The Unattained Yet Attainable Democracy

Canada and Quebec Face the New Century

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JAMES TULLY

NOTE ON THE AUTHOR

Professor Tully is Professor and Chair of Political Science at the University of Victoria, Victoria, British Columbia. He was for many years a member of the Departments of Political Science and Philosophy at McGill University. He is a member of the Research Group on Multinational Societies.

He writes and speaks on topics in contemporary political philosophy and the history of European political thought, as well as issues related to Canadian constitutional democracy. He was an advisor to the Royal Commission on Aboriginal Peoples, 1992-96, the John Seeley Distinguished Lecturer, University of Cambridge, 1994-95,Visiting Fellow, Australian National University, 1997, the Millennium Lecturer, King Baudouin Foundation, Brussels, 1999, and the Distinguished Lecturer, Center for Theoretical Studies, University of Essex, 2000. His publications include Struggles for *Recognition in Multinational Societies* (2000), co-edited with Alain-G. Gagnon, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995, 2000), *An Approach to Political Philosophy* (1993), (editor) *Philosophy in an Age of Pluralism (1994), (editor) Pufendorf: On the Duty of Man and Citizen* (1991), (editor) *Meaning and Context* (1989) and *Freedom and Belonging* (forthcoming).

Programme d'études sur le Québec
Université McGill

Université McGill
3460, rue McTavish, pièce 314
Montréal (Québec) H3A 1X9
tél.: 514 398 3960
télécopieur: 514 398 3959

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INTRODUCTION

The Desjardins Lecture is a public lecture. A public lecture should be on a topic of concern to the public and it should be addressed to the public. It should be an exercise of public reason among free, equal and diverse citizens over a matter of common concern. Bearing this responsibility in mind I have chosen for my subject the decision of the Supreme Court of Canada in *Reference Re the Secession of Quebec* of August 20 1998. This topic meets the conditions of a public lecture. The decision addresses an issue of the greatest public concern to all citizens of Quebec and Canada, it has been discussed by citizens and their representatives ever since it was rendered in 1998, and it is itself an exercise in public reason by the justices of our highest court.

I believe this is one of the most important decisions ever taken by the Supreme Court of Canada or by any court of a constitutional democracy. On the interpretation I will present, the judgement is revolutionary. It reorients the way we understand Canada as a constitutional democracy and the way we act as citizens within it. The Court describes a Canadian constitutional democracy that is coming into being as the unintended consequence of our struggles over the constitution. It is a form of democracy we have somewhat inadvertently created and in which Quebecers and Canadians could cooperate while respecting their diversity. Although this new form of constitutional democracy has not yet been attained, it is never the less attainable.

If this reorientation in the way we see our constitutional democracy were to be accepted by citizens and representatives, it could lead to the dissolution of the 'impasse' that has blocked relations of cooperation between Quebec and Canada over the last 30 years. It could enable us 'to face the new century together' as my subtitle rather optimistically puts it.

What, then, is the revolutionary reorientation in understanding constitutional democracy that the Supreme Court sets forth in its famous judgement? The Court asks us to look on Canadian constitutional democracy as a 'global system of rules and principles' for 'the reconciliation of diversity with unity' by means of 'continuous processes' of democratic discussion, negotiation and change. This is revolutionary because, for the last thirty years, Canada and other advanced constitutional democracies have been searching for a way to reconcile the increasing diversity of their members with the requirements of unity. The Supreme Court provides a way of dissolving this pressing problem by reconceiving constitutional democracy, not as a system that solves these problems once and for all with some definitive ordering of its members, but as a complex set of practices in which the irreducible conflicts over the recognition of diversity and the requirements of unity are conciliated over time.

I will call this an 'activity-oriented' view of democracy: that is, one which looks on democracy as processes of discussion and change both in accordance with the constitutional rules as well as over these rules. To bring this view of democracy into sharper focus I will contrast it with what we can call an 'end-state' orientation to democracy: that is, a view of democracy as some definitive ordering of the members of a political association and of the relations among them. On the end-state view of democracy, the primary concern is justice: arriving at the 'just' ordering of the members and their relations once and for all. On the activity-oriented view, the primary concern is freedom: that is, the democratic freedom to discuss and modify any prevailing ordering of the members and their relations, on the ground that any ordering will be less-than-perfect and will always harbour anticipated or unanticipated elements of injustice. So, a constitutional democracy will not be legitimate because it is completely just (which is never the case), but because it is free and 'flexible'—

always open and responsive to dissent and amendment.

It is my opinion that the cause of our constitutional impasse is that we tend to view the struggles over the status-quo, renewed federalism and sovereignty from an end-state perspective: that one of these constitutional arrangements is the just and definitive one. The reorientation the Supreme Court offers is to see these human, all-too-human disagreements as ongoing activities of democratic discussion and disagreement within the broader constitutional democracy we have created to reconcile these sorts of conflicts over time, as we cooperate together. In this enlightened view of constitutional democracy, the struggle over the status-quo, renewed federalism and sovereignty is not an 'impasse' at all. It is one kind of democratic disagreement and debate among many within a constitutional framework that has been created in the course of the struggle to deal fairly with it.

The Supreme Court lays out its vision of constitutional democracy in the first half of its judgement (sections 1-82). It then applies this general vision to the particular case of the secession in the second half (sections 83-147). Most of the discussion of the judgment, including the *Clarity Bill* C-20 and the National Assembly's response, *Bill 99*, has focused on the second half of the decision. This is understandable for we are deeply involved in this specific case of diversity. However, the concentration on the second half has led to two unfortunate consequences. First, the new orientation to constitutional democracy in the first half has tended to be overlooked. Second, citizens and politicians have tended to interpret the second half of the judgment in the light of their present conception of democracy—that is, an end-state view of democracy—rather than in the light of the activity-oriented conception of democracy in the first half. If I am not mistaken, both the defenders of the status-quo, the Federal Liberal Party, and the critics of the status-quo, the defenders of sovereignty, continue to defend and criticize the constitution under the prevailing orientation; an orientation the Court rejects. As a result, the discussion of the judgement has reinforced the prevailing orientation rather than freeing us from it and opening up the possibility of seeing our political association in a new light. Accordingly, what I would like to attempt in this lecture is to step back from the specific case in the second half and carefully exam-

ine the general account of constitutional democracy as a system for the reconciliation of diversity with unity in the first half.

In taking this unusual approach I believe I am following one of the Supreme Court's primary objectives. The Court is concerned to show how a hypothetical case of secession can be dealt with if it is approached as a certain *kind* of case: that is, as one case of reconciling diversity with unity. They argue that Canadian constitutional democracy 'must' be able to deal with a case of secession precisely because it is a case of reconciling diversity with unity and this is what Canadian constitutional democracy is designed to do, and has done many times in the past. So, the Court spends over half the judgment explaining how it deals with cases of this general kind, before it goes on to apply their explanation to the particular case.

This approach is important for two reasons. First, it is important precisely because it explains how constitutional democracy can be reconceived in order to reconcile diversity with unity without breaking down into civil war or war of secession. Second, if the Court is successful, it also will have answered one major argument for the sovereignty option. One major justification for sovereignty is that Canadian constitutional democracy cannot reconcile Quebec's demands for the recognition of diversity with Canada's demands for unity. Canada is thus said to be a 'straight jacket' and this fundamental flaw justifies secession. This charge has some truth in it if we view the constitution in the way the current defenders of the status-quo portray it. The defenders of the status-quo share the same assumption as the sovereignist critics. They too claim that the constitution cannot reconcile Quebec's demands of diversity, but they conclude that Quebec must conform to the existing constitution or secede, because the constitution is just as it is.

The Court goes to great lengths to answer this charge and to argue that, if we look at Canadian constitutional democracy in this new way, we can see that it is not the straight jacket that both its defenders and critics claim it is. Thus, although the Court's vision of constitutional democracy is applied to show that the constitution can cope with secession, it is also employed to show that it can be used to deal fairly with *any* case of reconciling diversity with unity that has arisen or may arise in the

future, including the recognition of Quebec as a people with the right of self-determination. In performing this task the Court is doing something far more important than dealing with a hypothetical case of secession. It is pointing out to Quebecers and Canadians that one of the major justifications for secession, as well as for the rigid defense of the status-quo, rests on a complete misunderstanding of the nature of the Canadian constitution. This is the Court's explicit conclusion of the entire judgment: 'the constitution is not a straight jacket' (s.150).

The lecture proceeds in three sections. The first is a brief summary of the principles that the Court applies to the specific case of secession in the second half of the judgment. The second section is an analysis of these principles and the general orientation to constitutional democracy set out in the first half of the *Reference* and how this approach has the capacity to dissolve the impasse. The final section shows how the Court applies its general account of constitutional democracy to three versions of the argument that the constitution is a straight jacket.

1. THE OPERATION OF THE CONSTITUTIONAL PRINCIPLES IN THE SECESSION CONTEXT

Any act of interpretation which aims to free us from a current understanding of our political situation and to present an alternative should start from where we are, here and now. I have suggested that many of us are, as a result of decades of political contestation, deeply engaged in struggles over whether we should defend the status-quo, renew the federation, or support the secession of Quebec, and, further, we are engaged in these strategies under the shared presumption that one of them (the one we support) is the just solution to the contest. As a result of this orientation our attention is drawn to second half of the judgment in which the Supreme Court applies the principles that it works up in the first half to the questions presented to it regarding the secession of Quebec. If this is correct, then a lecture that aims at reorienting our attention to the other way of looking at our situation available in the first half of the judgment should start from this present and prevailing orientation and work back

to the Court's alternative in the first half. Hence, I will begin with a brief summary of the Court's response to the questions regarding secession.

Recall, then, the general structure of argument of the second half of the judgment. The Court was asked three questions concerning the unilateral secession of Quebec from Canada. The Court replied that the National Assembly of Quebec could not effect the unilateral secession of Quebec from Canada under either the Constitution of Canada or international law. However, the National Assembly, or any other provincial legislature, could effect secession under the Constitution if it were to follow a complex, bilateral process of negotiation with the other members of the constitutional association.

This is of course one of the revolutionary features of the decision. For the first time, the right of Quebec or any other province to secede from the federation is recognised by the Supreme Court and a constitutional and democratic process for secession is laid out. No other court of a contemporary constitutional democracy has brought the process of secession under the orderly rule of law and democracy. As important as this is for peaceful constitutional change in the twenty-first century, it is not my concern in this lecture. My concern is the new understanding of constitutionalism that underlies this particular conclusion and the way it is used to show that the constitution is not a straight jacket.

The political process of negotiation over secession consists in two distinct parts. In the first phase, a clear majority of the citizens of Quebec must come to express through a process of democratic will formation a clear and unambiguous will to secede. A sufficient test of the democratic will of the majority is a referendum in which a clear majority votes YES on a clear and unambiguous question concerning secession. This first political process is characterised by the Court as one specific form of the exercise of a general, constitutional right, held by each member of a constitutional democracy, to initiate constitutional change. It is the application of this constitutional right in the specific case of secession of a province from the federation (ss.87, 150).

This first stage, if it occurs, would precipitate the second stage of the process of negotiation. The second phase consists of negotiations over secession (the proposed constitutional amendment) by the 'representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be' (s.93). There are three central features of these negotiations.

The negotiations are the specific form of the exercise of a general constitutional duty of the other members of the association to enter into fair negotiations with a member who has exercised its constitutional right to initiate constitutional change successfully. This constitutional duty is activated by and correlates with the constitutional right exercised in the first stage (s.88). Second, the negotiations must proceed in accordance with four fundamental constitutional principles: democracy, federalism, constitutionalism and the rule of law, and the protection of minorities (s.90). The four principles must inform the actions of all participants in the negotiation process (ss.90, 94). The reason Quebec cannot secede unilaterally is that unilateral secession would violate each of these four principles to which Quebec has bound itself as a member of Canada (ss.91, 149). Third, the exercise of the right to initiate constitutional change and the exercise of the duty to negotiate a legitimate demand for constitutional change in accordance with these four principles constitutes precisely in a particular case of the reconciliation of the diversity of the members with the demands of unity. 'Reconciliation' thus consists of the two complex, difficult and unpredictable stages of political negotiations within the binding constitutional framework (s.101).

As the Court's title to this section indicates, this analysis of secession is simply the 'operation' or 'specific application' of the principles of the general account of reconciliation of diversity with unity, the 'substance and foundation' of which is laid in the first half of the judgment (s.32).

2. CANADIAN CONSTITUTIONAL DEMOCRACY AS A SYSTEM FOR THE RECONCILIATION OF DIVERSITY WITH UNITY

Having seen that the conclusions of the Court's judgment on secession are derived from a more general vision of constitutional

democracy as a system for the reconciliation of diversity with unity by means of a right to initiate constitutional change and a duty to negotiate in accord with four principles, we are now in a position to examine the Court's understanding of constitutional democracy.

i. The Constitution, section 32.

Since the basis of the Court's entire orientation is the Constitution of Canada, the first question we must ask is what is the 'constitution' of a constitutional democracy according to the Court? The Court's understanding of a constitution is much broader than the narrow and more common notion of a constitution as a set of written constitutional texts. The 'constitution' certainly includes all the constitutional texts enumerated in section 52(2) of the *Constitution Act, 1982*, and these written texts have 'a primary place in determining constitutional rules', yet 'they are not exhaustive'. In addition to the constitution in this narrow sense, the Constitution of Canada 'embraces unwritten, as well as written rules'. The Constitution includes:

> the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state.

The Court derives this broad conception of a constitution from the role that a constitution *must* play in a constitutional democracy. A constitution is a system for dealing with the anticipated and unanticipated legal problems that a constitutional democracy faces over time. To 'survive', a constitution 'must contain a comprehensive system of rules and principles' which are 'capable of providing an exhaustive legal framework for our system of government'. But, since no written text could ever contain such an explicit and exhaustive framework for dealing with all the 'problems or situations which may arise', it follows that the Constitution *must* include whatever unwritten 'supporting principles and rules' are necessary from time to time to cope with problems unanticipated in the written texts.

How, then, does the Court gain access to the supporting rules and principles it requires to deal with problems that were not anticipated in or covered by the explicit rules and principles in the written texts of the Constitution without introducing an element of arbitrariness into constitutional jurisprudence? The Court answers this question with a two-step method. First, it cannot be a matter of the Court making explicit once and for all an exhaustive set of principles implicit in the democratic culture of the society and on which all citizens could agree, for the kinds of problems that a constitutional democracy will face cannot be exhaustively anticipated, and thus the appropriate principles for unanticipated cases cannot be exhaustively determined beforehand. (Such an exercise of searching for a determinate set of principles of justice, one may say, would be idle.)

Accordingly, the first step is to characterise in general terms the type of problem facing the Court. In this case, the type of problem is the 'reconciliation of diversity with unity'. This characterisation of the problem provides the Court with an orientation to the otherwise indeterminate global system of rules, thereby setting the context of the search for appropriate principles. That is, the Court first orients itself to the constitution *under this aspect*: not as a system for dealing with problems in the abstract, but as a system for dealing with the sort of problem it faces here and now—of reconciling diversity with unity.

The Court then asks what are the written rules and principles for dealing with such a type of case and determines if they are sufficient (cf: s.53). Since the Court (including its predecessor) has dealt with many cases of reconciling diversity with unity since 1867 (and earlier) it has many written rules and principles available to it. However, since it has dealt with this particular kind of reconciliation case, secession, only once (Nova Scotia in 1867) it finds that the written rules and principles are insufficient, and must thus search for appropriate rules and principles in the broader constitution, in order to perform its role in a constitutional democracy. This precipitates the second step.

The second step is to make explicit the (unwritten) rules and principles that are implicit in the broader constitution and appropriate for the type of problem at hand. There are three sources of these implicit principles: 'an understanding of the constitutional

text itself, the historical context, and previous judicial interpretations of constitutional meanings'. The examination of these three sources is neither endless nor arbitrary, for the Court approaches them under the orientation provided by the problem at hand: the reconciliation of diversity with unity. This narrows the range and focus of the investigation and it is further restrained by the primacy given, whenever possible, to the first source, the written texts of the constitution (Cf: s.53).

Consequently, the account of constitutional democracy as a system for coping with problems of reconciling diversity with unity, among other problems, in the first half of the judgment consists in the explication of the rules and principles appropriate to this type of problem which are implicit in the three sources. Sections 33—48 examine the historical sources and sections 49—82 examine the constitutional texts and their traditions of interpretation on this issue. As we have seen, in these sections the Court explicates and defends four such principles—federalism, democracy, constitutionalism and the rule of law, and respect for minorities—and one constitutional right and duty. These principles, the Court reminds us, 'are not exhaustive'. They are simply 'the four foundational constitutional principles that are most germane for the resolution of this Reference' (s.49).

ii. The bindingness and relations among the principles of reconciliation, sections 49-54.

We can see how the four principles operate in the activity of reconciling diversity with unity—understood as the exercise of the right to initiate constitutional change and the duty to negotiate in good faith—by asking two questions. Why are these principles and procedures binding on Quebec or on any member who wishes to initiate constitutional change? And, in what sense are they binding?

To summarise, these principles and procedures for amending the constitution are binding on Quebec (or any other member) because Quebec has agreed to them and employed them over 131 years to protect and develop its own forms of diversity within Canadian unity. Quebec and its partners have, that is to say, created both themselves and this new form of constitutional

democracy as an activity of reconciling diversity with unity by means of negotiations both within the existing rules and over those very rules in the long course of their struggles to survive and flourish. Canadian constitutional democracy is binding precisely because it is the house the occupants have created and continuously recreate in the process of creating themselves, much like the evolution of a 'living tree' (s.52).

The principles and procedures bind the members in complex ways (s.54). The four principles are a subset of an indeterminate number of 'underlying principles'. Although the principles are part of the 'structure' and 'architecture' of constitutional democracy, they are not ordered in any particular or definitive way (ss.49-50). They are defined in relation to one another, none is 'trump', and their application varies from case to case (s.49). The way the principles bind the members is further complicated by the fact that they are not bound to a static structure, even though the written text is primary, but to a set of procedures for modifying it over time, which are themselves amenable (s.76). In a phrase, the principles 'function in symbiosis' (s.49). Drawing on a classic activity metaphor, the Court characterises the principles and their operations as the 'life' or 'lifeblood' of Canadian constitutional democracy (s.51)

Let us now turn to how the Court explicates the four principles and illustrates their binding operation in reconciling diversity with unity.

iii. The principle of federalism, sections 55-60.

The principle of federalism is fundamental to the reconciliation of the type of diversity that the Court is primarily but not exclusively concerned with in the *Reference*. Federalism 'recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction' (s.58). Although the Court sees the Confederation of 1867 as an exemplar of the reconciliation of *various* types of diversity—of individual citizens, minorities of various kinds, and of provinces—it is the latter the Court emphasizes in the historical sections (s.43). In 1864-67 the principle of federalism was employed to give

'legal recognition of the diversity that existed among the initial members' and 'to accommodate that diversity' by recognising their 'independence and autonomy' (ss.43, 58). The Court means by 'diversity' here not only that federalism protects the provincial powers of autonomy and self-government but also that it protects the distinct cultural and linguistic identity of *each* province. This crucial aspect of diversity, the Court states, is 'a rational part of the political reality in the federal process' (s.58). This is how the Court puts it with regard to the distinctness of Quebec society:

> [59] The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture.

Quebec is bound by the principle of federalism for, although the other provinces have used it to protect their own diversity, and will continue to vigorously pursue this in 'the new millennium' (s.60), it is Quebec that has done by far the most to create and creatively employ this fundamental principle of the constitution to reconcile their diversity with Canadian unity since the beginning (s.59).

It is worth noting that the Court also uses its interpretation of the history of the federal principle in Canadian constitutionalism to reinforce its view that the Constitution is broader than the written text. The Court points out and celebrates the ability of Quebec to exploit successfully the great potential of the unwritten federal principle over and against the 'precise terms of the *Constitution Act, 1867*', which gave 'sweeping powers' to the central government and only 'partial' recognition to the federal principle (s.55).

iv. The principle of democracy, sections 61-69.

Democracy is the second fundamental principle implicit in the broad constitution. It is self-evident that members of a constitutional democracy are bound in general by the principle of

democracy. However, it is especially true in cases of reconciling diversity with unity, for democracy is the principle invoked whenever a member exercises its right to initiate constitutional change. A fundamental aspect of the principle of democracy is the 'sovereignty of the people' and the expression of their sovereignty through the clear expression of the will of the majority (ss.66, 75, 85). The right to initiate constitutional change by means of a clear majority on a clear referendum question is thus the recognition and application of this aspect of the democratic principle. The Court acknowledges that the proponents of secession are correct to base their case on this fundamental aspect of democracy (s.75). However, they are mistaken in arguing that the democratic expression of the majority will of the people of Quebec, or any other province, entails the right to secede without negotiations. The most that this aspect of the democratic principle can entail is the duty of Quebec and other members to negotiate what the majority agrees to in the referendum. Why is this so?

The Court explains that the right to initiate constitutional change is one type of right among many types that derive from the democratic principle. It is a right of the majority in a province to challenge and enter into negotiations over any of the constitutional rules of the global system of rules and principles which make up constitutional democracy. All members of a democracy have the right to discuss and seek to modify the laws and rules of the association in some way or another: by protesting, voting, building a majority, joining a party, introducing new legislation in a legislature, going to court, and so on (s.65). All these activities of democratic participation are ways of seeking to modify the rules of the global system in some manner, and thus are the exercise of the members' democratic rights to change the rules of the association to which they belong. Furthermore, a society is democratic not only because citizens and representatives have such rights of participation but also because the system has an obligation to acknowledge and respond to these many voices for change: to enter into legal and political negotiations in various institutions designed for the exchange of public reasons and to alter the laws as a result of fair negotiations. A duty to enter into negotiations in response to a well-supported exercise

of a right to initiate change follows from the same principle of democracy as the right. They are internally related or correlative.

Consequently, the right of a provincial or federal majority to initiate constitutional change and the correlative duty of it and the other members to negotiate should not been seen as an unique right and duty, but rather as one type of the basic rights and duties of democratic participation held by all members, such as the right to vote (s.65). The exercise of these manifold democratic rights and duties is the *activity* that renders a society democratic—the citizens and their representatives impose the laws on themselves and modify them as they cooperate together in a continuous process of discussion and change.

Since this line of argument is the centerpiece of the Court's new, practice-oriented vision of constitutional democracy, I will read a fairly lengthy quotation in which the right to initiate constitutional change and the correlative duty are derived directly from the broader class of democratic rights and duties of participation:

> [68] Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas"... At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.
>
> [69] The *Constitution Act, 1982* gives expression to this principle, by conferring a right to initiate constitutional change on each participant in Confederation. In our view, the existence of this right imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in

> order to acknowledge and address democratic expressions of a desire for change in other provinces. This duty is inherent in the democratic principle which is a fundamental predicate of our system of governance.

Two of the major conclusions with regard to secession follow immediately from this analysis of the principle of democracy. When any province exercises its right to initiate constitutional change the other provinces have a binding obligation to negotiate the proposal (s.92). Conversely, the province which exercises the right to initiate constitutional change binds itself to negotiating with the other members, and cannot bypass negotiations in an unilateral act of secession, or any other constitutional change, without violating the principle of democracy on which their right to initiate the process rests (s.91).

In the quotation I have just presented, the Court points out that no particular democratic change in the rules—no specific reconciliation of diversity with unity—will have 'a monopoly on truth' or enjoy a consensus. They will involve 'compromise, negotiation and deliberation' and there will be reasonable disagreement. 'Inevitably, there will be dissenting voices.' As a result, in a free and open constitutional democracy we will always be in the position of beginning again: entering into discussions and negotiations over reasonable demands to modify some existing rules of the global system, and being prepared to acknowledge and respond to the voices of dissent that will inevitably arise in turn in response to the last reconciliation. Constitutional democracy must thus be seen as an activity, a system of discursive practices of rule following and rule modifying in which diversity is reconciled with unity through the continuous exchange of public reasons.

All this is one dimension of the principle of democracy. There are other aspects to which Quebec and the other members have bound themselves in the historical evolution of constitutional democracy. The principle of democracy is expressed also in the institutions of 'representative' democracy (s.63). In Canada, popular sovereignty and representative democracy are articulated through the principle of federalism so Quebecers express their democratic will by means of their elected representatives in two

'concurrent majorities': the federal Parliament and the National Assembly (s.66). This conjunction of democracy and federalism serves to protect and promote Quebec's autonomy and distinctness (s.64) while at the same time empowering Quebecers to participate in the creation of Canada as a whole (s.65); a form of democratic activity that Quebecers have pursued with enormous success (ss.135-6):

> [66] The relationship between democracy and federalism means, for example, that in Canada there may be different and equally legitimate majorities in different provinces and territories and at the federal level. No one majority is more or less "legitimate" than the others as an expression of democratic opinion.... A federal system of government enables different provinces to pursue policies responsive to the particular concerns and interests of people in that province. At the same time, Canada as a whole is also a democratic community in which citizens construct and achieve goals on a national scale through a federal government acting within the limits of its jurisdiction. The function of federalism is to enable citizens to participate concurrently in different collectivities and to pursue goals at both a provincial and federal level.

This theoretical account of the interrelation between principle of democracy as 'the sovereign will of the people' and as 'representative democracy' and the principle of federalism is applied by the Court to explain why the reconciliation of a democratic demand to secede would have to be negotiated by the elected representatives of the two equal and concurrent majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole', neither of which 'trumps the other' (s.93).

v. The principle of constitutionalism and the rule of law, sections 70-78.

As we have seen, the principle of democracy is always exercised in relation to the rules and principles of the democratic system. Practices of democracy consist in discussing and negoti-

ating some rules by which we are governed, yet always in accordance with other rules that are not subject to negotiation at the same time. In this way, 'constitutional democracy' gives equal weight to constitutionalism and the rule of law, on the one hand, and the democratic principle that the laws must be based on the consent of the sovereign people, on the other. Democracy thus presupposes the third principle, constitutionalism and the rule of law and *vice versa* (s.78). The two principles are thus internally related and equiprimordial as the Court explains:

> [67] The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. *Equally*, however, a system of government cannot survive through the adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle.

Accordingly, to be committed to democracy is *eo ipso* to be committed to constitutionalism and the rule of law. Moreover, if constitutionalism and democracy are equal in status, then no constitutional rule can be exempt from the right to initiate change, yet *any* constitutional change must proceed in accordance with constitutional rules that are based on the consent of those governed by them. Thus, the conclusion that secession can be a legitimate democratic act *and* that it can be carried out under the rule of the constitution follows from the widely-accepted premise that constitutionalism and the rule of law and democracy are co-equal and constitutive principles of 'constitutional democracy', yet our Supreme Court is the first to work it out.

There are of course other reasons why the people of Quebec and of the other provinces have bound themselves to the principle of constitutionalism and the rule of law. The Constitution provides 'an added safeguard for fundamental human rights and individual freedoms which might otherwise be susceptible to fed-

eral or provincial government interference' (s.74). It also protects the vulnerable minorities within Quebec and other provinces, such as the French-speaking minorities outside of Quebec and the English-speaking minorities within, from the 'assimilative pressures of the majority' (s.74). This feature of constitutionalism is of such great important that it is given the status of an independent principle, the protection of minorities (ss.79-82). Finally, the constitutionalism principle places the division of powers beyond the reach of the will of the majority exercised through the federal parliament, thus protecting Quebec from assimilation by the majority of the rest of Canada (s.74). This is another thread of constitutionalism that Quebec has introduced, defended and woven into the Canadian fabric since at least Confederation. Finally, as Quebec has also always insisted, the amending formulas require an 'enhanced majority' or a 'substantial consensus' in order to protect Quebec and other members from domination by the majority in constitutional negotiations (s.77).

Consequently, a unilateral act of secession by Quebec would be illegitimate because it would violate the principle of constitutionalism Quebec has always invoked in its own case and to which it is bound, for such an act would 'usurp the powers of the other [level of government] simply by exercising its legislative power to allocate additional political power to itself unilaterally' (s.74).

vi. The impasse: the conflation of the constitution with a particular reconciliation.

Let this stand as a brief summary of the Supreme Court's new understanding of Canadian constitutional democracy as a flexible and continuous process of the reconciling diversity with unity (among other problems) by means of negotiations in accordance with the appropriate written and unwritten constitutional principles. According to the Court the evolving conditions for this new understanding of constitutional democracy came to maturity only in 1982 with Patriation and *the Constitution Act, 1982*, which 'removed the last vestiges of British authority over the Canadian constitution' (s.46). At the same time, the constitution became partially disentangled from the vestiges of internal constraints and

Canada 'was transformed to a considerable extent' from a 'system of Parliamentary supremacy to one of constitutional supremacy'. That is, the Constitution became 'the supreme law of Canada' and all governments are now required to comply with it (s.72).

However, precisely because the emergence of an attainable and considerably free-standing constitutional democracy coincided with a spectacularly contentious case of the reconciliation of diversity with unity in 1982—Patriation and *The Charter of Rights and Freedoms*—a fundamental misunderstanding set in. The Constitution, and so constitutional democracy, was conflated with Patriation and the *Constitution Act, 1982*, and, within this, primarily with the *Charter*, by both defenders and critics. Specifically, an influential political interpretation made it appear that the *Charter* and the specific process of its adoption constituted a constitutional meta-norm which supervenes over the principle of federalism and the respect for Quebec as an unique society. This particular reading of the reconciliation of diversity with unity in 1982 was mistaken for the constitution itself, on the presumption that constitutions are rigid structures rather than ongoing practices. To put this another way, an ordering of a subset of explicit rules at a specific time, 1982, were presumed to be 'trump'. This misunderstanding caused the constitution to be seen as a 'straight jacket' and led to the impasse in which we are entangled.

I have argued that one of the primary objectives of the Supreme Court in the *Reference* is to free us from this misunderstanding and so free us from the impasse, by freeing us from the conflation of constitutional democracy with a particular interpretation of constitutional texts arrived at by one party in a political process of the reconciliation of diversity with unity. Of course, the *Charter* altered the arrangement of fundamental constitutional principles *if* the principle of federalism was considered to be 'the dominant principle of Canadian constitutional law', as Maitland and Ritchie JJ, dissenting in the *Patriation Reference*...considered federalism to be' (s.57). This Court concedes that the principle of federalism *as* the 'dominant principle' has 'less force than it once did' before the introduction of the *Charter* (s.57). Nevertheless, they reaffirm that 'there can be little doubt that the principle of federalism remains a central organizational theme of our

Constitution' (s.57). This is to say that no single principle, and no single rule, is, or ever was, 'trump'. The principles always operate in 'symbiosis', no 'single principle can be defined in isolation', and none can 'exclude the operation of any other' (s.49).

As we have seen, the principles work in symbiosis to protect both the autonomy and diversity of Quebec and other provinces that have always been protected by the principle of federalism:

> [58] The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction.

But, the *Charter* also embodies other principles of equal importance to reconcile federal diversity with other faces of diversity, both old and new. I take the entire first half of the judgment to be a response to this widespread public misunderstanding and I would be completely satisfied if I have brought this to public attention.

If, then, the constitution is viewed from the Court's orientation, we can see that it is not the straight jacket to which the defenders of the status-quo claim we must be bound and from which the critics claim we must secede. I would like to analyse three examples of how the constitution is mistaken for a straight jacket by both sides and show how the Supreme Court's vision offers us a way to think and act differently in these three cases, overcome the impasse and go on together. As I mentioned in the Introduction, I believe that this is the most important objective of the judgment, for if the justices can show that 'the constitution is not a straight jacket', they will remove the main justification for secession and provide a new justification for continuing the democratic activity of reconciling Quebec's diversity with Canada's unity.

3. "THE CONSTITUTION IS NOT A STRAIGHT JACKET" (S.150)

i. 1982 and the inevitability of dissent and re-conciliation.

The first example of the thesis that the constitution is a straight jacket is *The Charter of Rights and Freedoms*. The Court's first response to this is to remind us that the *Charter* itself is a reconciliation of diversity with unity. It protects the rights and freedoms of individuals within Quebec and the rest of Canada to express themselves in diverse ways without being forced to conform to the majority, while, at the same time, protecting the distinctive public language and culture of the majorities. Second, the *Charter* serves to protect the diversity of linguistic, cultural and aboriginal minorities in Quebec and the rest of Canada from assimilation by the majority, and serves to reconcile them with that majority. In particular, the *Charter* recognises and protects the equality of the two official-language communities throughout Canada. This non-territorial and postmodern imagined community of Franco-Quebecers, Acadians, Franco-Ontarians, Franco-British Columbians, and so on, with its deep historical roots, may, for all we know, turn out to be as strong as, and *complementary with*, Quebec's territorialised nationalism. Only time will tell. What we do know for certain is that Quebec has created this powerful dimension of the pan-Canadian constitutional identity and has sought to have it entrenched beyond the reach of the assimilative English-language majority since the beginning (ss.79-81). In addition, the flexible amending formulas in the *Charter* make many kinds of quiet, intergovernmental constitutional negotiations and amendments possible. These have been employed in a host of ways to reconcile diversity with unity since 1982, from the creation of Nunavut to the Social Union. Finally, the written Charter protects the distinct linguistic and cultural identity of Quebec by preserving 'the basic division of powers in ss.91 and 92' (the basic institution of the principle of federalism), and by the notwithstanding clause in s.33, which gives 'provincial legislatures authority to legislate on matters within their jurisdiction in derogation of the fundamental freedoms (s.2), legal rights (ss.7 to 14) and equality rights (s.15) of the *Charter*' (ss.47,

59). All these successful aspects of reconciling diversity with unity make the *Charter* as popular in Quebec as in the rest of Canada.

Nevertheless, there are two reasonable objections advanced by the voices of dissent. The first is that the *Constitution Act, 1982* was brought in without the consent of the representatives of the citizens of Quebec in the National Assembly and this violated a conventional principle, believed by many to be implicit in the Constitution, that Quebec has a veto over a constitutional change that affects it distinct identity (in addition to the explicit veto that all provinces have over any alteration of their section 92 powers, but this was not at issue (s.47)). The second objection is that the *Charter,* although it recognises various kinds of diversity, fails to recognise one aspect of Quebec's diversity: its identity as a distinct society.

The Court's first response is that 'despite the refusal of the government of Quebec to join in the adoption, Quebec has become bound to the terms of a Constitution different from that which prevailed previously'. The reasons for this are that 'legal continuity' (the rule of law) requires 'an orderly transfer of authority' and the political negotiations were taken 'within a legal framework' which the Court, 'in the *Patriation Reference,* had ruled were in accordance with our Constitution' (s.47). The political negotiations were 'legitimate' because an 'enhanced majority', not unanimity, was legally required and because the representatives of Quebec in the federal Parliament voted for the amendment. The general rule is that 'Constitutional government is necessarily predicated on the idea that the political representatives of the people of a province have the capacity and power to commit the province to be bound into the future by the constitutional rules being adopted' (s.76). Further, the effect of the *Charter* on Quebec is mitigated in three ways: It does not alter the division of powers; the notwithstanding clause enables Quebec to derogate from sections of the *Charter* (s.47); and section 59 of the *Constitution Act, 1982* exempts Quebec from Article 23 (1) (a) of the *Charter,* which directly effects Quebec's linguistic identity, unless and until it has been 'authorized by the legislative assembly or government of Quebec'.

These reasons to consider the *Charter* a flexible jacket rather than a straight jacket are all, one might say, within the explicit,

written constitution. The Court goes on to consider the sense in which a province can be said to be bound to rules that its federal or provincial elected representatives have adopted in a legitimate manner. The justices argue that the province is bound in the flexible sense that if they wish to operationalise their dissent and exercise their constitutional right to seek to amend these rules, they are bound to follow the general principles and procedures for constitutional change we have already discussed (s.76):

> These rules are "binding" not in the sense of frustrating the will of a majority of a province, but as defining the majority which must be consulted in order to alter the fundamental balances of political power, ... individual rights, and minority rights in our society. Of course, those constitutional rules are themselves amenable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected.

Although this passage makes a general point, it provides an accurate redescription of what happened after 1982 in the language of the Court's new understanding of constitutional democracy. There was reasonable disagreement over the reconciliation in 1982. The actual reconciliation was reasonable but it did not have 'a monopoly on truth'. 'Compromise, negotiation and deliberation' were involved. Dissent was 'inevitable' (s.68). The government of Quebec and the federal government exercised their right to initiate constitutional change guaranteed to them in the very Act they sought to challenge and amend, the *Constitution Act, 1982* (s.69), and began a new process of reconciliation of diversity with unity which aimed to gain Quebec's consent. They sought this by an amendment that would give formal recognition to Quebec as a distinct society, thereby responding to the second objection to the *Charter,* and addressing these 'voices [of dissent] in the laws by which all in the community must live' (s.69). The other members of Canadian constitutional democracy acknowledged these dissenting voices, accepted their duty to enter into negotiations, and negotiated the Meech Lake Accord and the Charlottetown Agreement.

The *Charter* is not a straight jacket because it is not 'trump'. It is open to amendment through processes guaranteed by the Constitution and the Court sees these processes of discussion and change in response to perceived breaches of the conventions as fundamental to constitutional democracy. The Court states that the failure of these two attempts to amend the constitution is 'a matter of concern' (s.137). However, the Charlottetown Accord cannot be considered a failure of the constitution, for it did not receive majority approval in the referenda in Quebec and the rest of Canada. This illustrates that Canadian constitutional democracy works. It screens out proposals that fail to achieve a clear majority. The Meech Lake Accord is a difficult case to assess because no referenda were held. Notwithstanding, the Court is well aware that its non-ratification by Manitoba and Newfoundland is often reasonably put forward as evidence of a straight jacket.

The *Reference* judgment provides a response to this objection. Although an interpretive clause which recognises, protects and promotes the distinct linguistic and cultural identity of Quebec, including its English-language minority, was not adopted through a formal amendment to the written constitution, the Court states that such an interpretive requirement is never the less part of the diversity already recognised in the broader constitution. In 1993 a majority of the Court 'held that differences between provinces "are a rational part of the political reality in the federal process". It was referring to the differential application of federal law in individual provinces, but the point applies more generally. A unanimous Court expressed similar views in ...1990' (s.58). The protection and promotion of the distinct identity of Quebec, and of the minorities within Quebec, are repeatedly mentioned as fundamental values of Canadian constitutional democracy. Finally and most importantly, the Court points out that the four broad principles of reconciliation are used to interpret any written text of the Constitution and to guide in its evolution (s.52):

> The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Equally important, observance of and respect for these principles is

> essential to the ongoing process of constitutional development and evolution of our Constitution as "living tree".

The Court is saying that, whether or not there is formal recognition through a political process, the Court is under an obligation to interpret and apply the constitution as a device for the reconciliation of diversity in accordance with the four principles it has shown to be fundamental to it. That is, the justices will always interpret and apply the *Charter* to Quebec in such a way that the diversity within Quebec—of individuals, linguistic minorities, the multilingual and multicultural character of Montreal, and the right of indigenous peoples—will be reconciled with the linguistic and cultural identity of the Francophone majority, and this in turn with the requirements of unity (ss.58-59, 79-82). To put this in a slightly provocative way, the political struggles for recognition of Quebec's diverse identity in the Meech Lake and Charlottetown amendments were successful because the broader constitution does recognise Quebec's diversity in its fundamental principles and the Court sees itself and obligated to act accordingly in interpreting and applying the constitution in actual cases.

(It is also worth noting that most of the powers requested in the Meech Lake Agreement have since passed to the provinces in more flexible forms of negotiation and Quebec has been given a constitutional veto by the federal parliament.)

Therefore, the constitution can be construed as a straight jacket only if it is conflated with a narrow misinterpretation of the written text of the *Constitution Act, 1982,* and if this particular reconciliation is treated as 'trump'. But this is to misconceive the real character of the constitutional democracy Quebec and Canada have created and to which we are bound. The constitution that came into its own in 1982 did not 'misconceive Canada' and lead us into an impasse as many have argued. It is their misconception of Canada as a constitutional democracy that led to the present impasse. The entire process of Patriation and the *Charter and* the democratic struggle to amend the *Charter* in turn *is* the Constitution of Canada in action: an exemplar of constitutional democracy as the 'continuous process of discussion and evolution' in accordance with the rules and over the rules (s.148).

ii. The amending formula as a straight jacket.

The second argument that the constitution is a straight jacket turns on the present amending formula. If a clear majority vote YES to secession the ensuing negotiations would inevitably lead to an impasse because the present amending formula is so complicated, with unanimity, vetoes and referenda, that agreement would never be reached. Hence, the people of Quebec are blocked from exercising their democratic self-determination by the constitution and thus should proceed to unilateral secession for that very reason.

Even if it is true that the present amending formula is unworkable, and this is disputed, this would not affect the Court's vision of constitutional democracy. It is a contingent problem that could be resolved by amending the amending formula (which is not a responsibility of the Court), as Claude Ryan has suggested. More importantly, the Court does not say that negotiations over secession must be bound by the precise terms of the existing amending formula. Rather, the justices carefully state that amendment requires 'negotiation', not necessarily adherence to the existing amending formula (s.84). Although they state that the representatives of all the provinces and the federal government must 'come to the negotiating table' (s.88), they indicate that negotiations should be carried out 'by the representatives of the two majorities' (s.93). The negotiations would have to proceed in accordance with the four principles and to ensure that the interests of all the actors protected by them are taken into account (ss.94, 96, 101). If this were achieved to the satisfaction of all those affected and consulted, and then the complex ratification process blocked the proposed agreement for some contingent reason, then it would be the amending formula (which was not designed for the case of secession) that would be interpreted in the light of the four principles; not that the satisfactory reconciliation would be held hostage to a defective amending formula. A simple *Reference* to the Court at this point, should it ever occur, would resolve the issue. Considerations of 'legal continuity' and 'the orderly transfer of authority', which were invoked in 1982, would also, and somewhat ironically, play a role as well (s.47).

To think otherwise, as if the activity of constitutional amendment were a 'god that failed' due to an unworkable amending formula introduced in 1982, is to approach the problem from the end-state orientation that the Court rejects. Rather, if some contingent feature of the latest amending formula blocks the working of our democratic constitutionalism as a fair system for the reconciliation of diversity with unity by means of the right and duty to negotiate constitutional change over time, then it must be the specific feature of the existing amending formula that has failed, for this is exactly the sort of problem that our constitutional democracy *must* be able to deal with (s.32).

iii. The right to self-determination.

The most influential formulation of the straight jacket thesis is the argument that the 'people' of Quebec are unable to exercise their 'right to self-determination' within the Canadian constitution. Hence, Quebec's right to self-determination as a people is irreconcilable with the unity of Canada. This is the most common argument in support of sovereignty. It is presented in Bill 99, *An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec State,* as if it were self-evident that self-determination is irreconcilable with the unity of Canadian constitutional democracy.

The Court takes up this line of argument in the final 39 sections of the *Reference,* in response to the question of whether there is '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' (s.109). The Court accepts the international law principle that 'peoples' have the full right to self-determination. Further, since Canada has bound itself to the *Charter of the United Nations* and other documents of international law that affirm the right to self determination of peoples, Canada is bound to recognise it. International law 'expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states' (s.122). As a result, if Quebec, or any other community in Quebec or Canada, consti-

tutes a 'people' under international law, then the constitution would have to find a way to reconcile the full exercise of their right to self-determination with the unity of the other members of Canada. The exercise of the right to self-determination by a people within a larger state is called 'internal' self-determination: that is, 'a people's pursuit of its political, economic, social and cultural development within the framework of an existing state' (s.126). Apart from colonial or oppressed peoples, it is only if a people are blocked from the meaningful exercise of their right to self-determination within an existing state that they are sometimes said to have a right to external self-determination: that is, a right to secede (though not necessarily unilaterally) (s.134).

The Court replies that it does not have to determine if the Quebec people constitute a 'people' under international law (or if there are other peoples within Quebec or Canada) to answer this question, for Quebec is not blocked in the meaningful exercise of a right to self-determination in Canada. Quebecers fully exercise the powers of 'political, economic, social and cultural development' associated with the right to self-determination (s.136). In addition, to be self-determining, a people must also have the democratic and effective right to amend the constitution by which they are governed, whether this is their own or the constitution of the larger state, or else they are determined by someone else, and the exercise of their right is blocked. This is the aspect of self-determination that is at the heart of the argument for secession. The Court responds in the following way:

> [137] The continuing failure to reach agreements on amendments to the Constitution, while a matter of concern, does not amount to a denial of self-determination. In the absence of amendments to the Canadian Constitution, we must look at the constitutional arrangements presently in effect, and we cannot conclude under current circumstances that those arrangements place Quebecers at a disadvantaged position within the scope of the international law rule.

If we interpret 'the constitutional arrangements presently in effect' to refer to the formal recognition and powers Quebec has under the *Constitution Act, 1982* narrowly conceived (as I did in

an earlier paper), then it appears that the Court is evading the question, for it is the failure to reach agreements on the amendments that is the 'matter of concern'. If, instead, 'the constitutional arrangements presently in effect' is interpreted in light of the Courts' understanding of the constitution as a global system for the reconciliation of diversity with unity as it is presented and applied to the 'continuing failures to reach agreements on amendments' in this *Reference*, then it is clear that Quebecers are not at a 'disadvantaged position within the scope of the international law rule'.

Quite the contrary. Whether or not Quebecers constitute a people, they possess the powers of political, economic, social and cultural development associated with the right to self-determination and their distinct character as a diverse people, or peoples, is recognised by the Court in the fundamental principles and procedures of the constitution. Quebec also possesses a constitutional right to initiate constitutional change by which it is free to seek the Patriation of whatever federal powers a clear majority agrees to demand and the other members are obligated to negotiate the demand. Should a clear majority so decide, Quebec is also free to negotiate external self-determination (secession). And, these negotiations would not blocked by any contingent features but would be facilitated by the constitutional principles which would have to inform them.

Far from a straight jacket, the Court is saying that under the constitution as it is presented in this *Reference*, Quebec is treated as if it is a people with the full right to self-determination. This is exactly what the Court concludes (s.136):

> In short, to reflect the phraseology of the international documents that address the right to self-determination of peoples, Canada is a "sovereign and independent state conducting itself in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction.

CONCLUSION

I do not know if this revolutionary understanding of constitutional democracy as the activity of reconciling diversity with unity by means of the continuous exchange of public reasons in accordance with these four principles will ever come to be accepted by Quebecers and Canadians, and so enable them to dissolve the impasse and cooperate together in the new century. Perhaps the generation presently in power is too accustomed to the old way of thinking about the constitution and to their rival positions in the old struggles. On a more optimistic note, perhaps a younger generation, more accustomed to reconciling diversity on a daily basis, will come along and understand the Quebec and Canada they have inherited in this enlightened way, disentangle themselves from the impasse, and negotiate ways to go on together. Who knows? Whether or not such an reconciliatory *ethos* of constitutional democracy will ever be attained, our highest Court has shown us that it is at least attainable.