception of the operation of the democratic principle in the creation of a political community by consent may be called liberal, civic, and universalist. On this conception, any assemblage of individuals on a given territory, regardless of whether they share a pre- or sub-political identity, can create a democratic community through consenting as individuals to be governed under a single regime. Membership in the democratic community does not depend on the sharing of language, culture, or any particularist pre- or sub-political collective identity but rather in the agreement on general principles and the participation in the creation of common laws and institutions that vindicate those principles within a given territory. This conception of the democratic community may be called autopoietic or self-making — the community constitutes itself through the free making of the laws and institutions that embody the consent of its individual members to live together. This is the conception of democratic theory underpinning the liberal political and constitutional philosophy of Pierre Trudeau, and has recently been elaborated by Jürgen Habermas in defending the possibility of a pan-European democratic community.⁴¹

The application of the democratic principle to the legality of Quebec secession will operate in very different ways, depending on whether Canada as a political community is seen as itself constituted by the founding act, or consent, of Canadians as a democratic people, or rather as a union between two democratic peoples or communities, each constituted and circumscribed by the fact of language. In the first case, the will to govern ourselves together under a single constitution must be based on the consent of the individuals who make up the Canadian people as a single democratic community. In the latter case, this will is really a compound, or aggregation, of the democratic will of each people or linguistically determined democratic community to live under a single constitution. Thus in the latter case, with respect to Quebec secession, the relevant expression of democratic will could be that of the people of Quebec constituted as a linguistically-based democratic community. This does not mean only francophones but all members of the community whose democratic practices and procedures operate in or are based upon the language that is the native language of the majority. Thus, non-francophones can be seen as

Webber, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (Montreal: McGill-Queen's, 1994) at 200: language “tends by its very nature to define the boundaries of a political community. Language has this effect because, in addition to being a subject of public debate, it is the medium through which public debate occurs”.

⁴⁰ J.H.H. Weiler, “The State “über alles”: Demos, Telos, and the German Maastricht Decision”, Harvard Jean Monnet Working Paper 6/95 at 13-14.

⁴¹ J. Habermas, *Between Facts and Norms* (Cambridge MA: MIT Press, 1995) annex II, “national identity and democratic citizenship.”

forming part of a democratic people constituted by the French language, i.e. as the language of public life, public culture and law. Thus, also, the existence of Francophones outside Quebec does not refute the notion of Quebec itself constituting the French-language based democratic community — these non-Quebec Francophones merely constitute a minority in an English-based democratic community.

If however, Canadians as a whole constitute a demos, a democratic people, then the relevant expression of the will of this people to live together under a single constitution, or no longer to do so, is the consent of all Canadians. The Canadian union can only be severed democratically by decision — i.e. majority⁴² decision — of the Canadian people as a whole. This follows directly from the pan-Canadian democracy not being a compound or association of other democratic communities, but rather a primary or original democratic community formed by and forming in turn a people in its own right, the Canadian people. It is this community that is fundamental to the notion of ‘Canada’ for which the Constitution exists.

On this view, because secession involves an agreed decision of Canadians to no longer be, or act in the capacity of, a democratic people, it has a fundamentally different character than other changes, for example changes to the exact territorial dimensions over which that democratic community prevails. Within the territory and community which comprise Canada, provincial boundaries may shift and change and new provinces may be established, but Canada as a voluntarily constituted democratic community remains. Provinces could be — and were — established by mere federal statute out of the territories admitted into the Union.⁴³ Provincial boundaries could be altered in the same way.⁴⁴ Thus, for example, the provinces of Manitoba, Saskatchewan and

⁴² The majority principle applies here because of course unanimity would be completely impracticable and thus defeat democracy itself, and because no alternative is visible from the provisions of the constitution itself that embody the democratic principle. But the limits of the majority principle as an adequate expression of liberal democratic values suggest the importance of the principle of minority rights in determining the posture of the constitution towards secession; this principle will be discussed below in s. 5.

⁴³ Section 2 of the *Constitution Act, 1871* read: The Parliament of Canada may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament.”

This has been effectively repealed by the *Constitution Act, 1982*, s.42.

⁴⁴ Section 3 of the *Constitution Act, 1871* reads: “The Parliament of Canada may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.”

This has been effectively repealed by the *Constitution Act, 1982*, s.43.

Alberta were created by federal statute from the territory of Rupertsland;⁴⁵ the boundaries of the province of Quebec were extended on two occasions by federal statute with consent of the Quebec legislature.⁴⁶ Now sections 42 and 43 of the *Constitution Act, 1982* provide, respectively, for the manner in which new provinces may be established and provincial boundaries redefined. Neither of these types of changes affects the sine qua non for Canada to be considered a democratic community — the will to live together as a people under a single constitution and govern ourselves by our own laws and institutions. It is thus not surprising that some Quebec nationalist scholars, a group who generally do not recognize Canada as a primary or original democratic community, would see secession as analogous to a change of the number of provinces or provincial communities in the federation; Professor Woehrling has, for instance, argued that, as a matter of logic, secession of a province should require the same procedure as establishment of new provinces.⁴⁷

It should be noted, however, that if the Canadian union were a compound or association of democratic communities two interpretations would be possible of how the democratic principle should operate with respect to the legalization of secession. One view is that an association can only be democratically dissolved through the will of the majority in both of the primary democratic communities that constitute it. This would mean the consent of a majority of Québécois as well as a majority of the English Canadian democratic community. Another view is that the union can be dissolved if a majority in either democratic community wills it. Generally, those who have considered Canada as a union of two linguistically based democratic communities have adhered to the second interpretation of what democratic consent to secession means. Thus, the will of the majority of Québécois to end the Canadian union is sufficient to vindicate the democratic principle. It is an understatement that this view has not been substantiated by constitutional history or doctrine — it is supposedly based on the apparently democratic notion that a people, i.e. a linguistically or ethnically determined community can freely decide whether to be independent or not. But this begs the question of why this freedom could not be exercised, or indeed has not been exercised, to bind Quebec to a union that it cannot exit unilaterally. Generally, the idea of a freedom to contract means the freedom to bind one's

⁴⁵ The province of Manitoba was established by the *Manitoba Act, 1870* which was confirmed by the *Constitution Act, 1871*. The provinces of Alberta and Saskatchewan were established, pursuant to the *Constitution Act, 1871*, by the *Alberta Act (1905)* and the *Saskatchewan Act (1905)* respectively.

⁴⁶ *An Act respecting the north-western, northern and north-eastern boundaries of the province of Quebec*, S.C. 1898, c.3; *An Act respecting the delineation of the north-western, northern and north-eastern boundaries of the province of Quebec*, S.Q. 1898 c.6; *An Act to extend the Boundaries of the Province of Quebec*, S.C. 1912, c.45; *An Act respecting the extension of the Province of Quebec by the annexation of Ungava*, S.Q. 1912, c.7.

⁴⁷ "Les aspects juridiques d'une éventuelle sécession du Québec", [1995] 74 Can. Bar Rev. 292: "Il ne serait pas illogique que les conditions nécessaires pour l'entrée d'une nouvelle province dans la fédération soient les mêmes que celles exigées pour qu'une province puisse de séparer de celle-ci." at 311.

future will, not the freedom to enter and exit any agreement unilaterally, based on one's bare change of desire.⁴⁸ Yet, as Hamilton notes in *Federalist Papers* #22, "however gross a heresy it may be to maintain that a party to a compact has a right to revoke that compact, the doctrine itself has had respectable advocates".

The uncertainty about the meaning of democratic consent where the Canadian union is conceived as a compound of linguistically based primary democratic communities is perhaps part of the reason why, in fact, despite the many advocates of a two nations or community of communities view of the union, Canadian constitutional history, practice and law has been decisively shaped by the idea of Canada as itself a primary democratic community, with a government — the federal government — that exercises authority to govern in the name of all Canadians and gains that authority from the people as a whole, rather than it being delegated by the linguistically-based democratic communities. With bilingualism in federal institutions and a pan-Canadian democratic discourse enabled by a critical mass of bilingual citizens, and by a complementary commitment from all major political forces in the country to sustaining political debate and argument at the federal level in both languages, often at substantial cost for translation and interpretation, the pan-Canadian democratic community has been transformed from a mere possibility implied by existence of a federal Government directly responsible to the entire people, into a living reality. The Supreme Court has dismissed the compact theory of Confederation as unsustainable in fact,⁴⁹ and the more notional versions as not engaging the law.⁵⁰ Legally, the provinces that were joined in Confederation were not sovereign entities and therefore could not unite by voluntary act. Union was "imposed by a superior sovereign will"⁵¹: that of the Imperial Parliament.

Canada's constitutional evolution, like that of other former British colonies, consists in a gradual process whereby the source of sovereignty shifted from the Imperial Parliament to the will of the Canadian people as a whole. Thus, according to the Supreme Court of Canada in 1985 the very idea of a constitution

⁴⁸ See, generally, C. Fried, *Contract as Promise: a Theory of Contractual Obligation* (Cambridge: Harvard University Press, 1981); I. Kant, *Metaphysics of Morals*, Part I.

⁴⁹ *Patriation Reference*, *supra* footnote 2 at 803.

Of the original uniting provinces, only New Brunswick and Nova Scotia pre-existed confederation; the provinces of Quebec and Ontario were created by the British North America Act. British Columbia and Prince Edward Island entered Confederation after negotiation with the federal government only; and Manitoba, Alberta and Saskatchewan were later created by federal statute. The delegates to the Quebec Conference of 1864, where, it is argued, the basis of the union was agreed upon, were not authorized to conclude a binding agreement or draw up a scheme of union, and the resolutions which resulted from this conference were never approved by the legislatures of New Brunswick or Nova Scotia. The planned union did not enjoy support in either New Brunswick or Nova Scotia, and it was accomplished in fact only as a result of persistent pressure by the Imperial Government on the governments and legislatures of those provinces. See Norman McL. Rogers, "The Compact Theory of Confederation", (1931) 5 *Can. Bar Rev.* 395 at 398-406.

⁵⁰ *Patriation Reference*, 803.

⁵¹ G. Craven, *Secession: The Ultimate States Right* (Melbourne University Press, 1986) at 74 speaking of Australia, but equally applicable to Canada.

implies a basis in the will of the people as a whole: "The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government."⁵² In the Canadian case, patriation culminated the shift from Imperial to popular sovereignty, but its decisive endpoint was visible long before.⁵³

It is not surprising therefore that, after patriation, the pressure has been irresistible to submit constitutional changes that involve sweeping transformation of the basic political order to popular vote — as was of course done with the Charlottetown Accord. Quebecers of course fully participated in that exercise, together with other Canadians, thereby showing that Canadians are a single people with the will to express their fundamental political choices together as a *demos*.⁵⁴ And indeed up to the referendum, separatists such as Daniel Turp were able to argue (however implausibly) that the democratic exercise of self-determination took place in separate Canadian and Quebec democratic communities: "les hésitations [of the Mulroney government] à tenir un référendum pan-canadien qui affecterait l'avenir politique et constitutionnel du Québec va dans le sens d'une reconnaissance and d'une opposabilité du droit de libre disposition du peuple québécois au reste du Canada."⁵⁵

⁵² *Re Manitoba Language Rights*, *supra* note 3 at 745.

⁵³ In his speech on the Patriation Reference, Pierre Trudeau claimed that in finding a constitutional convention of a measure of provincial consent as a requirement for fundamental constitutional amendment, the Supreme Court, in that case, "fatally tilted the doctrine of Canadian sovereignty away from the people and towards the several governments, that is to say towards one form or another of the compact theory of Confederation" *supra* footnote 17. Yet, as the Charlottetown referendum demonstrates, the idea of a measure of provincial consent to some constitutional amendments is not in itself inconsistent with the notion that the ultimate legitimacy of such amendments is based on the consent of the Canadian people as a whole. This will be developed in greater depth in part 5 below, where the federal principle is discussed.

⁵⁴ As P. Russell has suggested, "On 26 October 1992, the Canadian people, for the first time in their history as a political community, acted as Canada's ultimate constitutional authority—in effect as a sovereign people." P. Russell, "The End of Mega Constitutional Politics in Canada?" in K. McRoberts and P. Monahan, eds., *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993) at 211. Russell notes elsewhere that Canadians never formally constituted themselves as a people through a single defined founding act. P.H. Russell, *Constitutional Odyssey: Can Canadians Become A Sovereign People* (Toronto: University of Toronto Press, 1993) at 235. This is because popular sovereignty in Canada was not achieved through a revolutionary act as in the United States or France, but through the gradual process of transformation of the sovereignty of the British Crown and Parliament into popular sovereignty, as described in the *Western Australia* case, to be discussed in detail in the text which follows. Up to and including Pierre Trudeau, Canadian statecraft has never understood democratic self-assertion in terms of a rupture with the existing legal order—another reason why the secessionists' invocation of democracy to trump law is fundamentally alien to the Canadian tradition.

⁵⁵ D. Turp, "Le droit à la sécession: l'expression du principe démocratique", in A.-G. Gagnon and F. Rocher, eds., *Répliques au détracteurs de la souveraineté du Québec* (Montréal: VLB éditeur, 1992) at 51. Of course, the administration of the referendum and the rules governing the campaign were rather different in Quebec, but as elsewhere, subject to the Canadian Constitution, including the Charter of Rights and Freedoms.

The relevance of the democratic principle to secession was explicitly addressed in the *Western Australia* case. In 1935, the State of Western Australia petitioned the British Parliament, wishing to secede from the Australian Commonwealth.⁵⁶ Secession had been approved by the majority of voters in Western Australia by referendum; it was opposed by the Commonwealth government. Legally, it could be achieved only by Imperial statute. The petition was referred to a Joint Select Committee of Lords and Commons which, after hearing argument and evidence from both the Commonwealth and Western Australia about the “long established and clearly understood principles” and “conventions of constitutional practice” concerning the exercise of the United Kingdom Parliament’s right to legislate for self-governing territories such as Australia, and after considering the “all pervading division of powers” between the Commonwealth and the states, decided that the petition could not be received: it was not in accord with the division of sovereignty within the Australian federation and therefore Parliament was “constitutionally incompetent”⁵⁷ to take the legal action requested.

The Committee stated,

The Parliament of the United Kingdom in enacting the Constitution, was giving effect to the voice of the people of the continent of Australia, and not to the voice of any State or States.⁵⁸ It is only therefore when invoked by the voice of the people of Australia that, according to constitutional usage, the Parliament of the United Kingdom can properly vary or dissolve that Federal Union.⁵⁹

The United Kingdom Parliament could not take the legal action requested “except upon the definite request of the Commonwealth of Australia conveying the clearly expressed wish of the Australian people as a whole.”⁶⁰ This is because the States are not sovereign, but exist as political entities only in respect

⁵⁶ For a full account and excellent discussion of the attempted secession of Western Australia see G. Craven, *Secession: The Ultimate States Right*, *supra* note 51.

⁵⁷ This referred to constitutional conventions by which Parliament felt itself bound. In strict law Parliament was able to accede to the request of Western Australia, or even to so legislate absent any request or consent. The central convention governing the exercise of the power of the United Kingdom Parliament to legislate in this context was, as stated in paragraph 3 of the Statute of Westminster, that no Imperial enactment shall extend to any of the Dominions as part of the law of that Dominion absent the request and consent of that Dominion. The crucial issue to be resolved in the case of Western Australia was *which* legislature was required by convention to consent to the legislation in question. This involved an inquiry into the division of sovereignty in the Australian federation.

⁵⁸ Note that in fact (although not in law) the application of the Australian Constitution to each colony was dependent upon the consent of the people of that colony as expressed in a referendum (Craven, *supra* note 51 at 156). This was not the case with the Union of the British North American colonies; therefore, this statement is even more applicable to the Canadian situation than to the Australian.

⁵⁹ Report by the Joint Committee of the House of Lords and the House of Commons on the Petition of the State of Western Australia (1934-35) H.L. Jour. 180-82, quoted at para. 11.

⁶⁰ Para. 13.

of the powers vested in them under the Constitution.⁶¹ Ultimate sovereignty is in the whole; therefore, a proper request for dissolution could only come from the government representing the whole of the Australian people. Moreover, the Committee in using the language “clearly expressed wish of the Australian people as a whole” appears to place on the federal Government an obligation to ascertain popular consent — it is difficult to imagine how the wish of the people as a whole could be legitimately ascertained except by referendum or plebiscite, conducted according to principles and procedures that allow the resulting choice to be considered clear, unambiguous, and voluntary.

3. *The Principle of the Rule of Law*

The Rule of Law as a constitutional principle has been clearly articulated by the Supreme Court of Canada in the Manitoba Language Reference: “The rule of law, a fundamental principle of our Constitution must mean at least two things. First, that the law is supreme over officials of the government and thereby preclusive of the influence of arbitrary power. . . . Second, the rule of law requires the creation and maintenance of an actual order of positive law which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life.”⁶²

In the words of Lesage J. in *Bertrand v. Quebec*, even a project for secession that envisages negotiated arrangements for the transition to independence would compromise “the stability of the legal order.”⁶³ A conflict of legal orders, with uncertainty as to whom and in what respects the citizen owes legal duties, or can apply for legal redress, is equivalent to the absence of law and order. Such a conflict could well exist in a transition period under the scenario of a non-unilateral secession; it would inevitably exist in the case of *unilateral* secession. Indeed, the risk to the rule of law is further accentuated by the position that the Quebec government elaborated in the *Bertrand* case itself — namely, that following the expression of democratic will to secede among Quebecers, the existing courts of Canada have no legitimate role in determining the rights and responsibilities of citizens in these circumstances. Thus, a compromise of the rule of law in the first sense, i.e. of a limit to arbitrary governmental power is added to the compromise of the rule of law in the second sense, i.e. the compromise of “legal stability”.

⁶¹ “It is essential in this connection to keep in mind that Western Australia, in joining the Commonwealth, surrendered all those powers, previously enjoyed by it as a self-governing Colony, which under the Commonwealth of Australia Constitution Act, 1900, were vested in the Commonwealth, and that it has since the coming into operation of that Act, continued to exist as a political entity in respect only of the powers which remain vested in the States.” at para. 8.

⁶² Re: *Manitoba Language Rights*, *supra* note 3 at 748-749.

⁶³ *Bertrand v. Quebec (Procureur Général)* (1995), 127 D.L.R. (4th) 409 at 430.

Indeed, the position of Quebec — that a manifestation of popular will to secede authorizes it to act completely unfettered by the rule of law as interpreted by the courts — is reminiscent of the concept of popularly authorized dictatorship used by theorists of the Third Reich to legitimate the destruction of the German legal order by Hitler: the view (paraphrased by William Scheuerman) that “because the sovereign people is only capable of responding to simple questions, the actual exercise of power is best left to a powerful executive, outfitted with the authority to act outside legal and constitutional procedures that may stand in the way of the omnipotent will of the *pouvoir constituant* upon which his claim to power rests.”⁶⁴ While, of course, Quebec’s position implies that it is the powers of the National Assembly that are unfettered, with the effective suspension of any justiciable legal rules concerning the relationship between the Assembly and the executive, control by the majority of the National Assembly would be indistinguishable from legally unfettered control by executive. The executive, in controlling the National Assembly could put virtually anything it wanted into an interim Quebec constitution, meaning that it would be no constitution at all.

In the presence of the manifest unwillingness of the Quebec government (at least the current government) to be bound by the rule of law in the matter of secession, even to the point of repudiating the legitimacy of any judicial restraint on the exercise of power, a serious question arises whether there is a constitutional obligation on the federal Government to use its powers, including the power of Peace, Order and Good government and perhaps reserve and disallowance, to impede the ousting of the rule of law. Clearly, at a certain point in the dynamic of the secession process the federal government, as Guy Bertrand has argued, might lose the power and capacity to ensure the rule of law (at least without resort to the use of force, which would further risk the rule of law). It would be difficult for the Court in the context of the current Reference to provide an answer as to the scope of such an obligation; but the absolute manner in which the Quebec government seeks at present to simply destroy the rule of law would suggest the desirability of considering seriously the nature of such an obligation in the context of further litigation. Should the Court in the reference find that unilateral secession is unconstitutional, and the Quebec government continue to simply repudiate the legitimacy and legality of any judicially defined limits of the secession project, the scene would clearly be set for such serious consideration.

⁶⁴ W. Scheuerman, “Revolutions and Constitutions: Hannah Arendt’s Challenge to Carl Schmitt” (1997) 10 *Canadian Journal of Law and Jurisprudence*, 141 at 146-147.

4. Federalism

As the Supreme Court has stated on a number of occasions, federalism is a fundamental principle of the Canadian Constitution.⁶⁵ If the dissolution of Canadian society is to be achieved in a constitutional manner it must be effected in accordance with the federal principle.

When the federal principle is invoked in this context it is usually in reference to the question of provincial consent. Both the Attorney General for Manitoba and the Attorney General for Saskatchewan invoke the federal principle in order to argue that some degree of provincial consent is required for Quebec secession.⁶⁶ The identification of the federal principle with the issue of provincial consent in the context of constitutional change is perhaps another legacy of the *Patriation Reference*. But it must be kept in mind that the amendments at issue in the *Patriation Reference* involved significant alteration to the powers of all provinces; the implications of the federal principle may be of a different nature when other types of changes are involved. It must also be kept in mind that the federal principle is not concerned only with provinces; Canada is a federation, not a confederation. The idea underlying the argument that by virtue of the federal principle provincial governments must consent to Quebec secession, seems to be that because secession of one province affects all other provinces that principle requires that provinces have a say in the matter.⁶⁷ But it is not sufficient merely to note that secession of a province affects other provinces to conclude that consent of those provinces is required; what is relevant to the issue of consent under the federal principle is the *manner*

⁶⁵ See for example *Manitoba Language Reference*, *supra* note 3 at 751; *Patriation Reference*, *supra* note 2 at 821, per Martland and Ritchie JJ.: "It can fairly be said (...) that the dominant principle of Canadian constitutional law is federalism."

⁶⁶ See Factum of the Intervener the Attorney General of Manitoba pars. 39, 46 and 47. While it is not explicitly claimed that provincial consent is required, this is implied by the structure of the argument which is as follows: Secession affects all other provinces and thus the federation as a whole (para. 35); the federal principle informs the provisions of Part V of the Constitution such that amendments affecting the federation as a whole require some degree of provincial consent under either section 38 or 41. See factum of the Attorney General for Saskatchewan paras. 39 and 58, where it is argued that both unilateral secession and secession with the consent of the federal government alone are contrary to the federal principle; secession can be accomplished constitutionally only with consent of "sufficient other provinces to comply with the requirement of section 38 or section 41, as the case requires".

⁶⁷ See Factum of Attorney General of Manitoba discussed in the previous note. Para. 35, which is preceded by the heading, "The secession of a province would affect the federation as a whole", reads: "The distribution of legislative competence between two co-ordinate powers, namely the federal Parliament and the provincial legislatures, creates a dynamic relationship not only between the central authority (Parliament) and the regional authorities (provincial legislatures) but also between and among the regional authorities themselves. This 'synergy' that emerges and flows from the co-ordinate sources of power in a federation would inevitably be affected by the secession of any constituent part of the federation. The mutuality of relations and expectations of the partners within the federation would be permanently altered."

in which these other provinces are affected. The federal principle mandates provincial consent either to an alteration of their own powers⁶⁸ or to a change in the distribution of powers between the two levels of government.⁶⁹ As noted by K.C. Wheare, this requirement follows from the federal principle as a logical necessity: if governmental powers are to be divided such that each level of government is independent,⁷⁰ this distribution must be binding⁷¹ and no government should be able to amend it unilaterally,⁷² at least without a decisive popular mandate.

Secession, viewed from a provincialist standpoint, involves removal of one province from Confederation and thus diminution of the scope of the entity to which the division of powers applies. But it does not touch the distribution of powers itself; nor does it change the relations between the central and remaining provincial governments in any legal sense. Certainly the political dynamics among the component parts of Canada will change as a result of Quebec secession,⁷³ but this has nothing to do with the federal principle, which is concerned with distribution and scope of legal powers⁷⁴ and not the interplay of political interests.

⁶⁸ As stated by the Supreme Court in the *Patriation Reference*, “[t]he 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.” *Patriation Reference*, *supra* note 2 at 905-6. See also P. Hogg, *supra* note 24 at 5-2.

⁶⁹ See Wheare, *Modern Constitutions*, second edition (London: Oxford University Press, 1966) at 86: “The principle of a federal government is that powers are divided between a government for the whole country and governments for its parts, and that these governments are independent of each other within their own spheres. It follows from this that the amending process must be so devised that neither the central government acting alone nor the constituent governments alone can alter the division of power in the Constitution.”

In effect, the latter flows from the former: alteration of the distribution of powers generally entails alteration of the powers of each member of the federation, and that is why consent is required. That it is alteration of the powers of any *particular* government which must be consented to by that government under the federal principle, is made evident by section 38 of the Constitution Act, 1982. While section 38(1) allows certain types of amendments affecting provincial powers to be made with the assent of only two-thirds of the provinces with fifty-percent of the population, section 38(3) allows a Province to opt out of any such amendment that derogates from its powers or rights. The result is that no amendment may affect the powers of any province absent its consent.

⁷⁰ Wheare defines the federal principle as “the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent.” K.C. Wheare, *Federal Government* (4th ed., 1963) at 10.

⁷¹ In other words, the Constitution must be supreme. *Ibid.* at 53.

⁷² *Ibid.* at 55.

⁷³ See Factum of the Attorney General of Manitoba, para. 35, quoted above footnote 67.

⁷⁴ See definition of “the federal principle” by K.C. Wheare in footnote 70, *supra*. As expressed in the *Patriation Reference*, the federal principle has to do with the distribution of powers between the federal and provincial governments, and the imperative that each level of government exercise only those powers within its constitutional sphere of authority. *Patriation Reference*, *supra* footnote 2, per Martland and Ritchie JJ., at 821.

Stated otherwise, secession would affect other provinces conceived as 'regional communities of citizens', but not as 'bodies politic'.⁷⁵

In the *Western Australia Case*, the Committee noted:

"The State of Western Australia, as such, has no locus standi in asking for legislation from the Parliament of the United Kingdom in regard to the constitution of the Commonwealth, any more than it would have in asking for legislation to alter the constitution of another Australian State, or than the Commonwealth would have in asking for an amendment of the constitution of the State of Western Australia."⁷⁶

In other words, each entity's involvement in consent to constitutional change is limited to matters that concern the scope of its own powers and the limits thereon. Where fundamental changes affect more than one region of the country, it is the *federal government* whose consent is indispensable.

This follows from the federal government's role as representative both of Canadians in their individual capacity as well as of Canada's regional communities in matters of national scope that affect those communities. This role is reflected in federal policies such as equalization and regional development, which acquire a constitutional status of sorts through s. 36, and perhaps most unambiguously in the in the Peace, Order and Good Government power accorded under s.91 of the *Constitution Act, 1867*.⁷⁷

Because the federal Government is under a responsibility to represent regionally diverse collective interests, this means that a pan-Canadian referendum, as a decisive indication of the will of individual citizens (a requirement, as we saw earlier, of the *democratic* principle) would not obviate the requirement that the federal Government itself consent to secession. In sum, a unilateral secession would be unconstitutional, in removing from the federal Government its role in balancing the interests of Quebec against those of other regions in Canada, and ensuring the terms of secession are equitable for the entire country.

⁷⁵ These phrases are used by F. Murray Greenwood, "The Legal Secession of Quebec — A Review Note" (1978) 12 U.B.C.L.R. 71 at 82, and by P. Gérin-Lajoie *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 1950) at 153-84, respectively.

⁷⁶ Report by the Joint Committee of the House of Lords and the House of Commons on the Petition of the State of Western Australia, *supra* footnote 59 at para.9 (emphasis added).

⁷⁷ "Some matters, in their origin local and provincial, might attain *such dimensions as to affect the body politic of the Dominion*, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion." *A.G. Ont. v. A.G. Can. (The Local Prohibition Case)*, [1896] A.C. 348 at 361, per Watson L.J. (emphasis added). Although the national concerns branch of P.O.G.G. was assimilated to the residual branch by the Court in *Reference Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, it was revived as a separate branch in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401.

5. *Minority Rights/Aboriginal Rights*

The protection of minority rights is a fundamental principle of the Canadian Constitution. As stated by the Privy Council, "the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected."⁷⁸ The minority rights principle is embodied in the protections for the education rights of religious minorities in s.93⁷⁹ of the *Constitution Act, 1867* — which the Supreme Court has called "a fundamental part of the Confederation compromise",⁸⁰ and in the linguistic rights provided in s.23 of the Charter. The interlocking minority rights provided in those sections create mutual obligations on the part of regional majorities to protect those minorities which form a majority in other provinces, and overarching powers and obligations on the part of the federal government to ensure such protection.⁸¹ Thus the minority principle laces the provinces together with certain reciprocal obligations, and presupposes the existence of a federal government able to act in certain ways throughout the territory on which those minorities exist.

Fundamental to the Canadian constitutional structure, the minority principle must be respected in the event of secession. This does not mean that provincial minorities need themselves *consent* to secession. The minority principle complements the democratic principle by responding to the limits of majoritarianism to protect minorities; it is not to be conflated with the democratic principle such as to impose a consent requirement. Rather, the minority principle would mandate that minority rights not disappear but continue to be adequately protected following secession. In other words, dissolution of Canadian society would be unconstitutional unless provision is made for the continued respect for minority rights.

⁷⁸ *In re the Regulation and Control of Aeronautics in Canada*, 1932 A.C. 54 (P.C.) at 70.

⁷⁹ This section applies to the four original provinces — Ontario, Quebec, New Brunswick, and Nova Scotia, as well as to British Columbia and Prince Edward Island (for the latter, see *British Columbia Terms of Union*, R.S.C. 1985, App.II, No.10, s.10; *Prince Edward Island Terms of Union*, R.S.C. 1985, App.II, No.12, second-last numbered par). Protections similar to that of section 93 were negotiated upon creation of the other provinces and are included in their constituting statutes (*Manitoba Act, 1870*, R.S.C. 1985, App.II, no.8, s.22; *Alberta Act*, R.S.C. 1985, App.II, no.20 s.17; *Saskatchewan Act*, R.S.C. 1985, App.II, no.21, s.17) and in the *Terms of Union of Newfoundland* (schedule to *Newfoundland Act*, R.S.C. 1985, App.II, no.32; s.17).

⁸⁰ *Reference Re an Act to Amend the Education Act*, [1987] 1 S.C.R. 1148 at 1197, per Wilson J.

⁸¹ Ss.93(3) gives the Protestant or Roman Catholic minority in any province an appeal to the Governor General in Council from any act or decision of any provincial authority affecting any right or privilege of that group in relation to education; ss.93(4) gives Parliament the power to enact remedial laws to give effect to any decision of the Governor General in Council under s.93.

This cannot be satisfied merely with the inclusion of a bill of liberal-democratic rights in the constitution of the new state created following secession. As recognized by the Supreme Court of Canada, the minority rights provided in the Canadian Constitution, premised on the distinctive terms and conditions of the Canadian union and the particular territorial and demographic balance between various religious and linguistic minorities at Confederation, are quite distinct from the more universal liberal democratic rights such as are protected by the Canadian Charter.⁸² Nor can this requirement be satisfied by mere assurances on the part of the seceding province. The reciprocal nature of minority rights in Canada and the fact that the Constitution provides for a federal role in minority rights protection, imply that continued protection of minorities must be ensured in a negotiated agreement between the seceding province and the rest of Canada. Unilateral secession is thus precluded under the minority rights principle.

Unlike minority rights, aboriginal rights are not created in the Constitution but are presupposed and recognized by it.⁸³ As the Supreme Court has recently stated, they have their source in the prior occupancy by Aboriginal peoples of the territory now comprising Canada and are the means by which the Constitution reconciles this prior occupancy with Canadian sovereignty.⁸⁴ Many difficult issues are raised with respect to the rights of Aboriginal groups living in Quebec in the context of secession, the most important of which will be whether these groups need consent to their inclusion in a sovereign Quebec⁸⁵ or to the inclusion of territories over which they enjoy rights.⁸⁶

⁸² *Reference Re an Act to Amend the Education Act, supra*, where the Court held that the Charter did not apply so as to render unconstitutional a distinction made on the basis of religion in the provision of funding for denominational schools. Wilson J. found that "the special treatment guaranteed by the constitution to denominational, separate or dissentient schools, even if it sits uncomfortably with the concept of equality embodied in the Charter because not available to other schools, is nevertheless not impaired by the Charter. It was never intended, in my opinion, that the Charter could be used to invalidate other provisions of the Constitution, particularly a provision such as s.93 which represented a fundamental part of the Confederation compromise."

⁸³ *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at 538, per Lamer C.J.C.: "In identifying the basis for the recognition and affirmation of aboriginal rights it must be remembered that s.35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law: *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313." (emphasis added).

⁸⁴ *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at 547-8. "[T]he aboriginal rights recognized and affirmed by s.35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The content of aboriginal rights must be directed at fulfilling both of these purposes."

⁸⁵ See Factum of the Intervener Grand Council of the Crees, par.69.

⁸⁶ See Factum of the Intervener Makivik Corporation, para. 26.

In the context of the present reference, these are unripe issues. They do not have to do with the legality of unilateral secession itself, but rather territorial issues which would arise in the event of secession.⁸⁷ Only once a court has determined how secession might legally occur, and only if a particular secession project is proposed, will it then fall to be determined which territories may be included in a sovereign Quebec and which groups need consent to their inclusion. To address Aboriginal land claims in the context of the current Reference is to assume what needs to be proven: that the territorial boundaries of the province of Quebec would remain as they are in the event of secession.

6. Summary

Dissolving or changing the polity to which the Canadian constitution applies is fundamentally different from amending the form and manner of government, and arguably the amending formula is not applicable to a change of this nature. The Court, in answering the first question submitted to it, must not take a narrowly positivist approach focussing on the terms of the amending formula, but rather must have recourse to the foundational norms of the constitutional order itself. These foundational norms, which include the democratic principle, the principle of the Rule of Law, the federal principle and the principle of minority rights protection, do not merely form the justification for political conventions but are binding legal principles which, now that the Constitution has been patriated, structure and govern the exercise of all constitutional change in Canada.

Unilateral secession would severely compromise the stability of the legal order and is thus precluded by the principle of the Rule of Law; the position of the Quebec government that a manifestation of popular will to secede authorizes it to act unconstrained by law as interpreted by Canadian courts, is a further repudiation of this principle. If, as we have argued, Canadians as a whole constitute a democratic people, then Canadian society can be dissolved only by decision of this democratic community, whose wishes are represented and

⁸⁷ The issue of breach of the provisions of the *James Bay Northern Quebec Agreement*, in which the aboriginal rights of the Crees and Inuit of Northern Quebec are now embodied and which is protected under s.35(1) of the Constitution, ultimately boils down to a territorial claim. Negotiated in a federal context, the Agreement provides for obligations toward the Native parties on the part of both the federal and provincial governments and thus presupposes the continued existence of both levels of government in their present capacities. (See Grand Council of the Crees, *Sovereign Injustice: Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Quebec*, Nemaska, Quebec, 1995 at 278-281.) Unilateral secession of Quebec would mean that one level of government (depending on whether the territory in question remains in Canada or forms part of a sovereign Quebec) would no longer be able to carry out its obligations under the Agreement, and thus would constitute a fundamental breach of its terms. This would have the result of reopening the question of Aboriginal rights in the territories covered by the Agreement, as well as that of the inclusion of these territories in Quebec — which inclusion is, arguably conditional on the terms of the Agreement.

mediated by the federal government. Under the federal principle, the federal government has a crucial role to play in the secession of Quebec, both in representing the wishes and interests of the democratic community constituting Canadians as a whole, and in ensuring the welfare of regional communities throughout Canada. Because the other provinces as such are not implicated by secession, provincial governments have no role to play in this matter. An important part of the federal role is that of ensuring that adequate protections for minorities in a sovereign Quebec are included in a negotiated secession agreement. Aboriginal territorial claims consequent upon secession, the resolution of which will likely involve partition of the territory presently included in Quebec, do not have to do with the legality of unilateral secession per se and are best resolved in a future reference in which all such claims can be carefully considered.

Part II *Question #2: The “Right” to Secede in International Law*

1. *Introduction*

In the second question, the federal Government has, first of all, asked the Supreme Court whether international law confers on Quebec a “right” to secede unilaterally from Canada. This is followed by a more specific question: “In this regard, is there right to self determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?” A preliminary issue in interpreting question #2 is whether the second, more specific question should be read by the Court as circumscribing the more general inquiry into the legality of unilateral secession to the international law doctrine surrounding the right to self-determination, or whether it should be viewed as simply directing the court to consider self-determination among other considerations of international law.

The former, narrow interpretation of the two-part character of the question would largely exclude the Court from considering a wide range of international legal or quasi-legal norms, for example, with respect to minority rights, secession in the case of the unworkability of a federal arrangement, or secession as a remedy for suppression of independence, that are arguably relevant to assessing the general legality of secession under international law. The clear thrust of the traditional doctrine of self-determination, as almost universally interpreted by academic authorities and in state practice, would exclude a right of Quebec to secede. The narrow view of the question would lead to a simple, if unbalanced analysis — and one that would seriously threaten to drive a wedge between legality and legitimacy, unwittingly strengthening the hand of those who seek a farewell to the rule of law altogether since it would exclude those rubrics of international legal discourse under which it is possible to seriously entertain the kinds of claims that many Quebecers both federalist and sovereigntist have invoked as a basis for the right to decide their own future.

Perhaps fortunately, the federal Government in its factum has itself implicitly rejected the view that the second part of the question simply narrows the first; it has asked the Court to answer "No" to both parts, thereby implying that there are two separate questions to be answered, and that it is theoretically *possible* to have a negative answer to the second part and an affirmative one to the first.⁸⁸ At the same time, the argumentation that follows in the federal factum concentrates almost exclusively on the doctrine of self-determination, perhaps a tactical decision since, as noted, here the law seems clearest in denying to Quebec a right to unilaterally secede.

This being said, other important preliminary interpretative issues remain with respect to the scope of the Court's inquiry into the legality of unilateral secession under international law. Many of these centre on the meaning of the word "right". This expression could extend from the minimalist proposition that there is no international law rule that prohibits unilateral secession of a federal sub-unit to the maximalist proposition that the purported right in question is such that it "trumps any competing claims or entitlements" in the words of Monahan and Covello.⁸⁹ In between these two extreme propositions, is situated a third meaning of "right" that would comprehend the question of whether, according to prevailing normative criteria, a unilateral secession would attract the recognition of Quebec by the international community as a sovereign state. While recognition has traditionally been viewed as a purely political prerogative of the recognizing state, and the minimum legal criteria for statehood themselves defined in "realist terms" of control by the government of the entire territory in issue, the recent approach of some states to independence claims in the Baltic states and the former Yugoslavia has tended to link the recognition process to a normative inquiry about the justifications for secession.⁹⁰ If the Court is to respond to the federal Government's stated wish to inform Canadians as clearly as possible about the legal *enjeu* surrounding secession, it cannot arguably ignore the emerging international law concerning recognition, since recognition is in fact the most probable "real world" context in which the international community will face the legal questions surrounding the justification of unilateral secession. As Sopinka J. suggested in considering the appropriate role of the Supreme Court in reference cases, "the question must be given an interpretation that will make the answer of assistance in resolving the dispute".⁹¹ Nevertheless, purist or traditionalist public international lawyers would probably eschew the notion that, in the strict sense, a self-standing "right" to secession is created simply because the seceding state in question is judged in conformity with emerging recognition criteria.

⁸⁸ Para. 121.

⁸⁹ P.J. Monahan and L. Covello, *An Agenda for Constitutional Reform*, Final Report, York University Constitutional Reform Project, 1992 at 98.

⁹⁰ See K. Knop, "The "Righting" of Recognition: Recognition of States in Eastern Europe and the Soviet Union", *Proceedings of the Canadian Council of International Law*, 1994.

⁹¹ *Re Canada Assistance Plan*, [1991] 2 S.C.R. 525 at 547.

With respect to the minimalist version of the meaning of a “right” to secession, the answer is almost patently obvious — since, in general, only states are subject to binding obligations under international law, a non-state group cannot, by definition, be prohibited from undertaking action to unilaterally secede. What international law can do, is limit how other States may legally respond to this action—for example preventing other states from acting in such a way as to undermine the “territorial integrity” of the state from which the group is seeking to secede. International law may also impose on States positive obligations to protect minorities or other groups, such as aboriginal peoples, that may legally impact upon their response to a unilateral secession, and therewith, in practice, the ability of the seceding group to execute it. And in this sense, even the apparently obvious minimalist proposition that international law gives a right to secession in not prohibiting it requires qualification.

This qualification relates, in fact, to the maximalist proposition of a right that trumps other claims. Do these other claims, for example of minorities or aboriginal groups to territory, or of Canada to a fair settlement with respect to debt and federal properties, potentially circumscribe the scope of a right to secede unilaterally or does a right to secede effectively render them null and void? Or are they to be conceptualized as discrete counter-claims against the seceding group, in theory separate from the right and its limits and to be determined at a later point in time?

While some minority group representatives and aboriginal groups have intervened in the Reference, the sum of material before the Court clearly does not allow an adequate disposal of all possible legitimate claims these groups might have against a seceding group in Quebec. Detailed submissions with respect to territory and partition have not, for instance, been made. And indeed, it would arguably be appropriate only to dispose of such claims in an action where these groups could press their claims as parties against the seceding group, which would have its case justifiably prejudiced if it were not to respond. Thus, there is a good argument that the Court should simply at the outset make any determination concerning a “right” to secede subject to claims that may be persuasively pressed by other groups in international law — recognizing that these other claims, if honoured, may have the effect of defeating any such right by making the secessionist project practically impossible on its own terms. More generally, the specific terms of these controversies having not yet been well-defined the Court might simply view them as not yet ripe for resolution through a reference.⁹²

This relates to the overall question of the time frame, or temporal horizon, in which the Court seeks to answer the question concerning a right to secession. Under some of the international law principles or norms to be considered below, the answer to the question of whether there is a right to secession could well have a different character depending upon whether the Court chooses to consider the place of Quebec in Canada since Confederation, for example, or during the post-1982 or even post-Meech era as the appropriate frame of reference. Conversely,

⁹² See *A.-G. Ont. v. A.-G. Can.* (Local Prohibition) [1896] A.C. 348 at 370.

with respect to the validity of the Court's determination in the future, a finding for example that the "internal", democratic equality dimension of the right to self-determination does not yield a legal right to secession might well have little applicability if a government came to power in Ottawa with an overtly discriminatory attitude against Quebecers or francophones generally, seeking perhaps to reverse bilingualism and to exclude Quebecers from the public service or senior cabinet posts.⁹³

The issue of temporal horizon is complicated by a major difference between the context of the reference and the context in which the issues in question are generally considered, namely *ex post* the action of secession itself, when the world community is considering recognition and/or other treatment of the seceding group. In that case, the state of affairs at the moment in question becomes decisive. The difference may be defined in terms of responding to suddenly emerging political circumstances in a manner that seems to be appropriate for the moment, and giving an opinion intended to guide future conduct of the (implicit) disputants, conduct that may occur under circumstances that the Court is not fully in a position to predict. Furthermore, since international law evolves, in part, through the reaction of States themselves to emerging events, this is a further reason why the Court should consider not only established but also emerging international law doctrine (*lex ferenda* as well as *lex lata*). And doing so will inevitably involve the Court in some speculation as to whether the case of Quebec would likely *trigger* development of the law in the direction of a right to secede, whether founded on minority rights, self-determination or other related principles of international legal order.

2. *The Right of Self-Determination and its Relation to a Possible Right to Secede*

The right of "peoples" to self-determination is contained in binding international instruments to which Canada is a party, including the UN Covenants on Economic, Social And Cultural Rights and the Covenant on Civil and Political Rights.⁹⁴ A relatively uncontroversial meaning of this right was that it entailed the right of independence for colonial peoples, reconciling the moral imperative of decolonization with the need for stability of borders by conferring on such peoples the right to govern themselves within the existing colonial boundaries.⁹⁵ The law with respect to the application of the right of self-determination to particular groups, ethnic, religious, etc., within the territory of a state or erstwhile colony has been largely, and some thinkers would say,

⁹³ It is not surprising in this respect that prominent sovereignists have welcomed explicit anti-Quebec statements and positions by for instance members of the Reform Party.

⁹⁴ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Can. T.S. 1976 No. 46, art. 1; *International Covenant on Civil and Political Rights*, 19 December 1966, Can. T.S. 1976 No. 47, art. 1.

⁹⁵ International Court of Justice, *Advisory Opinion on Namibia*, ICJ Reports 1971, 31; *Advisory Opinion on Western Sahara*, ICJ Reports 1975, 32.

excessively⁹⁶ determined by the concern to avoid boundary disputes and protect the stability of the interstate system. Thus, in elaborating the right of self-determination of peoples, the 1970 Declaration on Friendly Relations of the United Nations General Assembly, contains a proviso that none of the provisions of the Declaration setting out the right “shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”⁹⁷

As many commentators have noted, this proviso seems to make it clear that, with respect to *non-colonial* peoples, the right to self-determination is satisfied by the existence of a democratic government representing the entire population on the basis of non-discrimination, which is known as “internal self-determination”.⁹⁸ However, the wording of the Declaration also suggests, by negative implication, that where a State is *not* possessed of a government representing the whole people on a non-discriminatory basis, the right to self-determination *may* entail disruption of the territorial integrity of an existing independent State, i.e. may entail secession: as Cassese suggests, “A racial or religious group may attempt secession, a form of external self-determination, when it is apparent that internal self-determination is absolutely beyond reach.”⁹⁹

How might this principle apply to Quebec? In the first place, its invocation requires that the authorities attempting secession, the government and National Assembly of Quebec, present themselves as acting on behalf of a racial or religious group. This would require reversion to the old notion of the “French Canadian race”, defined either in biological race-theory terms or religiously by French Catholicism, which was typical of 19th and early 20th century French Canadian nationalism, and has been largely repudiated by contemporary nationalists and independentists.¹⁰⁰

This concept, in terms of the claims of the authorities attempting the secession, may be both under- and over-inclusive.

⁹⁶ See for example, L. Brilmayer, “Secession and Self-Determination: A Territorial Interpretation” (1991) *Yale Journal of International Law*, 177; Allen Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* Westview Press, Boulder Coll., 1991.

⁹⁷ United Nations General Assembly, *Declaration on Principles on International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV) UN GAOR, 25th Sess. Supp. No. 28, U.N. Doc A/8028 (1970).

⁹⁸ Thus, Cassese suggests that the Declaration “eventually crystallized and amalgamated the previously conflicting views of States” with respect to internal self-determination. A. Cassese, *Self-Determination of Peoples: A Legal Appraisal* (Cambridge: Cambridge University Press, 1995) at 108.

⁹⁹ Cassese, *ibid.* at 119.

¹⁰⁰ See generally, R. Cook ed., *French-Canadian Nationalism*. (Toronto: Macmillan of Canada, 1969)

Certainly underinclusive, if the intent is to disrupt the territorial integrity of Canada to the extent that the entire existing territory of Quebec would be encompassed by the seceding State, since significant parts of that territory are populated by groups other than the "French-Canadian race".¹⁰¹ Over-inclusive, in the sense that the Quebec authorities do not represent the entire "French-Canadian race" but only that part of it resident in Quebec.

If an argument could be staked out that the seceding authorities are representing a racial group, then one would proceed to consider whether the relevant group has been discriminated against with respect to its participation in the government purporting to represent the entire population on the territory in question. This raises very important issues of democratic theory and its application in a multi-racial state. As a matter of democratic theory, at least three conceptions of what non-discriminatory representation means are possible. The first could be described as a formal individual rights perspective, according to which the conferral of the formal legal right to vote, hold public office, and be a civil servant without discrimination as to race satisfies the right to internal self-determination.¹⁰² A second perspective, that of equality of opportunity, would consider, as well, whether *in practice* there is equal access to the national government and its institutions regardless of race, and whether appropriate accommodations have been made where needed to ensure such access. In this regard, a fundamental dimension of the approach adopted by the Trudeau government in response to increased nationalist sentiment in Quebec was to increase the representativeness of the federal Government with respect not only to francophone Quebecers but French Canadians generally, particularly through the policy of official bilingualism.¹⁰³ In Trudeau's view, representativeness could not be guaranteed by formal equality alone, but required a commitment to equality of linguistic opportunity with respect to the federal government and its institutions. Before these changes were implemented, there were few senior French-Canadian civil servants, key cabinet positions were rarely held by French-Canadians, and the main currents of public life at the national level tended to exclude them. Even today, how much has been really achieved remains controversial (for example, English still predominates as the language of many governmental meetings in Ottawa) but the objective measures of French-Canadian participation such as the percentage of senior federal officials relative to the percentage of francophones in the population as a whole suggest that significant equality of opportunity in participation has

¹⁰¹ This is separate from the issue of whether, if Quebec has a right of secession, the principle of *uti possededis* would apply against any claim of other groups to partition. The question here is whether there is enough of a clear fit between the discriminated against racial group and a defined territory to allow for the right *in the first place*.

¹⁰² T. Franck, "The Emerging Right to Democratic Governance" *supra* note 15

¹⁰³ See K. McRoberts, *Misconceiving Canada: The Struggle for National Unity*, (Toronto: Oxford University Press) ch. 4 and the sources cited therein.

occurred, given the basic reality that French-Canadians belong to a numerical linguistic minority.

A final perspective on representativeness would extend to the notion of co-determination at the federal level as between the various racial groups, including a veto over federal decision-making. This perspective is reflected in some of the institutions of the former Yugoslavia, including the collective presidency. On this view, representativeness without discrimination cannot be achieved unless the racial groups themselves co-decide at the national level. Something of this concept is evident in the nationalist position of a kind of Quebec-Canada union, based on equal partnership.¹⁰⁴

To the extent that international law has fixed on a relevant concept of non-discrimination in the case of internal self-determination, this appears to resemble most closely that of formal individual rights.¹⁰⁵ Perhaps the only obvious case where the international community may have considered the absence of democratic rights as a justification for secession was that of Bangladesh, where the leadership of an East-Pakistan based political party that had won elections held throughout the whole country — not simply in the seceding territory — declared the independence of East Pakistan, when the existing military government sought to maintain control, completely rejecting the election results.¹⁰⁶ But as James Crawford notes, in the federal Government's *Experts' Report*, it is unclear what judgment if any the international community made as to existence of a right to secession in this case, given that, with the exception of India, recognition only followed the surrender of Pakistani forces and the consequent acquiescence of the existing Pakistani authorities in the secession.¹⁰⁷

In the absence of greater clarity from state practice about the concept of equal democratic representation that informs the right to internal self-determination, the conservative view of the academic authorities that bases the concept on formal individual democratic rights and their free exercise without discrimination probably reflects with some accuracy the current state of the law. In any case most of the democratic and equality rights entrenched in the U.N. Civil and Political Covenant generally have this character.¹⁰⁸ Nevertheless, there are some who have suggested, including one of us, that the conception of equality in these instruments should, in appropriate cases, be interpreted to

¹⁰⁴ See Quebec, Commission sur l'avenir politique et constitutionnel du Québec, Report of the Commission on the Political and Constitutional Future of Quebec (Bélanger-Campeau Report), Quebec, March 1991; and the Platform of the ADQ, the Party of Mario Dumont, Quebec-Canada: A New Partnership.

¹⁰⁵ As agreed by scholars such as Brownlie, Franck and Cassese.

¹⁰⁶ Report of James Crawford, *Experts' Report*, Supplement to Factum of the Attorney General of Canada, at 20.

¹⁰⁷ *Ibid.* para. 33.

¹⁰⁸ Adopted Dec. 16, 1966, 999 U.N.T.S. 171.

include “factual equality”¹⁰⁹ This would extend, then, to the representativeness in fact of the national government, whether in terms of senior offices held by members of the group in question or the actual ability, given linguistic considerations, to fully participate in national institutions generally. However, this extension of the concept of equality would raise very difficult issues of the appropriate accommodations that might be expected in order to achieve “factual” democratic equality — not every group can be accommodated with respect to its linguistic or other needs (for instance, religious observance), and certain practices aimed at achieving factual equality (such as quotas or aggressive affirmative action policies) could violate the base concept of non-discrimination that still prevails in most of international human rights law. Finally, there is no basis for a communitarian conception of equality between peoples or groups as collectivities in the law and jurisprudence of international equality rights — and indeed it is understandable that States would not have agreed to a conception of equality that would radically alter the way that liberal democracy is practiced, and place in question fundamental institutional and constitutional arrangements, including the principle of one person, one vote.

In the case of Quebec, almost all the scholarly commentary has been dismissive of the view that a denial of equal democratic rights exists such that internal self-determination is threatened, triggering a right to secession. According to Woehrling, “il ne fait pas de doute que le Canada possède un gouvernement représentant l’ensemble de sa population sans distinction de race, de croyance et de couleur.”¹¹⁰ Williams claims: “[the Quebec francophone population] has full representation in the federal Parliament, government and civil service.”¹¹¹ According to Cassese, writing in the leading contemporary treatise on self-determination, “. . . one is confronted here with a political claim to secession that is *totally unsupported by law* (although legal arguments are vociferously employed by the proponents of secession) . . .”¹¹² Of the commentators, Finkelstein, Vegh and Joly stand out as implicitly recognizing that not only formal equality, but actual levels of representation may be relevant to determining whether the Quebec francophone population is represented on a non-discriminatory basis by the national government. Hence, they refer not only to proportionate representation in Parliament and the legal entitlement to

¹⁰⁹ See Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (New York: United Nations, 1979); R. Howse, “Qu’une langue, quelle qu’elle soit, n’en réprime pas une autre”: The Human Rights Committee Decision on the Quebec Sign Law and the Protection of Minority Language Rights in International Law”, in S. Reger, ed., *Les Droits Linguistiques au Canada: collisions ou collisions?* (Ottawa: Centre Canadien des droits linguistiques, 1995) 583 et 607.

¹¹⁰ J. Woehrling, “L’évolution et le réaménagement des rapports entre Québec et Le Canada anglais,” in J.-Y. Morin and J. Woehrling, *Demain Le Québec... Choix politiques et constitutionnels d’un page en devenir* (Sillery, Qué. Septentrion, 1994) at 128.

¹¹¹ S. Williams, *International Legal Effects of Secession by Quebec* (North York: York University Centre for Public Law and Public Policy, 1992) at 21.

¹¹² *Supra* note 98 at 253.

three of the nine seats on the Supreme Court of Canada, but also to representation in the federal Cabinet and the civil service, matters of practice rather than law, as well as to official bilingualism policies.¹¹³

One commentator, Daniel Turp, has argued that Quebec has been denied internal self-determination, but on the basis of a concept of internal self-determination that seems founded on an entirely erroneous conception of international law doctrine. Thus, Turp does *not* claim that the Canadian government has failed, on any plausible democratic theory, to represent Quebecers without discrimination; rather he supposes that internal self-determination somehow includes a measure of self-government by the racial group in question over its territory.¹¹⁴ Thus, Turp claims the supposedly illegitimate imposition of the 1982 Constitution on Québec as a political sub-unit as well as the failure of the Meech Lake Accord constitute a denial of the right of internal self-determination. Yet, of course, in neither case did the event in question reduce the representativeness of the federal Government with respect to francophone Quebecers. Even scholars who are open to the notion that a denial of internal self-determination is a justification for secession, such as Bucheit, see the political status of the group in question, i.e. their *collective* political status within the State as irrelevant to the right to internal self-determination: according to Bucheit, “the terms of [the Declaration on Friendly Relations] offer very little comfort to groups demanding political autonomy simply for the sake of parochialism. What seems to be required is a denial of political freedom and/or human rights as a *sine qua non* for a legitimate separatist claim. This does not of course totally invalidate the claims of, for instance, the French Canadians, the American Blacks, Welsh or Bretons, but it does suggest that their respective States are under no obligation imposed by international law to recognize their demands beyond providing protection for human rights, a representative government that does not discriminate on the basis of race, creed or color, and the other requirements set forth in the declaration. If these conditions are satisfied, the instrument apparently consigns discussions regarding the political status of such groups within their States to the level of internal constitutional law.”¹¹⁵

The only easily imaginable hard case that arises, then, with respect to the application of a right of secession to Quebec based on the denial of the right to internal self-determination, is in the eventuality of a federal Government coming to power in Ottawa that would substantially reverse the representativeness in

¹¹³ “Does Quebec Have a Right to Secede at International Law?”, [1995] 74 Can. Bar Rev. 225 at 255.

¹¹⁴ D. Turp, “Le droit à la sécession: L’expression du principe démocratique” in A-G. Gagnon and F. Rocher, eds., *Répliques aux détracteurs de la souveraineté du Québec*, *supra* note 55; “Quebec’s Democratic Right to Self-Determination” in S. Hart *et al.*, *Tangled Web* (Toronto: C.D. Howe Institute, 1992).

¹¹⁵ L.C. Bucheit, *Secession: The Legitimacy of Self-Determination* (New Haven: Yale University Press, 1978) at 94.

practice of francophone Quebecers, either dismantling official bilingualism, or systematically excluding Quebecers from a proportionate number of positions in the Cabinet, on key parliamentary committees and so forth. In our view, it would be inappropriate for the Court, given the lack of explicit development in the law and related academic commentary of the conception of democratic representation at work in the Declaration, to exclude the possibility of a justified claim to secession on such a scenario by adopting a rigid formal equality view of the right to internal self-determination.

3. *Minority Rights*

Article 27 of the United Nations Covenant on Civil and Political Rights¹¹⁶ states: “[in] those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” While there is a strong basis for taking the view that Article 27 confers only individual rights, given that the text attributes the rights in question not to minorities, peoples or some other collectivity, nevertheless this is qualified by the expression “in community with other members of their group”, which suggests an entitlement to collective forms of the *exercise* of minority rights. On whether a dimension of collective power or autonomy is contained within Article 27 the authorities are divided.¹¹⁷ However, a number of very distinguished authorities, including Capotorti in his classic study of minority rights for the United Nations have made a strong case that Article 27 may extend to the obligation to grant minorities at least some autonomous collective institutions, such as schools for instance.¹¹⁸

Moreover, the right to collective existence as a community is increasingly being recognized as implicit in Art. 27. Thus, in the *Lubicon Lake Band* case, the U.N. Human Rights Committee found a violation of Art. 27 on the basis that Canadian government policies with respect to industrial development and environment threatened the existence of the band as a community.¹¹⁹ In the Quebec sign law case, also before the Human Rights Committee, one member of the Committee, albeit dissenting, found that the restrictions on the use of English entailed in the law could be justified on the basis of a right to survival

¹¹⁶ 999 U.N.T.S. 171, 6 I.L.M. 382 (1967).

¹¹⁷ For a statement of the various views, see N. Lerner, “The Evolution of Minority Rights in International Law”, in C. Brolmann, R. Lefeber and M. Zieck, eds., *Peoples and Minorities in International Law* (Dordrecht: Nijhoff, 1993) at 89-93.

¹¹⁸ F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (New York: United Nations, 1979) at 98-99; P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991) at 185-186.

¹¹⁹ United Nations Human Rights Committee, Communication No. 167/1984, *Lubicon Band v. Canada*, UN Doc A/45/40 Vol. II.

in Art. 27.¹²⁰ While not explicitly citing Art. 27, in its second opinion, the Arbitration Commission of the Conference of Yugoslavia held that “where there are one or more groups within a State constituting one or more, ethnic religious or language communities, they have the right to recognition of their identity under international law.”¹²¹ In this opinion, the Arbitration Commission declined to take the view that the right to recognition of identity, and other aspects of minority rights in international law, could justify the Serbian population of Bosnia-Herzegovina forming an independent state. Nor, however, did the Arbitration Commission simply exclude the possibility that secession might be an eventual legal remedy in the event of systematic violation of minority rights. Its concern, understandably, was to secure the recognition and compliance with minority rights in the first instance.

If there is a collective dimension, including an element of political autonomy, implicit in Art. 27, then the question arises, first of all, whether Canada could be considered in violation of this right with respect to Quebec, and secondly, as noted, whether in the absence of any reasonable prospect of obtaining Canadian compliance with the right, secession could be considered a possible ultimate remedy. Here, the patriation of the Constitution in 1982 without the consent of the Quebec National Assembly and the failure to address increased demands for political autonomy under the Meech Lake Accord and in subsequent constitutional negotiations might well be raised as violations of Art. 27. The question would be, whether despite these events, francophones as a minority within the meaning of Art. 27 nevertheless enjoy adequate political autonomy to ensure their collective existence as a minority and the right to recognition of their identity.

This is, of course, precisely the main controversy that has plagued constitutional dialogue in Canada over the last decade. Many opponents of Meech and subsequent proposals, did not deny that, in an important sense, the survival of francophonie in North America is not possible without some political autonomy for Quebec, but considered that the degree of autonomy conferred by the existing constitutional arrangements has proven adequate to the evolution of a flourishing francophone community in Quebec and in Canada as a whole.¹²² But much of the constitutional law and policy community in Canada, whether in Quebec or elsewhere has taken the opposite view, or at least acquiesced or sympathized with the position.¹²³

¹²⁰ Individual opinion of Mr. Birame Ndiaye, United Nations Human Rights Committee, Views: *Communications Nos. 359/1989 and 386/1989*, 31 March 1993. CCPR/C/47/d/359/1089/rev.1.

¹²¹ Opinion No. 2, November 20 1991, (1993) I.L.M. 1498, para. 2.

¹²² See, for instance, D. Coyne and R. Howse, *No Deal! Why Canadians Should Reject the Mulroney Constitution* (Hull: Voyageur, 1992).

¹²³ See for instance, K. McRoberts, *Misconceiving Canada: The Struggle for National Unity*, *supra* note 103; G. La Forest, *Trudeau and the End of a Canadian Dream* (Montreal and Kingston: Queen's University Press, 1995); J. Webber, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution*, *supra* note 39.

There is little rigorous argument, however, as to why any particular set of additional accommodations is necessary to ensure the collective existence, indeed flourishing of the francophone minority — at least in the way of additional powers to Quebec. Thus, not surprisingly those who believe that additional accommodations are necessary vary widely as to what these actually might have to be, to guarantee the collective existence of the community. Some, for instance Webber, seem to believe that accommodations that would be based upon a strict interpretation of the division of powers in the 1867 constitution would be sufficient, along with a constitutional recognition of distinct society.¹²⁴ Others see exclusive Quebec control over language and culture as necessary.¹²⁵ But, again, these kinds of positions tend merely to assert a subjective perception of vulnerability under the current arrangements — they offer little in the way of objective evidence or even reasoned, objective criteria with respect to determining what is genuinely necessary for collective survival as a minority.

Moreover, some of the assertions in question, for instance the notion that the Charter of Rights and Freedoms somehow limits the ability to protect the French language and culture adequately, or to ensure assimilation to the francophone linguistic and cultural milieu, raise an extremely important difficulty inasmuch as they imply that Quebec may require the latitude to exercise powers that themselves may run afoul of international human rights norms, with respect to minorities within Quebec. If Quebec were to become an independent State these minorities would themselves be entitled to the protection of Art. 27. This illustrates the perverse character of an argument that Quebec should have a right to secede based on francophones being unable to vindicate their Art. 27 rights within the existing constitutional framework — the constraints that the constitutional framework places on the ability to impose the French language and culture in Quebec may well turn out to be less severe or at least no more severe than those imposed on independent states by international human rights law itself.¹²⁶

This being said, the manner in which the referendum question and strategy were framed in 1995 seems to set up, as it were, an Art. 27 argument. Canada is to be offered a negotiation on political and economic partnership, with a unilateral declaration of independence only to take full effect in the event of a refusal to negotiate or the failure of negotiations. Thus, Quebec's fundamental claim is articulated as not that of secession but a greater political autonomy, with

¹²⁴ Webber, *Ibid.*

¹²⁵ See the visionary *indicia* S. Dion, "Explaining Quebec Nationalism", in R. Kent Weaver, ed., *The Collapse of Canada?* (Washington D.C.: Brookings Institution, 1992) at 77-121.

¹²⁶ And sovereigntists typically claim the intention to fully respect these rights. They are simply under a misimpression that the rights in question are less constraining of a linguistic and cultural nationalist program than is the Canadian Charter.

secession the remedy when the effort to achieve this greater political autonomy fails. However, a careful examination of the character of this demand for greater political autonomy shows it to be a thinly disguised demand for full Statehood, with the arrangement between Canada and Quebec being of much the same nature as that between, for example, the existing parties to the North American Free Trade Agreement.¹²⁷

Thus, the claim that secession is being pursued only on the basis of the failure to achieve certain accommodations with respect to political autonomy that may fall within Art. 27 is disingenuous, at least with regard to the project of the Parizeau and now Bouchard government. A far more difficult scenario would be presented, were — for example — a referendum question to be based upon the premise that secession would be pursued if agreement were not attained with respect to the contents of the Meech Lake Accord, or a similar package that also included devolution of specific powers or the creation of new exclusive powers, such as language and culture. Of course, there is no generally accepted principle of international law that secession is a remedy for the violation of Article 27.¹²⁸ In an extreme situation such a position would seem not unreasonable — if it is obvious that Art. 27 has been rendered completely ineffective in protecting a minority's right to collective existence, denying a right to secession may be tantamount to asking a minority group to passively accept cultural genocide.¹²⁹ However, Article 27 is part of the Civil and Political Covenant, one of the few international human rights instruments that contains a complaints procedure, to which Quebec, or francophones within Quebec has access. Significantly, neither the patriation of the Constitution in 1982 nor the failure of the Meech Lake Accord gave rise to any complaint before the Human Rights Committee of the United Nations — nor has the Parizeau or Bouchard Government ever sought such a determination before proceeding with the remedy of sovereignty. This would belie any claim that secession was the last available remedy for the francophone minority to protect its right to collective existence.

4. *The Dissolution of the Federation*

A factor that loomed large in the international community's view of the legitimacy and perhaps legality of a number of claims to independent statehood in the case of the former Soviet Union and the former Yugoslavia was the

¹²⁷ See R. Howse, "Sovereignty . . . But Where's the Association?", *Canada Watch* 3, no. 7 (May/June 1995) at 97-102.

¹²⁸ T. Franck, "The Emerging Right to Democratic Governance", *supra* footnote 15 at 58-59.

¹²⁹ See L. Brilmayer, "Secession and Self-Determination: A Territorial Interpretation" *supra* note 96.

perception, or reality, that the federal order itself had become non-functional.¹³⁰ While James Crawford, in his report to the federal Government, characterizes the Yugoslav Arbitration Commission's support for the independence of the Republics as recognition of a "fact", he also suggests that this recognition had profound juridical significance, providing the "underlying legal rationale for the positions taken by the members of the European Community and eventually by most members of the United Nations, . . ."¹³¹

Three factors that led the Commission to take the view that the dissolution of the Yugoslav federation was a "fact" — meaning implicitly a legal fact meriting the legal response of recognition by the international community — were: 1) referendum results in favour of independence in several but not all the republics; 2) "The composition and workings of the essential organs of the Federation . . . no longer meet the criteria of participation and representativeness inherent in a federal State"; 3) the inability of the federal and republican authorities to restore peace and order on the basis of the old federal arrangements.

The significance of these findings for the legality of a unilateral Quebec secession has generally been ignored. However, they may be more relevant than other normative benchmarks in international law to the legality and legitimacy of such an effort. It is possible that a vote in favour of some version of secession in a future referendum could provoke a crisis capable of paralyzing the Canadian state. There is a wide variety of views as to capacity and legitimacy of the federal Government alone to respond to such a vote, and any initiative that immediately followed it. Gordon Gibson, for instance, appears to take the view that in the wake of a "Yes" vote, the federal Government would be simply incapable of charting any response and would have to put matters in the hands of the provinces to a significant extent, if not some spontaneous assembly of citizens.¹³² It has even been suggested that in the event of a positive referendum result the federal cabinet and/or government might be required to resign, or at least any members of either from Quebec decline themselves from decision-making. Such measures could result in a fundamental power vacuum at the federal level, resulting in the kind of incapacity of federal organs noted by the Arbitration Commission.

It is, of course, our argument in the first part of this paper that the federal Government does have the authority, and indeed responsibility to respond to a secession bid on behalf of the country as a whole: this is at the core of the federal

¹³⁰ See L.S. Eastwood Jr., "Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia" (1993) 3 *Duke Journal of International Law* 299. See also, J. Crawford, "State Practice and International Law in Relation to Unilateral Secession", Supplement to *Federal Factum: Experts' Report*, Attachment 11.

¹³¹ *Ibid.* para. 45.

¹³² G. Gibson, *Plan B: The Future of the Rest of Canada* (Vancouver: Fraser Institute, 1994) at 167-170.

principle.¹³³ However, as noted by many commentators, many Canadian politicians, including at the federal level, have suggested that Ottawa should not, or perhaps cannot, either as a practical matter or a matter of political legitimacy, take active measures to oppose a secession initiative based upon a positive referendum result.¹³⁴ However, these statements, given the strategic value of not announcing in advance certain policies in the event of secession, cannot be taken as indicative of how the federal Government might in fact act in the event; what is clear is that the Constitution *allows* it to act decisively, and without the need for consent of other governments (except where it is purporting to alter their constitutionally entrenched powers). Nor is there any legal reason why the federal Government would cease to be representative of all Canadians, including Quebecers, even in the event of a majority vote in favour of secession.

5. *Recognition and the Legality of Secession*

It has been suggested that, in the absence of a self-standing right to secession under international law, a secession can become legalized *ex post*, especially where the seceding entity meets international legal criteria for recognition and is accordingly recognized by other States. According to Woehrling, where successful and effective in maintaining a monopoly of public authority over its territory “le droit international prendra acte de l’existence du nouvel État.”¹³⁵ However, as admitted by Woehrling, the case of the dissolution of Yugoslavia places inconsiderable doubt whether recognition can be conceived as a purely political act divorced from the general normative order of international law. In one of its opinions, the Commission ventured the view that discretion to recognize or not recognize an entity seeking recognition was «subject only to compliance with imperatives of international law, in particular those prohibiting the use of force in dealings with other States and guaranteeing the rights of ethnic, religious, or linguistic minorities».¹³⁶ In another of the Opinions, the Commission defined the imperatives of international law as also including “respect for the fundamental rights of the individual and the rights of peoples”.¹³⁷ Some publicists view this qualification of discretionary recognition as an important and welcome development of international law, despite its rejection by at least one major power, France. Alain Pellet suggests; “il est . . . bon et sain que le principe de légitimité (manié avec prudence et raison) fasse irruption dans le droit et l’on regrettera à nouveau que la France, de plus en plus isolée,

¹³³ See the discussion of the federal principle above.

¹³⁴ See for example, J. Woehrling, *supra* note 110 at 129.

¹³⁵ J. Woehrling, «L’évolution et le réaménagement des rapport entre Québec et le Canada anglais» *supra* note 110 at 129.

¹³⁶ Opinion No. 9.

¹³⁷ Opinion No. 1, para. 1(e).

s'obstine à récuser l'élément de moralisation qu'introduit la notion de *ius cogens* dans le droit international."¹³⁸

If preemptory norms of international law are increasingly accepted as governing discretion to recognize new States, then the possibility of Quebec secession being legalized through *ex post* recognition depends on its consistency with those norms. In the case of a unilateral secession, an immediate problem would be that posed by the "rights of peoples" including the right of the Canadian people to a government that represents them on the basis of equality and non-discrimination — as is clear from the analysis above of the right to self-determination, the Canadian people have this right and now exercise it through federal institutions. A secession that, at a minimum, did not have the consent of the Canadian people as a whole, would likely violate this right. It would certainly deny to members of the Canadian people on Quebec territory a right to be represented on the basis of equality by a government of the *Canadian* people. The recognition of the former Yugoslav republics as independent States was fundamentally linked, it will be recalled, to the Commission's judgment that the federal institutions of Yugoslavia were non-functional and certainly not representative of the Yugoslav people as a whole; with the collapse of the federal institutions, the right of self-determination of the *Yugoslav* people became, in *fact*, a dead letter. But as long as the Canadian government remained legally and practically capable of acting on behalf of the entire Canadian people, the right of the Canadian people to self-determination would remain intact. In sum, the Supreme Court should find that unilateral secession of Quebec could not be legalized *ex post* under international law, because by virtue of its very unilateralism such an act would violate the right of the Canadian people to self-determination, which at a minimum entails the right to decide their future together by democratic means, through a process in which all Canadians are represented on the basis of equality.

Conclusion

The received wisdom of the constitutional elites that have dominated the discourse on national unity since Meech Lake is that the reference to the Supreme Court on the legality of Quebec secession is at best an irrelevancy, and at worst a direct provocation to Quebecers.¹³⁹ This assumes that the Court's articulation of the principles of constitutional and international law in the reference will not teach Canadians anything of value about the nature of their constitutional order and its normative foundations. But the analysis in this

¹³⁸ A. Pellet, «L'Activité de la Commission d'Arbitrage de la Conférence européenne pour la paix en Yougoslavie» (1992) 37 *Annuaire français de droit international* 220 at 228.

¹³⁹ See, for instance, K. McRoberts, *Misconceiving Canada; The Struggle for National Unity*, *supra* footnote 103 at 241-243.

article suggests that the first two questions in the reference cannot be answered properly without some very important lessons being taught — the lesson that Canadians are a sovereign people, not a community of communities; that the exercise of that sovereignty democratically is achieved through federal institutions and as well through national referenda; and that the Canadian path to democratic sovereignty has depended on judicial guardianship of the rule of law and the primacy of right. These lessons are indispensable to the felicitous evolution of Canada, whatever the fate of Quebec nationalism.