INTRODUCTION: QUEBEC, CANADA AND THE FIRST NATIONS: THE PROBLEM OF SECESSION

Vermont Law School's Program for the Study of Global Civil Society

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The articles in this edition are part of Vermont Law School's efforts to promote inquiry into the law of civil society.[1] Vermont Law School presently sponsors three programs: a *Canadian Studies Program* of joint faculty and student research and exchange with McGill Law Faculty; a student and faculty exchange with the *Trento Facolta di Jurisprudenza* in Northern Italy, and a *Vermont-Karelia Rule of Law Project* assisting Petrozavodsk State University, Karelia, Russia.[2] Each of these areas: Quebec, the Alto-Adige region, and Karelia are deeply involved in efforts to define their appropriate political and legal identities, and the laws governing each of these areas reflect some degree of autonomy.[3] This demand for autonomy is part of a worldwide movement towards the formation of civil societies in which "a set of diverse non-governmental (and governmental) institutions which is strong enough to counterbalance the state, and, whilst not preventing the state from fulfilling its role of keeper of the peace and arbitrator between major interests, can nevertheless prevent the state from dominating and atomizing the rest of

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1. *See Symposium: Law and Civil Society*, 15 ARIZ. J. OF INT'L & COMP. L. 319 (1998). The footnotes in this earlier symposium set forth some of the extensive literature on civil society. The reader is referred to that symposium for access to that literature.

There is one radical rationale for civil society which is not set forth in this article or the previous article. This is the discovery of a polycentric political system in which many autonomous units formally independent of one another choose to act in ways which take account of one another through cooperation, competition, conflict and conflict resolution. *See* VINCENT OSTROM, THE MEANING OF AMERICAN FEDERALISM CONSTITUTING A SELF-GOVERNING SOCIETY 223-44 (1991). The notion of polycentricity as part of governance systems suggests the radical conclusion that political authority and decisionmaking may be more radically dispersed in ordinary unified states than we imagine.

2. For further information regarding each of these programs, contact Professor Cheryl Hanna, Program Director-Canadian Legal Studies Program; Prof. Carl Yirka, Vermont-Karelia Rule of Law Project, Petrozavodsk State University, Karelia, Russia, Richard Brooks, Coordinator of International, Comparative and Foreign Law, all of Vermont Law School.

3. For a discussion of the laws pertaining to Quebec's unique civil law, see KATHERINE VALCKE, QUEBEC CIVIL LAW AND CANADIAN FEDERALISM. For a discussion of the unique autonomy of the Alto-Adige area in Italy, see OSKAR PERLINE, AUTONOMIA E TUTELA DELLE MINORANZE NE TRENTINO-ALTO-ADIGE: CENNI DI STORIA, DIRITTO E POLITICA (1996). For a discussion of Karelia and other federal states of Russia, see GENNADY DENILENKO, WILLIAM BURNHAM, LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION 173-210 (1999).

society."[4] The relative autonomy of certain geographical areas within a nation is one of the institutional arrangements for counterbalancing the central government.

In a previous symposium,[5] the faculty from Vermont Law School, McGill Law Faculty and elsewhere, sought to define the ways in which U.S., Canada, and Quebec might resolve their common problems, in part by exploring how the law of civil society might shed light upon those problems. In this symposium, the outgrowth of a presentation at the North American Cooperation Section at the 1999 annual conference of the American Association of Law Schools,[6] the authors look at the issue of secession in Canada and elsewhere, and the recent Canadian Supreme Court opinion on the issue of Quebec's possible future secession. This opinion is of interest throughout the world, in part because it seeks to chart a civilized alternative to otherwise repressive reaction to demands for autonomy or bloody wars of independence. Consequently, the editors have wisely decided to include the Supreme Court opinion in this issue along with the articles.

The recent Canadian Supreme Court opinion regarding Quebec secession documents the constitutional ways in which Canada is indeed a civil society. The court recounts the history of the formation of Canada as a Confederation in which each of its major constitutional documents reveals the recognition of diversity,[7] as Dean Wroth and Jean-Francois Gaudreault-DesBiens have set forth in the articles below. This recognition was institutionalized in a unique Canadian federalism which recognized the federal and provincial sharing of powers to reflect diversity, established a relative autonomy of the provinces and facilitated democratic participation.[8] Although the opinion recognizes the traditional democratic principles of universal suffrage, majority rule, representation in the service of self-government, the opinion also recognizes that there are "different and equally legitimate majorities in different provisions and territories and at the federal level."[9]

The court however has a deeper and more modern notion of civil society. It appeals to a rule of law and constitutionalism which, among other things,

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4. Ernest Gellner, *The Importance of Being Modular*, *in* CIVIL SOCIETY: THEORY, HISTORY, COMPARISON 32 (John A. Hall, ed., 1995).

5. *See Symposium*, *supra* note 1.

6. 1999 Annual Meeting, Association of American Law Schools (AALS) Panel: *Quebec, Canada and First Nations: The Problem of Secession*. An additional excellent oral presentation was offered by Allen Buchanan, Prof. of Philosophy, University of Arizona Tucson.

7. *See* Reference re Secession of Quebec, [1998] 2 S.C.R. 217 [hereinafter *Quebec Secession Reference*]. Throughout the opinion, the court discusses the Constitutional Act of 1867, British North American Act of 1895, Constitutional Act of 1982, and Canadian Charter of Rights and Freedoms. The early Canadian efforts are set forth in 21 YALE J. INT'L L. 67 (1996).

8. *See Quebec Secession Reference*, at para. 40.

9. *Id.* at para. 45.

"may seek to ensure that vulnerable minority *groups* are endowed with the *institutions* and *rights* necessary to promote their identities against the assimilative pressures of the majority . . . ."[10] This role of law is echoed in the court's discussion of the protection of minorities, specifically religious education rights and minority language rights. Thus the constitution of Canada, its history and its present court recognize "the set of diverse non-governmental (and governmental) institutions" which counterbalance central government in a civil society. Such a recognition of the elements of a civil society leads the court to urge the civility of "a continuous process of discussion" about secession.[11]

The court's appeal to negotiated discussion over secession highlights another aspect of civil society. The "civil" in civil society may refer to the level of civilization which characterizes that public space between government and individual privacy.[12] The growth of peaceful markets, the professions, the arts, literature, civic friendships, and refined manners are part of that civilization.[13] The virtue of civility is often cited as the corresponding political competence of civil society.[14] Canada has been labeled such a "civil society."[15]

Both Jean-Francois Gaudreault-DesBiens and Samuel LaSelva, in their articles below, offer a deeper understanding of the possibility of civil society and civility. LaSelva finds the basis of Canadian unity in a complex aspiration of fraternity—an aspiration very different from the United States federal unity. Gaudreault-DesBiens provides a deeper understanding of the different Canadian and Québécois narratives of their histories and pursuits of identity. He understands civility in part as the absence of "intellectual concepts, ideas and principles" which hide the dramatic otherness of the three cultures which make up Canada's complexity. This complexity becomes more evident upon

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10. *Id.* at para. 49. (emphasis added).

11. *Id.* at para. 46.

12. Adam Fergeuson in his THE HISTORY OF CIVIL SOCIETY (1767, 1995) appeared to have such a notion of "civilization," which included the growth of professions, manners, the arts, and literature. Ferguson and Adam Smith viewed such civilization as the product of the growing wealth from the market.

13. Other students of "civilization" have identified a much more complex story of the growth of civilization. *See e.g.*, JOHN HALE, THE CIVILIZATION OF EUROPE IN THE RENAISSANCE 355-464 (1954).

14. For a discussion of civility, see HALE, *supra* note 13; ROBERT HEFNER, DEMOCRATIC CIVILITY: THE HISTORY AND CROSS-CULTURAL POSSIBILITY OF A MODERN POLITICAL IDEAL (1998); JEFFREY GOLDFARB, CIVILITY AND SUBVERSION: THE INTELLECTUAL IN DEMOCRATIC SOCIETY (1998); STEPHEN CARTER, CIVILITY: MANNERS, MORALS AND THE ETIQUETTE OF DEMOCRACY (1998); EDWARD SHILS, THE VIRTUE OF CIVILITY: SELECTED ESSAYS ON LIBERALISM, TRADITION AND CIVIL SOCIETY (1997); and GLENN TINDER, TOLERANCE: TOWARD A NEW CIVILITY (1976).

15. For a recent careful empirical portrait of Canada, see NEIL NEVITTE, THE DECLINE OF DEFERENCE (1996).

reading Claude-Armand Sheppard's assessment of the Supreme Court opinions' treatment of the claims of the James Bay Cree.

Secession in general and Quebec secession in particular may be viewed both as the recognition of separate civic cultures necessitating political separation in order to maintain civility or a wrenching division of a shared culture which had supported a common level of civilization and its corresponding civility.

The relationship of the political and legal issues of secession[16] to the phenomenon of the recent growth of civil societies throughout the world [17] is complex. On the one hand, it is not unusual to find that civil societies have either been formed out of previously existing independent social groupings; indeed, Canadian history fits that historical pattern.[18] It is also true that civil societies throughout their histories encounter demands for independence from groups within their borders. We are witnessing such a demand from Kosovo in Yugoslavia at the present time. Efforts at creating and maintaining civil societies are often efforts at joining together and keeping together different cultural groups. The question becomes how, both legally and politically, to join and keep such groups together and, conversely, when and how to let them separate.

Grasping the notion of a "civil society" (with built-in expectations and acceptance that there will be groups and institutions which counterbalance its otherwise unitary state power), may lead one to treat demands for secession differently than if one viewed a nation as a unitary state lacking the tolerance of any relatively autonomous groups within its borders. In civil societies, such demands for secession may be more easily accommodated while maintaining some unity of the state or secession may be permitted to come with relative ease. Perhaps the Canadian situation illustrates this untested generalization.

Two recent developments, both political and intellectual help us to think about secession and its meaning in modern life. One development is the recognition by political scientists of different forms of "consociation," the relative political autonomy of groups within state boundaries.[19] The second is the advent of modern international federations, such as the European Union

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16. For a definition of secession, see ALAN BUCHANAN, THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC 9-22 (1991).

17. For a recent theoretical overview of the international political current of civil society, see TOWARD A GLOBAL CIVIL SOCIETY (Michael Walzer, ed., 1995).

18. *See generally* ROBERT BOTHWELL, CANADA AND QUEBEC: ONE COUNTRY, TWO HISTORIES (1995).

19. The principal work here is AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION (1977).

and NAFTA.[20] Each of these historical developments provides ways of thinking about secession.

Political theorists, who have recently set forth consociation as a relatively new political concept by which to think about political plurality within state boundaries took the word from the medieval political theorist, Johannes Althusius, who is reputed to have "invented" federalism.[21] His invention included the notion of communities themselves having representation in a higher form of government rather than the direct representation of individuals.[22] The modern form of consociation seeks various ways in which communities or groups might be represented within the structure of government.[23] Such a form of representation helps to advance "a politics of identity" in which persons are not seeking resources and power, but rather meaning through group membership.[24]

Full fledged consociational democracies may be found in Belgium, Switzerland, Austria and many third world countries.[25] Many other nations have one or another consociational feature. These feature include: (1) a grand parliamentary or executive coalition; (2) mutual veto or concurrent majority rule; (3) proportionality as a principle of political representation; (4) a high degree of autonomy in which each segment runs its own affairs. Other principles may include various recognition of group rights and representation.[26] These characteristics suggest the possibility of a variety of ways in which a segmented group may be accommodated in a political system rather than fully integrated either through spatial scattering or programs of assimilation. Canada has been described as semi-consociational with strong cleavages of history, law, culture, language and religion between Quebec and the other provinces. These cleavages are reflected in the strong provincial powers of Quebec and informal concurrent majority rule on provincial matters.

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20. There have been, of course, various forms of international alliances since ancient Greece. But my reference here is to modern federations. *See* T. C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW (3d ed., 1994); WILLIAM ORME, JR., UNDERSTANDING NAFTA: MEXICO, FREE TRADE AND THE NEW NORTH AMERICA (1996).

21. *See* ALTHUSIUS JOHANNES, POLITICS (Beacon Press, 1964).

22. For an excellent description of the history theories of federalism, see CARL FRIEDRICK, TRENDS OF FEDERALISM IN THEORY AND PRACTICE (1968).

23. *See generally* LIPJART, *supra* note 19.

24. *See generally* AUSTIN SARAT AND THOMAS KEARNS, CULTURAL PLURALISM, IDENTITY POLITICS AND THE LAW (1999). Much of the recent communitarian literature explores this dimension of identity politics. *See also* DANIEL BELL, COMMUNITARIANISM AND ITS CRITICS (1993). For a Canadian-related discussion, see WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE (1989).

25. *See generally* LIPJART, *supra* note 19.

26. *See id.*

We Americans are quite historically biased against consociationalism. We learned (perhaps) in our ninth grade civics classes that the Articles of Confederation preceding the adoption of our constitution were a failure.[27] (We ignore the extent to which the resulting Constitution was itself based upon the partial oppression of Indians and Negroes. We also recall a civil war fought against a secessionist movement partly justified in terms of the consociational doctrines of Calhoun,[28] described by LaSelva below). Yet, quite a few commentators on the U.S. South and its culture share some legitimate concerns that a way of life was unnecessarily sacrificed in a well justified effort to rid the nation of the scourge of slavery.[29] The most pluralism which our dominant political culture in the United States would appear to tolerate is some form of administrative federalism in which states are largely the administrative arms of the central government combined with interest group politics and protection of civil rights. With the heightened modern sense of and respect for cultural pluralism, we Americans can recognize the need for something such as consociation in the United States and in other nations including Canada. The demands of First Nations groups for increased autonomy both in the United States and Canada have stimulated the most serious scholarly interest in consociation and at least modest public concern about new consociational arrangements with indigenous peoples.[30] Canadian scholars and scholars of U.S. Indian law are ahead of the rest of us in rethinking the legal issues of consociation.

The second major development in recent decades is the advent of a new international federalism of the European Union (EU) and an incipient North American Free Trade Agreement (NAFTA) union in North America, perhaps soon to be extended to Latin America. This federalism also draws upon an old concept, "subsidiarity," which has been given new life in the European Community.[31] In the Maastricht Treaty on the European Union, the

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27. *See* HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST, Vol. 1, 24-37 (1985). The anti-federalists saw limitations in the Articles of Confederation, but they tended to view the difficulties of the time to other "deeper" factors such as the limitations of the American spirit, and these anti-federalists did not embrace a strong federal government. *See* LIPJART, *supra* note 19. *See also* AVIAM SOIFER, LAW AND THE COMPANY WE KEEP (1995).

28. *See* JOHN C. CALHOUN, *A Disquisition on Government and a Disclosure on the Constitution and Government of the United States*, *in* 1 THE WORKS OF JOHN CALHOUN (1853-1855).

29. *See* EUGENE D. GENOVESE, THE SOUTHERN TRADITION: THE ACHIEVEMENT AND LIMITATIONS OF AN AMERICAN CONSERVATISM (1994).

30. *See* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP (1995).

31. *See* Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L. L. 127; Jean Silveri, Note, *A Comparative Analysis of the History of the United States and Canadian Federal Policies Regarding Native Self-Government*, 16 SUFFOLK TRANSNAT'L L. REV. 618 (1993); George Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994).

institutions of the Community are enjoined to act in areas of concurrent competence "only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States."[32] A recent study of the subsidiarity functions within the EU suggests that it can only be understood in light of several political purposes, including the insuring of self determination and accountability, the promotion of political liberty, the maintenance of flexibility, the preservation of identity and promotion of diversity, and respect for the internal divisions of the component states.[33] A review of the workings of the EU suggests that these principles indeed guide the relations between the community and its component states.

The recognition that nations are now increasingly subjected to externally applied community standards as in the case of the EU, parallels in a curious way the recognition that states may be affected and limited by recognized and legally structured internal groups. In both cases, the nation state and its internal decision making is modified, from the inside and the outside, by consociation or international federation. The growth of civil societies may be characterized as the growth in recognition of both consociation and federation of nations.

What does all of this have to do with secession in general, the threatened secession of Quebec from Canada, and the Canadian Supreme Court opinion? Simply this. The act of secession is ordinarily viewed as the creation of two unitary states out of one. Under such a view, there are only two options: one state or two. The sharpness of the options tends to encourage the notion that only a power struggle will resolve the problem. But in fact, there are two other options. The first option is a consociational state which retains one state, but in a different form which recognizes an internal autonomous component. Another option is two separate states, bound in a federated arrangement which respects key values of each state. In short, in the secession situation faced by Canada and Quebec, there are four alternatives: a unitary Canadian state; a consociational Canadian state, two separate unitary states of Quebec and Canada, and two states joined in federation. These four options are further complicated by the presence of the Cree. The expansion of options indeed complicates matters. What is the practical consequence of such a complication?

The Canadian Supreme Court opinion urged a dialogue between Canada and Quebec. What would such a dialogue be about? *Hopefully, it might be a deliberative exploration of all four alternatives.* If such an exploration is to

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32. EUROPEAN COUNCIL IN EDINBURGH, CONCLUSIONS OF THE PRESIDENCY, Dec. 12-13, 1992, *cited in* George Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994).

33. *See* Bermann, *supra* note 31, at 340-44.

be more that a power struggle, it must be guided by principle. The Canadian Supreme court offered one set of principles: federalism, democracy, constitutionalism and rule of law, the protection of the minorities.

The meaning of these principles, despite their brief explication by the court, is not self-evident. Any principled negotiation will require an exploration of how these concepts "apply" in the Quebec secession situation.[34]

Another closely related set of principles which might be applicable is that set of principles which guides the determination of subsidiarity in Europe, i.e., what arrangement best advances the self determination, the political liberty, the flexibility, the preservation of identities, the fostering of diversity and respect for each state and its internal divisions?

Finally, by looking that the question of secession through the lens of the theory of the law of civil society, new resources become available. The legal theory of civil society is all about how the parts, i.e. groups and institutions of the state, relate to the whole. The legal theory of civil society is about how law functions in arranging the relationship between the parts and the whole. In another article,[35] I have identified seven such legal functions: (1) the facilitation of the establishment and functioning of civic, market, and mesogovernmental institutions; (2) the protection of those institutions from infringements upon their functioning; (3) the enabling of self-regulation; (4) the enabling of these institutions to perform public functions; (5) the channeling of individual activity within institutions; (6) the resolution of conflicts within the institutions; and (7) the societal expression of important public values. Examples of each of these functions are described as applied to institutions within society, i.e., cooperatives, families, language groups, corporations, professions, non-profits, collective bargaining units. By assessing the effectiveness of the law in the context of a given civil society, evidence will be obtained as to whether or not the law of that civil society can perform satisfactorily in relation to the institutions of the segmented group requesting secession. In other words, the evaluation of the law of civil society may help determine the feasibility of retaining either a unitary or consociational state. For example, if the law of Canada is found to offer adequate protection to the autonomy of religious groups and churches within Quebec, then presumably Quebec cannot claim religious freedom as justification for separation. Thus, the theory of the law of civil society and conclusions derived from its application may be helpful in assessing the claims of both sides in a secessionary dispute.

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34. For a recent discussion of the deliberative processes necessary, see HENRY RICHARDSON'S PRACTICAL REASONING ABOUT ENDS (1994).

35. Richard Brooks, *Law and Civil Society in the United States, Canada, Quebec and the First Nations*, 15 ARIZ. J. INT'L. & COMP. L. 1 (1998).

One final argument on behalf of viewing the Canadian situation through "civil society" glasses. As I type these words, the U.S. and NATO are bombing Yugoslavia at a time when a part of this nation, Kosovo, is demanding independence. We are bombing not in defense of independence, but in the name of autonomy. In short, we are presently backing the creation of Yugoslavia as a consociational state in Eastern Europe. This situation of Yugoslavia and Kosovo illustrates that the plight of Canada as a consociational state is not unique to Canada. What may be more unique is the civilized way in which Canada struggles to maintain that consociational state or gracefully permits secession. Perhaps by studying Canada as a civil society, we can learn a lot about what is needed in the rest of the world.