IMPOVERISHMENT OF THE LAW BY THE LAW: A CRITIQUE OF THE ATTORNEY GENERAL'S VISION OF THE RULE OF LAW AND THE FEDERAL PRINCIPLE

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[U]n gouvernement s'expose quand il refuse obstinément et trop longtemps ce que le temps a proclamé nécessaire.

Ce qui est exagéré n'a pas de valeur.

Talleyrand (1754–1838)[1]

This brief article is devoted to a critique of the arguments put forward by the Attorney General of Canada in connection with the Reference concerning certain questions relating to the secession of Quebec (hereinafter, "the Reference"). This critique will not be presented from a plainly positivist standpoint. On the contrary, I will be examining in particular (1) how the approach taken by the Attorney General impoverished the legal concepts of the rule of law and federalism, both of which were, however, central to her submission; and, in a more general way, (2) how the excessively detailed analysis of constitutional texts contributes to the impoverishment of the symbolic function of the law, however essential that dimension may be to its legitimacy.[2] My criticism will take into account the reasons for judgement delivered recently by the Supreme Court in the Reference.[3]

IMPOVERISHMENT OF FUNDAMENTAL CONSTITUTIONAL PRINCIPLES

The position of the Attorney General of Canada as to the relevance of the rule of law and federalism concepts can be summarized as follows.

The Constitution of Canada is the supreme law of the land, the source of all authority. It determines the extent and limits of the powers of both levels of government. Any standard that contravenes the Constitution can be declared legally invalid. Furthermore, the Constitution sanctions a principle already recognized in Canadian law, namely the rule of law, according to which, to prevent arbitrariness, any action by the state must be authorized by law. Order and justice are therefore assured, as the state may act only in compliance with clear and previously stated rules that it has adopted itself. The courts are the guardians of the rule of law. Lastly, since Part V of the *Constitution Act, 1982* expressly establishes the rules to be followed to amend the Constitution, it follows that it is the only applicable standard.

The Attorney General maintained that Section 45 of the *Constitution Act, 1982*, the only one allowing a province unilaterally to amend a part of the Constitution, did not authorize secession; no one disputed this assertion. The issue, the Attorney General maintained, was therefore resolved. It followed, she said, that the Court did not have to make any further determination; the interpretation of section 45 sufficed.[4] The Court did not have to "stray into" issues such as how secession might be effected,[5] or express an opinion

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1 Quotations taken from Jean Orieux, *Talleyrand ou le sphinx incompris* (Paris: Flammarion, 1970) at 684 and 819.

2 For my purposes here, there is no need to address the problems of international law raised by the Reference.

3 This article is a modified version of a paper presented at the 1998 Annual Conference of the Canadian Association of Law Professors, which was held on June 3 at the University of Ottawa and had as its theme "Legality and Legitimacy: The Reference concerning certain questions relating to the unilateral secession of Quebec from the rest of Canada." I had been given the task of critiquing the arguments submitted by the Attorney General of Canada. Since then, the decision of the Supreme Court has been handed down: see *Quebec Secession Reference* (1998) 161 D.L.R. (4th) 385. Because some of the reasons expressed by the Court bore a resemblance to my earlier criticism, it was felt that an amended version of my paper should be published.

4 It should be added that the Attorney General was of the opinion that international law did not recognize the people of Quebec's right to secede and that, in any event, domestic law had precedence over international law in this matter.

5 Reply of the Attorney General, para. 41; Factum of the Attorney General of Canada, para. 116; Written Responses of the Attorney General to the questions asked by the Supreme Court, paras. 68-71. In this regard, the Attorney General

on the merits of the sovereignist project.[6] It did not have to explain whether other principles could have been invoked in support of such a project.[7] Neither did it have to express an opinion on the relevance of a national referendum,[8] or on the need to obtain consent from the Aboriginal peoples.[9] She even seemed reluctant to allow that the provinces could make a political commitment to recognize the people of Quebec's right to unilaterally decide their own future.[10] For the Attorney General, the rule of law compelled the Court to limit its examination to section 45 of the Constitution.

The Attorney General also enlisted the federal principle in support of her case against a province's right to secede. She said, "[o]ne of the consequences of the federal principle in Canada is that no single governmental institution — whether at the central or provincial level — can claim plenary authority over the population of a given province,"[11] which naturally excluded the power for a province to become fully sovereign. While the Attorney General recognized that "there is a Quebec people in a sociological, historical and political sense,"[12] in her view Quebec nevertheless remained a province like the others: "a full and equal — indeed a founding — member of the federation. The legislature of Quebec, *like other provincial legislatures*, exercises numerous important heads of power and enjoys significant autonomy under Canada's federal constitutional structure."[13] Lastly, when the concept of federalism is put forward, the emphasis is oddly on unity and not diversity, as, for example, when the Supreme Court referred in *Morguard* to "the obvious intention of the Constitution [of 1867] to create a single country."[14]

In short, we learn that the values of federalism and rule of law (and of democracy), "[f]ar from superseding or supplanting the terms of the Constitution, ... are found in the Constitution's specific amending provisions and reinforce their application."[15]

Pressed by the Court, which was anxious to know whether there were some principles that would show the way out of the deadlock brought about by the impossibility of obtaining the consent required by Part V to effect a secession, the Attorney General replied: "it is not Part V that would have 'failed' if a constitutional amendment proposal did not obtain the required resolutions of assent, but rather, the particular proposal under consideration."[16] The Constitution triumphed absolutely. The Titanic was indeed unsinkable. The ship did not sink; the water level, unfortunately, rose above the upper decks.

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The preceding definitions of rule of law and federalism are perfectly consistent with what is found in most works of constitutional law. They are both deficient, however, in that they are based on the presumption that legal standards adopted by the state have an objectively identifiable content of universal scope. They conceal the fact that the porosity of these standards allows their interpreters to inflect their meaning. In this way, meaning becomes largely determined by the expectations of the target audience. Here comes into play the concept of legitimacy, which is not to be confused with strict adherence to a constitutional standard stripped of any context.[17]

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invoked the fact that such questions could raise many issues apt to affect the provinces, which, with the exception of Manitoba and Saskatchewan, did not intervene in the Reference: Factum of the Attorney General of Canada, para. 118. Since the federal government could have inquired of the provinces whether it was convenient to proceed by reference to the Supreme Court, it is strange, to say the least, that it should invoke their absence to encourage the Court not to express an opinion on questions relating to how secession might be effected. If the provinces were absent, the Attorney General had only herself to blame.

6 Reply of the Attorney General, para. 32.

7 Factum of the Attorney General of Canada, para. 116.

8 Written responses of the Attorney General to the questions asked by the Supreme Court, para. 58.

9 Reply of the Attorney General, para. 44.

10 Written responses of the Attorney General to the questions asked by the Supreme Court, para. 52.

11 Factum of the Attorney General of Canada, para. 74.

12 Reply of the Attorney General, para. 91.

13 Reply of the Attorney General, para. 64 (emphasis added). Also see Factum of the Attorney General of Canada, paras. 193, 196.

14 *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 S.C.R. 1077 at 1099, passage quoted and approved in the *Provincial Court Judges Reference*, [1997] 3 S.C.R. 3 at paras. 97-98 and reproduced in para. 62 of the Reply of the Attorney General. Also see Factum of the Attorney General of Canada, para. 84, where it is said that "a central objective of Confederation was to bring together the then-province of Canada ... and the provinces of Nova Scotia and New Brunswick in a single federal union."

15 Reply of the Attorney General, para. 67. Content with the fact that "Canadian courts have long and frequently recognized" these values, the Attorney General did not feel the need to expand on their content.

16 Written responses of the Attorney General to the questions asked by the Supreme Court, para. 73.

17 To the Attorney General's credit, it must be said that she herself was a victim of the role she had been assigned (although did she herself not assume this role?). Indeed, the legal debate based on the invocation of mutually exclusive rights compels the parties involved to take die-hard positions and to ask for the maximum precisely in the hope of obtaining the maximum. In the words of my colleague Yves-Marie Morissette, it forces each party to "treat the other as if he was a liar."

The political institutions of a given society and the laws that they pass will appear legitimate, in the sense that the people will freely agree to obey them, to the extent that such institutions are in tune with the values and beliefs of the community members.[18] Legitimacy thus presupposes the possibility of dialogue amongst the various segments of the community and between state institutions and those segments. A political (or even judicial) institution failing to defend concepts of humanity, of community, and of public interest in keeping with people's expectations, will see its legitimacy and its power to constrain start to dwindle.[19] These values will, among other things, constitute the horizon,[20] the background of intelligibility, used by the judges as a basis for interpreting the vague concepts expressed above.[21] The interpretation of these concepts, which in their abstraction appear universal, will be sustained by "local" values.[22]

From this point of view the concepts of rule of law and federalism must be considered.

Faithfulness to the law, even constitutional law, is not necessarily identical with faithfulness to the moral ideal,[23] to the aspiration that underlies the notion of rule of law. Strict adherence to official legality may be nothing more than faithfulness to a legality stripped of any ethical concerns. I agree with Jeremy Webber's view that the rule of law means that the exercise of any political power is linked to an obligation to justify political actions in the eyes of all.[24] All political power must aim at the common interest ahead of special interests; a political action is therefore justified only if it tends to promote a concept of the public interest that can be defended publicly, before society *as a whole*. Such a power will be legitimate insofar as, within such a context, the decisions made by political institutions appear acceptable, even to those who oppose them.[25]

This concept of the rule of law is more restrictive than it seems, since it compels the political authorities, under penalty of a loss of legitimacy, to defend and give reasons for their notion of the public interest to all audiences that make up Quebec or Canadian society. It calls for dialogue, for consideration of varied interests, and for compromise. This concept of the rule of law is

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18 Charles Taylor, "Alternative Futures: Legitimacy, Identity, and Alienation in Late-Twentieth-Century Canada" in *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism* (Montreal: McGill-Queen's University Press, 1993) at 59-119, 64: "This term [legitimacy] is meant to designate the beliefs and attitudes that members have towards the society they make up. The society has legitimacy when members so understand and value it that they are willing to assume the disciplines and burdens which membership entails. Legitimacy declines when this willingness flags or fails."

19 *Ibid.* note 18 at 68: "Institutions are defined by certain norms and constituted by certain normative conceptions of man. It is these conceptions that they sustain. But the relationship of support also works the other way. It is these normative conceptions that give the institutions their legitimacy. Should people cease to believe in them, the institutions would infallibly decay; they could no longer command the allegiance of those who participate in them. Institutions demand discipline, frequently sacrifice, always at least the homage of taking their norms seriously. When they lose legitimacy, they lose these."

20 Charles Taylor, *The Malaise of Modernity* (Concord: House of Anansi Press Ltd., 1991) at 37.

21 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* trans. by William Rehg (Cambridge: The MIT Press, 1998) at 156: "A collective self-understanding can be authentic only within the horizon of an existing form of life; the choice of strategies can be rational only in view of accepted policy goals; a compromise can be fair only in relation to given interest positions. The corresponding reasons count as valid relative to the historical, culturally molded identity of the legal community, and hence relative to the value orientations, goals, and interest positions of its members. Even if one assumes that in the course of a rational collective will-formation attitudes and motives change in line with the arguments, the facticity of the existing context cannot be eliminated; otherwise ethical and pragmatic discourses, as well as compromises, would lack an object. ... As used for the validity component of legal validity, the expression 'legitimacy' designates the specific kind of prescriptive validity ... that distinguishes law from 'morality.' Valid moral norms are 'right' in the discourse theoretic sense of just. Valid legal norms indeed harmonize with moral norms, but they are 'legitimate' in the sense that they additionally express an authentic self-understanding of the legal community, the fair consideration of the values and interests distributed in it, and the purposive-rational choice of strategies and means in the pursuit of policies."

22 Some will object that, according to the point of view expressed here, there could be legitimacy of the law, even if the local values were perverse and allowed the adoption of legislative measures intended to oppress minorities. However, as I explain further on, there is respect for the rule of law, and therefore legitimacy, only insofar as the values defended by the state are publicly debated before *all members* of society, including minorities. This public debate and dialogue, and the compromises that it necessarily entails if it is based on a genuine willingness to listen and debate, will confer legitimacy on political actions because, from that point on, they will appear acceptable even to those who oppose them, their point of view having been heard and taken into account.

23 As understood by C. Taylor, *supra*, note 21 at 16, namely, "a picture of what a better or higher mode of life would be, where "better" and "higher" are defined not in terms of what we happen to desire or need, but offer a standard of what we ought to desire."

24 Jeremy Webber, "The Rule of Law Reconceived" in Kalman Kulcsar and Denis Szabo, ed., *Images, Multiculturalism on Two Sides of the Atlantic* (Budapest: Institute for Political Science of the Hungarian Academy of Science, 1996) at 197.

25 A constitution is not as inevitable as the law of gravity. The concept of legitimacy does not enter into our subjection to the latter: "The law of gravity is absurd and indefensible when you fall downstairs; but you obey it." See Arnold Bennett, *Helen With the High Hand* (Gloucester: Alan Sutton Publishing, 1983) at 22.

closely intertwined with the democratic principle.[26] It prevents a given society's differences from being crushed under the weight of ontological definitions or an idiotic presumption of unanimity. It avoids the "all or nothing" stance so characteristic of the official law. It recognizes that the law is not just a means to control, but also to facilitate, human relationships. Lastly, it supposes that the mainstay of a democratic constitutional order is neither the state, nor a 50 per cent plus one majority of citizens who have voiced their opinion on a possibly confusing question, nor a legislative text, albeit constitutional, conveying only a half-message to an important segment of the population. A democratic constitutional order is anchored in the general public, whose every member has the right to be heard, as the legitimacy of power derives from them all.[27]

Understood this way, the rule of law is not opposed to legal pluralism, respect for diversity, or the granting of special status to certain groups, provided these options are presented, explained, defended in public, discussed and approved by the community, and intended to contribute to the vitality of society *as a whole*.

The reasons for decision delivered in the Reference attest that this vision of the rule of law is shared by the Justices of the Supreme Court. The Highest Tribunal clearly disavowed the Attorney General's position.

According to the Court, the Constitution is not confined to its explicit provisions. Acknowledging the primacy of the written word, the Court nevertheless recognizes that the Constitution also encompasses underlying principles that "inform and sustain the constitutional text" (para. 49).[28] In fact, the Court finds it unnecessary to examine the amendment provisions.

Among the principles referred to by the Court are federalism, democracy, constitutionalism and the rule of law, and respect for minority rights (*ibid.*). These principles, and this is of capital importance, are said to function in symbiosis (*ibid.*); furthermore, none of them is absolute to the exclusion of the others (para. 93). Consequently, the rule of law and constitutionalism are closely linked to the democratic principle, and vice versa (para. 67). Furthermore, in the Court's opinion, the rule of law must not be confused with a blind subjection and adherence to legal norms, or democracy equated with majority rule. On the contrary, the rule of law serves a much broader purpose. It aims at "vouchsaf[ing] to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs" (para. 70). As for democracy, it must not be confined to its institutional and individual dimensions, but rather must be conceived as "fundamentally connected to substantive goals" such as the accommodation of cultural and group identities (para. 64), which includes the protection of minorities (paras. 79-82). Finally and

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[26] J. Habermas, *supra*, note 22 at 135: "The law receives its full normative sense neither through its legal *form* per se, nor through an a priori moral *content*, but through a *procedure* of lawmaking that begets legitimacy. ... It is not the legal form as such that legitimates the exercise of governmental power but only the bond with *legitimately enacted* law. At the posttraditional level of justification, ... the only law that counts as legitimate is one that could be rationally accepted by all citizens in a discursive process of opinion- and will-formation" (emphasis in original).

[27] The solution to a problem of legitimacy does not lie in "better information" but rather in "better listening." Better information will not make the amending formula any more acceptable to the people of Quebec, or the majority principle any more acceptable to those who oppose Quebec's independence, if these groups do not feel that the processes in question were adopted following a serious public debate on the vision of justice and social order that they translate, a debate during which these groups will have had the opportunity to be heard and to have their opinion taken into account.

This vision of the rule of law assumes, to quote Rousseau, that "the more grave and important the questions discussed, the nearer should the opinion that is to prevail approach unanimity": Jean-Jacques Rousseau, "The Social Contract" in *The Social Contract & Discourses*, trans. by G.D.H. Cole (London: J.M. Dent & Sons Ltd., 1913) at 1-123, B.IV, Ch. 2 at 94. I feel it is important to quote Rousseau at greater length on this subject. Rousseau wondered about the following question: "[h]ow are the opponents at once free and subject to laws they have not agreed to?" (at 93). Does such submission of citizens who have not consented to the adoption of a law not constitute a form of oppression? Not in Rousseau's view: "When in the popular assembly a law is proposed, what the people is asked is not exactly whether it approves or rejects the proposal, but whether it is in conformity with the general will, which is their will. Each man, in giving his vote, states his opinion on that point; and the general will is found by counting votes. When therefore the opinion that is contrary to my own prevails, this proves neither more nor less than that I was mistaken, and that what I thought to be the general will was not so. If my particular opinion had carried the day I should have achieved the opposite of what was my will; and it is in that case that I should not have been free" (at 93-94). Rousseau then expresses his opinion on the thorny issue of the proportional number of votes necessary to conclude that this general will exists: "A difference of one vote destroys equality; a single opponent destroys unanimity; but between equality and unanimity, there are several grades of unequal division, at each of which this proportion may be fixed in accordance with the condition and the needs of the body politic. There are two general rules that may serve to regulate this relation. First, the more grave and important the questions discussed, the nearer should the opinion that is to prevail approach unanimity. Secondly, the more the matter in hand calls for speed, the smaller the prescribed difference in the numbers of votes may be allowed to become: when an instant decision has to be reached, a majority of one vote should be enough. The first of these two rules seems more in harmony with the laws, and the second with practical affairs. In any case, it is the combination of them that gives the best proportions for determining the majority necessary" (at 94).

[28] For the sake of brevity, references to the paragraphs of the decision will appear in parentheses in the text itself.

most importantly, between these two flying buttresses stands the *legitimacy* of a political system. There lies the reason for their inescapable symbiosis:

> 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. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through 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. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values (para. 67).

The Court then stresses the fact that democracy is synonymous with a continuous process of discussion, a discussion that entails compromise, negotiation, deliberation, and, most importantly, a consideration of the dissenting voices that must be acknowledged and addressed "in the laws by which all the community live in" (para. 68). Again, rule of law and democracy are closely interrelated. Viewed in such a perspective, the Court is indeed correct when it states that "constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it" (para. 78).

The Attorney General's description of the federal principle was also disarmingly simplistic. Indeed, federalism represents much more than a simple method of distributing powers between levels of government. Were the federal principle merely an abstract concept, there would be no difference between Belgian, Swiss, U.S., and Canadian federalism. However, no constitutional theory that takes history into account, nor any moral vision of what Canadian federalism might signify, enlivened the Attorney General's dry description. It was therefore impossible for the judges to determine, from such a definition, what gives Canadian federalism its particular texture. Before choices can be meaningful, that which sustains such choices must be made manifest. This lack of vision was distressing for everyone, not just for Quebec.

The current crisis in Canada fits into a historical continuity. History can therefore not be ignored without trivializing the Canadian constitutional conflict.

Unlike the situation in the U.S., nationhood has never been taken for granted in Canada.[29] It is always in the process of being built. I agree with Samuel LaSelva's assertion that Canadian nationality presupposes Canadian federalism, which in turn rests on a complex form of fraternity between diverse communities, such fraternity being aimed as much at those sharing our way of life as it is at those having adopted alternative ones.[30] This concept of fraternity, not being totally disembodied, recognizes the tragic failures of this brotherhood (the tragic fate of the Aboriginal peoples and of Francophones outside Quebec[31]) and recognizes the greatness as well as the misery of the Canadian federal structure. However, in the final analysis, if Canada is to survive, it is because some people are convinced that the acceptance of differences is the royal road to a more just society.[32]

Canadian federalism is therefore based on a mutual recognition of differences — meaningful differences, that is, for they are not all equal. A thing does not necessarily become important simply because it is asserted. It becomes so when this choice fits into a particular *shared* horizon of significance allowing agreement on the importance of a given difference.[33] While it is self-evident that all provinces are distinct each in its own way, they do not all offer such a degree of specificity as to justify creating distinctions among them, if the intent is to make a choice resting on the fundamental characteristics of Canadian federalism as

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29 Samuel V. LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements and Tragedies of Nationhood* (Montreal: McGill-Queen's University Press, 1996) at 38 and 190.

30 *Ibid.* note 31 at xiii and 3, 23-27.

31 In this regard, read Arthur Isaac Silver, *The French-Canadian Idea of Confederation, 1864-1900*, 2nd ed. (Toronto: University of Toronto Press, 1997).

32 S.V. LaSelva, *supra*, note 29 at 7.

33 Charles Taylor, *supra*, note 20 at 52: "To come together on a mutual recognition of difference — that is, of the equal value of different identities — requires that we share more than a belief in this principle; we have to share also some standards of value on which the identities concerned check out as equal. There must be some substantive agreement on value, or else the formal principle of equality will be empty and a sham. We can pay lip-service to equal recognition, but we won't really share an understanding of equality unless we share something more. Recognizing difference, like self-choosing, requires a horizon of significance, in this case a shared one."

it evolved from 1867,[34] namely and in particular, the existence of a Quebec in which the majority language and culture is French. Any definition of Canadian federalism that ignores Quebec's (and Aboriginal peoples') distinctiveness will never be legitimate.[35] By fiercely trying not to look at the past (and even at the present), and by clinging solely to defining abstract legal norms which in themselves have no ontological significance, we deprive ourselves of the power to make valid choices and to give meaning to law, which is anything but trivial and which can, on the contrary, engender legitimacy.

If all reference to the horizon of significance that history represents is eliminated, then all choices are equally valid, all equally important, and the net result is an anemic, trivial, and even absurd version of Canadian federalism.[36]

The Supreme Court certainly understood as much. In describing the above mentioned underlying constitutional principles, the Court did not fail to indicate that they "emerge[d] from an understanding of the constitutional text itself, *the historical context*, and previous judicial interpretation of constitutional meaning" (para. 32).[37] It then went on to recount the historical circumstances from which Confederation stemmed (paras. 33–48). Seen through this historical lens, federalism convincingly appears as much more than an abstract mechanism providing for the distribution of powers between different levels of government. In this light, not only does it appear as a "legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today" (paras. 43, 57), but also as the *only* political mechanism by which the cultural and linguistic diversity of the different peoples inhabiting Canada could be reconciled with their desire to unite and work together toward common goals (para. 43). In addition, instead of trying to hide Quebec's specificity in Confederation, the Court clearly states that it was a determining factor in the choice for federalism in 1867:[38]

> 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. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867.... The federal structure adopted at Confederation enabled French-speaking Canadians to form a numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the *Constitution Act, 1867* in such a way as to promote their language and culture. It also made provision for certain guaranteed representation within the federal Parliament itself (para. 59).

In short, the Court failed to acquiesce to the Attorney General's dwarfing definitions of the rule of law and the federal principle. It gave an answer that is undeniably more complex, but infinitely more subtle and more in tune with Canadian constitutional reality.

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[34] Roderick A. Macdonald, "...Meech Lake to the Contrary Notwithstanding" (1991) 29 Osgoode Hall Law Journal 253-328 and 483-571, p. 542: "Other provinces are not distinct in a constitutionally relevant sense because there is no constitutional criterion (which rises to the level of constituting a "fundamental characteristic of Canada") out of which their distinctiveness emerges." At 565, he adds, "True equality of the provinces does not mean reducing all provinces to the same level. It means treating provinces equally in respect of issues where they are equal."

[35] See S.V. LaSelva, *supra*, note 29. R. A. Macdonald, *supra*, note 34 at 528-529 maintained, a few years ago, that the Meech Lake Accord could not have been adopted without an acknowledgment of Quebec's distinctiveness: "It [would have] require[d] the elaboration of a theory of Canada which acknowledges Quebec's distinctiveness and which celebrates the contributions of French-speaking Canadians throughout the country to Canadian self-definition."

A. I. Silver, *supra*, note 31 at 265-266: "From [the] point of view [of the rest of Canada], Quebec's attempts to bring its minorities into a French-speaking sphere seem to be only the bullying of minority groups by the majority ethnicity. But from the Quebec point of view, the integration of other ethnicities into the French-speaking community simply makes Quebec a full and integral society in the same way as the rest of Canada — a pluralistic society in which people of diverse backgrounds and ethnicities live together democratically with French as their common public language. *What we have, in effect, is two similar but distinct multicultural entities, one in the rest of Canada, living its public life in English, the other in Quebec, living in French.* If we insist on seeing French in Quebec as merely an "ethnic" language, we misunderstand both the nature of Quebec society and the meaning of Quebecers' demands. Yet, if we fail to understand them and refuse to recognize Quebec as the society it is, then it seems likely that a majority of Quebecers may soon decide to leave Canada altogether" (emphasis added).

[36] See Charles Taylor, *supra*, note 20 at 37-41 regarding what confers importance on the choices one makes.

[37] Emphasis added. Further on (para. 49), the Court explained that "[b]ehind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles."

[38] Since the Court did not hesitate to take the past and the present into account when appraising the rights granted by the Constitution to aboriginal peoples, why would it hesitate when the time came to examine Quebec's place in Confederation?

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By basing her arguments on legal concepts that she implied generate their own meaning, and by disconnecting these concepts from the moral ideal that is their goal and from the specifically Canadian historical continuity in which they belong, the Attorney General was at once impoverishing their normative meaning and the legitimizing power they have in the minds of all Canadians.[39] Wrapping up the Canadian reality in legal frills removed from any context will never be enough to generate legitimacy.[40] Some will object to this view on the ground that lawyers are not historians or sociologists. This, to me, will be proof that, in their view, the law in itself can provide objective responses to complex questions. I do not believe this. The source of the law and of the political action it justifies is to be found elsewhere. The Supreme Court apparently shares a similar conviction.

On the part of the Attorney General, this was an attempt to use the law to give some lustre to an absence of constitutional theory or, at the very least, to a theory based on an understanding of the Canadian political order which, it goes without saying, is not shared by Quebec separatists but (is it necessary to remind those who, like Torquemada, see heresy everywhere?) also is not shared by a majority of Quebecers who are, at this point, still not interested in independence.

The Attorney General was deluding herself if she thought that the answers she was seeking would pull Canada out of the current crisis.[41]

Impoverishment of The Symbolic Function of The Law

Law's indeterminate nature is one of its weaknesses, but paradoxically it can also be one of its strengths, insofar as it can serve its legitimizing function as a symbol.

In his *Pensées*, Blaise Pascal (1623-1662) wondered about the underpinnings of the authority of law. What he says on this subject is useful for grasping the relevance of the law from a legitimacy point of view: "One says that the essence of justice is the Legislator's authority, another the convenience of the Sovereign, still another the living customs, and he alone is right. Nothing is just by reason alone; everything changes with time. Custom is all equity, for the simple reason that it is accepted as such. That is the mystical foundation of its authority. He who tries to analyze its underlying principle will destroy it. Nothing is more faulty than those laws which aim at righting wrongs. Those who obey such laws because they are just, obey to the justice they imagine and not to the essence of the law. Law does not escape itself. It is law and nothing more."[42]

In short, there is law, and there is "the idea of law," as Georges Burdeau said.[43] The idea of law refers to the citizens' attitude with respect to law; to their willingness to invest it with — or, conversely, deprive it of — meaning. Law acquires a symbolic status when it allows everyone a glimpse of what they imagine or wish for. Law gets its strength from what it says and from what it does not say.[44] This mystical underpinning

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39 The absence of a constitutional theory of federalism that would make it possible to explain the merits of the Meech Lake Accord not only led to the Accord's failure, but also had an adverse effect on Canadian constitutionalism in general "by undermining the public's confidence that there is a history, symbolism, and vision of the country which is capable of sustaining it in the future." R. A. Macdonald, *supra*, note 34 at 277.

40 According to the approach taken by the Attorney General, the law would act on its own accord, on a passive and sheep-like public, whereas in fact, the official law can act only if the standard that it expresses is already rooted in social "practices."

41 S.V. LaSelva, *supra*, note 29 at 15: "As depicted by poets, tragedy often results because crucial facts and events are misunderstood or forgotten when they need to be comprehended or acted upon."

42 Quoted by Philippe Malaurie, *Anthologie de la pensée juridique* (Paris: Éditions Cujas, 1996) at 79-80 (my translation). The original French version reads like this: "[L]'un dit que l'essence de la justice est l'autorité du législateur, l'autre la commodité du souverain, l'autre la coutume présente et c'est le plus sûr. Rien suivant la seule raison n'est juste de soi, tout branle avec le temps. La coutume [est] toute l'équité, par cette seule raison qu'elle est reçue. C'est le fondement mystique de son autorité. Qui la ramènera à son principe l'anéantit. Rien n'est si fautif que ces lois qui redressent les fautes. Qui leur obéit parce qu'elles sont justes, obéit à la justice qu'ils imaginent, mais non à l'essence de la loi. Elle est toute ramassée en soi. Elle est loi et rien davantage."

43 Georges Burdeau, "Essai sur l'évolution de la notion de loi en droit français" (1939) *Archives de Philosophie du droit* 7: "[L]'idée de loi appartient à tout citoyen: chacun lui donne sens et substance en dehors de toute préoccupation d'école ou de doctrine. On s'attache à elle, on la magnifie ou on la discrédite et c'est en grande partie de cette attitude de tous que dépend, en définitive, dans une démocratie la valeur de la loi."

44 In a televised documentary entitled *Thomas Jefferson* (a Florentine Films Production; financed by The Arthur Vining Foundations and the Corporation for Public Broadcasting; http://www.pbs.org), an American historian, Joseph Hellis, made this statement in regard to the U.S. Declaration of

of law, and that which makes it authoritative, is what today we call legitimacy.

But we, Canadians, have become masters in the art of transforming symbols into meaningless signs,[45] as shown by the finicky deconstruction of the phrase "distinct society" appearing in the Meech Lake Accord.[46] Law's indeterminate nature, useful this time, would in fact have made it possible to ensure this expression's symbolic function by allowing the people to invest it with meaning. The public's expectations would then have inflected the meaning given to this expression by the courts. But no, we preferred the kind of "definitionalism"[47] which destroys everything by making it necessary for everything to be said and, more tragically, which allows anything to be said.

In short, *dura lex sed lex* constitutionalists too often aid in the killing of the very instrument from which they make their living, the law. Yet such law has legitimizing power if we do not lose sight of its symbolic function,[48] and if we recognize that the vague concepts it includes have meaning only if they fit into the continuity peculiar to Canada's constitutional history. This is precisely what the Supreme Court has achieved.❑

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Independence: "Those are the closest things to the magic words of American history. Those are the words that all Americans, at some very very important level, believe in. They are the essential words of the American creed. And part of Jefferson's genius was to articulate, at a sufficiently abstract level, these principles, these truths that we all want to believe in. The level is sufficiently abstract so that we don't notice that these truths are, at some level, unattainable and, at another level, mutually exclusive. Perfect freedom doesn't lead to perfect equality; it usually leads to inequality. *But Jefferson's genius is to assert them at a level of abstraction where they have a kind of rhapsodic inspirational quality. And we all agree not to notice ... that they are unattainable, and not to notice that they are mutually exclusive or contradictory*" (emphasis added).

45 I have borrowed this expression from R.A. Macdonald, *supra*, note 34 at 276.

46 In this regard, read R.A. Macdonald, *ibid.* at 275-277.

47 R.A. Macdonald, *ibid.* at 276.

48 Pierre-Elliott Trudeau, the great defender of reason over emotion, nevertheless recognizes the importance of symbols in building a sense of national belonging. After asserting in "Federalism, Nationalism, and Reason" (in *Federalism and the French Canadians* [Toronto: Macmillan, 1968] at 182-203) that "*... in the last resort* the mainspring of federalism cannot be emotion but must be reason" (at 194; emphasis in original), because "[t]he rise of reason in politics is an advance of law; for is not law an attempt to regulate the conduct of men in society rationally rather than emotionally?" (at 196). He nevertheless admits that a "national consensus will be developed ... only if the [Canadian] nationalism is emotionally acceptable to all important groups within the nation. Only blind men could expect a consensus to be lasting if the national flag or the national image is merely the reflection of one part of the nation, if the sum of values to be protected is not defined so as to include the language or the cultural heritage of some very large and tightly knit minority, if the identity to be arrived at is shattered by a colour-bar" (at 193).