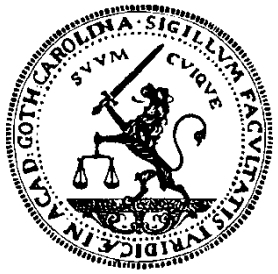

FACULTY OF LAW
Lund University

Hilda Hansson

A State of One's Own?

A Legal Study of the Right to Self-Determination and Secession with Focus on the case of Québec and Canada

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Contents

Abstract

This thesis examines the right of a people to self-determination and the possibility of secession in a democratic context, focusing on the Québec-Canada case. To that end, it studies (1) the historic and contemporary relationship between Québec and Canada, (2) the meaning of the right to self-determination within international law, (3) possibilities for unilateral secession, and (4) secession by virtue of democracy.

In this process, the thesis employs an analytical legal method with a human rights-centred approach. The material underpinning the study is primarily international legal sources, used to establish and interpret international law *lex lata,* but even some views on *lex ferenda.* The judicial decision *Québec Secession Reference* from the Supreme Court of Canada furthermore plays an integral part. The source material is viewed through an international and a multicultural perspective.

Britain gained control of French Québec in 1759, and the Québécois has since struggled to preserve their culture; distinguished by French language, civil law and Roman Catholicism. When federal Canada was established in 1867, Québec also had to fight against centralisation. The sovereignty movement grew during the 1960s and onwards, resulting in two referendums regarding secession as well as in the *Reference* before the Supreme Court.

The right to self-determination is customary international law and is normally fulfilled through political participation of the citizens in the democratic process. Having met this requirement, a state has earned its right to territorial integrity, and any right to secession is precluded.

Self-determination also includes a right for a people to preserve their culture. Yet, international law does not *per se* guarantee a collective group such influence.

Democracy, however, is by Western states given a deeper meaning than majority rule and is also attributed values such as tolerance and respect for all groups within a state. The Supreme Court of Canada held this to include, in certain cases, an obligation to negotiate a potential secession.

The Québécois, therefore, have no right to secession, as their claim to self-determination is fulfilled within the Canadian state. Seen in the context of democracy, they could however utilise their self-determination to negotiate a consensual secession.

International law and democratic principles can therefore be said to represent mainly liberal-individualist ideals, on the expense of collective interests. Nonetheless, it also allows for mutual consideration, which is necessary for the peaceful coexistence of different groups, be it in a multi-ethnic state or in a state of one's own.

Sammanfattning

Uppsatsen behandlar ett folks självbestämmanderätt samt möjligheten till utträde i en demokratisk kontext. Den redogör i synnerhet för situationen mellan Québec och Canada. För att uppnå syftet utgår uppsatsen från frågeställningar angående (1) relationen mellan Québec och Canada i ett historiskt samt nutida perspektiv, (2) innebörden av rätten till självbestämmande inom folkrätten, (3) möjligheten till ensidigt utträde samt (4) utträde genom en demokratisk process.

Metoden som används är främst rättsanalytisk, med mänskliga rättigheter som en infallsvinkel. Uppsatsen har baserats till största del på folkrättsliga källor. Dessa har i första hand använts för att fastställa gällande rätt, men även för viss diskussion *de lege feranda*. Rättsfallet *Québec Secession Reference,* hänskjutet till den kanadensiska högsta domstolen, spelar också en viktig roll. Dessa källor granskas utifrån ett internationellt- samt multikulturellt perspektiv.

Den tidigare franska kolonin Québec kom från år 1759 att kontrolleras av Storbritannien. Alltsedan dess har invånarna kämpat för att bevara sin kultur, vilken utmärker sig genom det franska språket, ett kontinentaleuropeiskt rättssystem och katolicism. När Canada blev en federal stat år 1876 har provinsen även fått kämpa emot centralisering. Självständighetsrörelsen växte under 1960-talet och framåt och resulterade i två folkomröstningar om utträde samt avgörandet *Québec Secession Reference* från Högsta Domstolen.

Självbestämmanderätten utgör internationell sedvanerätt och uppfylls som huvudregel genom medborgarnas deltagande i den demokratiska processen. Om så är fallet har staten i fråga rätt till respekt för sin territoriella integritet och det kan därmed inte föreligga en rätt till utträde.

Ytterligare en aspekt av självbestämmande är rätten för ett folk att bevara sin kultur. Dock ger inte folkrätten som sådan en specifik grupp tillräckligt med inflytande för att säkerställa detta.

Demokrati tillskrivs emellertid en djupare innebörd än enbart majoritetsstyre och anses i västvärlden även innefatta b.la. respekt och tolerans gentemot samtliga grupper i en stat. Canadas högsta domstol menade att detta även, givet vissa omständigheter, kan inkludera en skyldighet att förhandla om ett eventuellt utträde. Det fransktalande Québec har följaktligen

ingen rätt till utträde, eftersom deras självbestämmanderätt anses uppfylld redan i egenskap av medborgare i Canada. Sett i ljuset av demokrati och dess innebörd torde det vara möjligt för dem att använda sin självbestämmanderätt för att förhandla fram ett utträde.

Folkrätten och demokratiska principer kan således säga främst spegla liberala och individualistiska värderingar, och därmed åsidosätta kollektiva intressen. Å andra sidan möjliggör detta ömsesidig respekt och hänsynstagande, vilket i sin tur med största sannolikhet är nödvändiga förutsättningar för att olika grupper ska kunna leva sida vid sida. Detta oavsett om så sker i form av en mångkulturell stat eller i flera självständiga stater.

Abbreviations

AJIL	American Journal of International Law
CERD	International Convention on the Elimination of all Forms of Racial Discrimination
CSCE	Conference for Security and Cooperation in Europe
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICJ	International Court of Justice
ILSA	International Law Students Association
OED	Oxford English Dictionary
OSCE	Organisation for Security and Cooperation in Europe
OSCOLA	Oxford University Standard for the Citation of Legal Authorities
PQ	Parti Québécois
UDI	Unilateral Declaration of Independence
UN	United Nations
UNGA	The General Assembly of the United Nations
UNTS	United Nations Treaty Series

1. Introduction

1.1 Background

> 'If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.'[1]

One of the forces steering the course of history is the idea of the nation and its self-determination: the yearning for freedom and to be master of one's destiny. During the last decades, promoted by the United Nations, it has developed from a political concept to a legal right.[2] The right has also evolved from a colonial context, and is now considered a customary and universal principle of international law.[3]

The ultimate expression of self-determination is secession, as that is the most effective way to ensure the political and cultural interests of a people.[4] This is an issue fraught with political tension, as it tends to also include a claim on territory, which by default conflicts with the right to territorial integrity of an already existing state.[5] The last century has seen a rise in such conflicts, with Biafra, East Pakistan, and Kosovo but a few examples.[6] The phenomenon is not isolated to oppressive or politically unstable states; it exists even in liberal democracies, such as Catalonia (Spain) and Scotland (United Kingdom).[7]

This study will focus on the status of Québec within Canada. The secessionist struggle, which has been going on with varying fervour for over 250 years[8], came to a legal zenith through the *Québec Session Reference*[9] before the Supreme Court of Canada[10].

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[1] Mill (1865) chap. II para. 1.
[2] Musgrave (1997) 90.
[3] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, ICJ Reports 2019, 95 [151–155]; UNGA Res 2625(XXV) of 24 October 1970.
[4] See Van Dyke (1980) 4.
[5] Musgrave (1997) 180.
[6] See Crawford (1997) paras. 50–51; Castellino (2000) Ch. 5.
[7] See Crawford (1997) para. 51; Economist Intelligence Unit (2020) 10.
[8] See generally Trofimenkoff (1982).
[9] *Reference Re Secession of Québec* [1998] 2 SCR 217. Also: *'the Reference'*.
[10] *Hereafter:* 'The Court'.

Why would the Québécois, as citizens of a democratic and developed state, still be set on seceding from Canada? This thesis seeks to examine Québec-Canada relations in the context of international law on self-determination and secession. Lastly, it seeks to understand how these relate to democracy. The focal point for much of the study will be the *Québec Secession Reference*.

1.2 Purpose Statement and Research Questions

This thesis seeks to examine the right to self-determination in the context of a multi-ethnic democratic state where one group expresses secessionist ambitions, with the focus being the province of Québec in relation to the federal state of Canada.

To that end, the following questions will be answered:

1. How can the legal and social relations between the province of Québec and the state of Canada, along with their respective inhabitants, be described, in a historic as well as a contemporary setting?
2. What is the scope and meaning of the right to self-determination, within international law in general and for the Québécois in particular?
3. What, if any, right is there for a people to effectuate a unilateral secession within international law?
4. Given the absence of (3), does a democratic state have any obligations towards a national group expressing a clear wish to secede?

1.3 Delimitations

Self-determination and secession are vast and intricate topics; and due to the limited time and scope of the thesis, delimitations were necessary. Some of them will be discussed here.

A major issue not appearing in the study is the definition of a 'people' entitled to self-determination. This is a controversial question much discussed in literature, without a clear

answer. The thesis, much like the Court[11], assumes the Québécois to be a people entitled to self-determination, and focuses instead on the meaning of the right.

The right to self-determination appears in numerous[12] documents from the United Nations, and international conventions; most of which have a similar wording. Focus is therefore here on the few which are most frequently referred to in literature, namely res. 2625, common art 1 of the Human Rights Covenants and the Helsinki Declaration[13] .

During the decolonization process, self-determination played a key role. The postcolonial issue was carefully considered, but ultimately the democracy angle was chosen instead, mainly for practical reasons. When examining Québec and Canada, a wide array of documentation was available online. In the case of e.g. Bangladesh/Pakistan, this would have been unlikely, as that secession took place in the context of armed conflict and political turmoil.[14]

Even within the topic of Québec/Canada, delimitations were necessary, one being the time aspect. The secessionist debate in Québec has been more or less active in the past century, but thrived under the Parti Québécois and the two referendums. Since the 1998 Supreme Court Reference, the movement has stagnated, with the leading party not currently pushing the question.[15] This study therefore focuses on events and views expressed prior to the 2000s.

1.4 Definitions

An important distinction is to be made between 'Québécois' and 'Quebecker' within the thesis. In French, '*québécois(e)'* is the standard term for a native or inhabitant of Québec, with the English translation being 'Quebecker'. However, 'Québécois' can be used also in English to mean Francophone Quebeckers and their culture.[16] The linguistic nuances can therefore play a part in the political discourse.[17]

[11] See *Québec Secession Reference* [124–125].
[12] E.g. res. 1514(XV) of 14 December 1960; res. 1541(XV) of 15 December 1960.
[13] International Covenant on Civil and Political Rights & International Covenant on Economic, Social and Cultural Rights.
[14] Cf. Castellino (2000) Ch. 5.
[15] See Stein (2016).
[16] Government of Canada, 'Québécois' (2020).
[17] See Le Devoir, 'Québécois ou Quebeckers?' (25 November 2006).

In this thesis, 'the Québécois' refers to the people of French-Canadian ethnicity, seeking to exercise their right to self-determination. It is thus used in a general, non-political sense and does not intend to make assumptions regarding the views of individuals. 'Quebeckers', in contrast, means all residences of the province.

1.5 Methodology

In order to provide a balanced and thorough answer to the questions above, the use of legal research methodology is decisive. The study primarily uses an analytical legal method. It originates from the dogmatic method[18], which foremost seeks to establish 'current law'. The analytical method, however, develops the concept further by systematising relevant legal sources and studying them in the light of accompanying argumentation.[19] In this case, applicable sources on self-determination and secession are put in the context of collective interests, territorial sovereignty and democracy.

The conclusions reached through the analytical legal method, as advocated by Sandberg, can go beyond *lex lata*, and include also critical observations of a *lex feranda* nature.[20] The study therefore employs also a human rights-centred method. This approach seeks to contextualise human rights as to their special nature; i.e., not as norms operating in a legal void, but as norms of natural pedigree acting as guardians of human dignity, and forming part of a social process.[21] Self-determination is more particular still, being primarily a collective right, where group interests have to be viewed in contrast to individual interests. The thesis furthermore discusses the history and politics behind contesting norms and their interpretations, through a self-critic method.[22]

The perspectives underpinning the study are mainly international and multicultural ones. The issues discussed are global phenomena pertaining to international law where different norms

[18] See Kleineman (2018), 24-33.
[19] Sandgren (2005) 651–656.
[20] Ibid.
[21] See McInerey-Lankford (2017) 46–47, 59–60.
[22] Ibid 42–47.

and interests have to be balanced. Of particular importance is the identity and stakes of the Québécois in relation to those of English Canada.

OSCOLA is the main citation system used, with certain adaptations for a primarily Swedish audience. Such changes are: the information included in footnotes, given names of authors featured in the bibliography,[23] and the inclusion of certain web-addresses for the convenience of the reader.

1.6 Source Material and Previous Research

Due to its decentralization, the international legal system consists of various sources, although art. 38(1) of the ICJ Statute[24] is considered a general starting point. The Statute differentiates between two types of sources: primary sources creating new law and obligations, and secondary sources helping to interpret the primary. The starting point of the study is therefore the regulation of self-determination in primary sources, seen in the light of secondary ones.

As the binding UN Charter and Human Rights Covenants are vague, it is important to establish a norm of customary international law regarding self-determination. The study here relies primarily on res. 2625, which despite its non-binding nature defines such a custom.[25] In terms of secondary sources, the study uses state practice, e.g. the Helsinki Declaration, and doctrine from prominent scholars within the field; such as Crawford and Cassese both of whom featured in the *Québec Secession Reference*[26].

The case study of Québec-Canada also plays an important role in the thesis. In exploring the national identity of the Québécois and their conflict with Canada, mainly national legislation and official publications are used. These are 'primary' in the way that they express the official standpoint and grievances of the parties. Even literature is used in this regard, namely by the prominent Canadian historian Mann Trofimenkoff[27], and Encyclopedia articles.

[23] Cf. Trolle Önnerfors & Wenander (2016) 47–50, 74–75.
[24] Annexed to the UN Charter.
[25] See *Chagos Archipelago* [151–155].
[26] Crawford acted as an expert for the Attorney General, see Bayefsky (2000) 31, 153. Cassese was cited by the Court (see *Québec Secession Reference*, 'Authors Cited').
[27] See Government General of Canada, 'Ms Susan Mann'.

For the discussion on secession and democracy, the *Québec Secession Reference* makes up the backbone. As a judgement from the Supreme Court of Canada, it is not binding for other states.[28] Judicial decisions by national courts can in certain circumstances nonetheless carry international weight, as pointed out by Henriksen.[29] He proceeds to describe the current judgement as '[t]he most authoritative statement on the link between statehood and self-determination'.[30] The *Reference* is therefore further used to draw certain general conclusions.

It is important to recognise that the *Reference* has also received critique. One complaint is the usage of non-binding international instruments by the Court to form its conclusion on unilateral secession.[31] However, said conclusions also reflect state practice and doctrine, as will be shown below.

Previous research on the subject of self-determination is made up of ample literature. Not primarily a study of literature, the thesis does not strive to give a comprehensive overview. Rather, it seeks to highlight some of the major contributions and put them in the context of the Québec-case.

1.7 Outline

The structure of the thesis follows that of the research questions. The questions each represents a main theme: Québec-Canada relations, self-determination, secession, and democracy; which are in turn the focus of four consecutive parts (pts. 2–5). However, each part builds on previous sections, showcasing the interconnectivity of the themes. Finally, in pt. 6 the themes are further intertwined through the analysis and conclusion.

[28] *Québec Secession Reference* [20]; cf. ICJ Statute art. 38(1).
[29] Henriksen (2019) 31.
[30] Ibid 67.
[31] Dufour & Morin (1999).

2. Québec-Canada Relations

2.1 Historic Background

European settlers started arriving in what would become Québec around the early 17th century, claiming the land for France. Life in the colony was harsh, and religious conviction was often what drove the inhabitants on.[32] In the 1750s, war broke out between France and Britain, both in Europe and North America. By 1759, Britain had conquered Québec, and through the Treaty of Paris in 1763 France gave up its rights to the land. The French settlers in Québec now became British subjects.[33]

Canada came to include two distinct cultures already in its infancy. The colonial population of 1763 was Francophone, although many British soon arrived, not in the least loyalists fleeing the revolutionary war in the south. The Québécois, unlike the Anglophones, were largely Roman Catholic, followed the French civil code and practiced a particular landowning system (seigneurial system).[34] Wanting to ensure the loyalty of the French-Canadians,[35] Britain attempted to guarantee these rights through the Québec Act of 1774.

Roman Catholicism has played a major role in Québec's historic development, where the clergy for a long period dominated most aspects of French-Canadian life. From 1875 to 1964, Québec had no ministry of education, and schools were instead under religious influence. Nuns provided many social services, which gave them loyalty in turn. To ensure compliance, the clergy also attempted to silence intellectual debate.[36] Through its control, the Church furthermore dissuaded French-Canadians from association with their Anglophone neighbours, as that would allegedly lead to the disappearance of their culture.[37]

[32] Trofimenkoff (1982) 2-7.
[33] Ibid 16-18, 30.
[34] Couture (2019).
[35] Trofimenkoff (1982) 36.
[36] Ibid 120-126.
[37] Britannica Academic, 'Québec'.

As Anglophone North America underwent rapid industrialisation and urbanisation, many French-Canadians still led agrarian lives. Even after the inevitable modernisation, they remained economically and socially disadvantaged in a province where they were numerically superior.[38]

Attempts have been made to anglicize Québec. The most notorious one came around 1841, after French-nationalist revolts had been repressed.[39] The Crown's envoy Lord Durham remarked in his report: 'I expected to find a contest between a government and a people: I found two nations warring in the bosom of a single state'.[40] He went on to claim that unity and stability required a uniform national identity, and therefore recommended (non-forcible) assimilation.[41] Consequently, Upper and Lower Canada (Québec and Ontario) were merged into a united Province of Canada.[42] During the last century, Québec has fought against centralisation on the part of Ottawa.[43]

Secessionism grew in Québec during the 1960s and onwards. During the 'Quiet Revolution' (a period of economic and social progress), a new nationalism developed, based on the particular identity of *Québécois* rather than French-Canadian.[44] Under the PQ, two referendums regarding secession were held: one in 1980 and one in 1995. Both were rejected by the Quebeckers, the second with a very narrow margin. This led to the central government turning to the Canadian Supreme Court to determine the legality of such a unilateral secession.[45]

2.2 National Legislation

The Dominion of Canada was established through the Constitution Act of 1867, which is still today an integral part of the state's constitutional framework. The act builds a union based on a federalist structure, with a clear division of power between the central government and the

[38] Britannica Academic, 'Québec'; Bartkus (1999) 182–183.
[39] Buckner (2020).
[40] Durham (1839) at Bélanger (2000) pt. 1.
[41] Ibid pt. 4.
[42] Buckner (2020).
[43] Québec (Province) & Secrétariat (1999).
[44] Durocher (2015).
[45] Beyefsky (2000) 5-6, 9–14.

provinces.[46] The national parliament consists of representatives from the different provinces according to provisions in Chapter IV; it has the exclusive right to legislate on matters of national importance, such as defence and public debt (s. 91). Québec, along with the other provinces, have their own legislatures (ss. 71-80), which retains exclusive power in regard to a range of issues, such as civil and property rights, healthcare and other local matters (s. 91). Québec also has a judicial system, operating under chapter VII.

In 1982, Canada 'patriated' its constitution, and thereby gained full sovereignty from Britain. The Constitution Act of said year was the result of fierce negotiations, led by Prime Minister Pierre Trudeau. That Canada was to gain supreme authority over its Constitution was not unproblematic, as the issue of its amendment procedure divided the actors.[47] In the *Patriation Reference*, the Court ruled that Ottawa did not need the consent of all provincial governments in order to effectuate the amendment in question.[48], The Constitution Act of 1982 could therefore be adopted by Trudeau and remaining provinces, even though Québec refused its consent.[49]

That Québec under premier René Levesque refused its signature can largely be attributed to its views on self-determination, which will be discussed in pt. 3.2 One of the conditions set out by the provincial legislature was that the Constitution must recognise 'that the two founding peoples of Canada are fundamentally equal and that Québec, by virtue of its language, culture and institutions, forms a distinct society within the Canadian federal system […]'.[50] A veto-right regarding constitutional amendments was also demanded.[51]

The unilateral patriation of the Constitution left Québec feeling betrayed, now bound in the Canadian union by terms it had never agreed to.[52] Ottawa has since made several attempts to rectify the situation through granting Québec special status, but unwillingness on the part of remaining provinces has prevented such constitutional changes.[53]

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[46] See generally Constitution Act, 1867.
[47] Azzi (2020).
[48] *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753.
[49] See Constitutional Accord of November 5, 1981.
[50] Resolution of the Québec National Assembly, December 1, 1981.
[51] Ibid.
[52] See Québec (Province) & Secrétariat (1999) [20–22]; *Québec Secession Reference* [47].
[53] Bayefsky (2000) 5–6.

3. The Right to Self-Determination in International Law

3.1 International Instruments and State Practice

Self-determination, at its core, is the right for a group to control their own future and circumstances, although its exact meaning is highly disputed. Historically, it has in the West been associated with ideas such as representative government and individual liberty. In Eastern and Central Europe, self-determination instead developed in the context of multi-ethnic states, emphasising nationalism and putting the group at the forefront.[54]

Since 1945, self-determination has developed from a political concept to a general principle under international law.[55] It appears in documents such as the UN Charter art. 1(2) and common art. 1 of the Human Rights Covenants. The right was firmly established as being universal in scope by the General Assembly in res. 2625.[56] Princ. 5 par. 1 reads: 'all peoples have the right freely to determine, without external influence, their political status and to pursue their economic, social and cultural development […]'.

In *Chagos Archipelago*, the ICJ declared the right to self-determination to be customary international law, and to have been so since the passing of UNGA res. 1514 in 1960. *Opinio juris* and state practice were then confirmed through ICCPR, ICESCR and res. 2625.[57] The norm is therefore binding for all states.[58]

3.1.1 Internal and External Aspects

[54] Musgrave (1997) 2–6.
[55] Musgrave (1997) 62; *Québec Secession Reference* [114].
[56] See Musgrave (1997) 75–76.
[57] *Chagos Arcipelago* [150–155].
[58] Cf. Henriksen (2019) 24.

A common way of classifying the right to self-determination is by distinguishing between its internal and external aspects. The internal aspect concerns the relation of a people vis à vis the state in which they are a member. It is characterised by the continuous participation in the political process and terms such as democracy and self-rule. The external aspect, in contrast, means the relation of a people vis à vis another people or state. Its nature is more revolutionary, as it can create new international actors.[59] External self-determination can be exercised through e.g. independence, association or integration with another state.[60]

3.1.2 Political Aspects

Self-determination includes a political aspect, which gives *peoples* a privileged position in international law compared to minorities.[61] Western states have through state practice elaborated their traditional stance to determine a contemporary meaning. An important document is the Helsinki Declaration of 1975, adopted by the CSCE[62]. Its princ. VIII declares:

> [b]y virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.[63]

Compared to the wording of res. 2625, the Helsinki Declaration takes on a wider and more liberal meaning of self-determination. In unambiguous terms, it makes the right universal and continuous. It also implies that enjoyment of other human rights is a prerequisite for being able to exercise self-determination, as 'in full freedom', according to Cassese, must be read to mean 'free from oppression by an authoritarian government'.[64]

Musgrave summarises this position on self-determination as 'the ongoing right of all citizens within the state to participate in periodic elections which result in a representative

[59] Thornberry (1993) 101.
[60] See res. 2625 princ. 5 par. 4; UNGA res. 1541(XV) princ. VI.
[61] Cf. International Convention on the Elimination of All Forms of Racial Discrimination art. 3.
[62] CSCE changed its name to OSCE in 1994. Canada is a member, and signatory to the declaration.
[63] CSCE Final Act (1975) princ. VIII.
[64] Cassese (1995) 285–286.

government'.[65] This view is supported by Crawford, who means that in independent states, the right to self-determination is fulfilled through the participation of its people in the democratic process.[66] Internal self-determination would consequently suffice to fulfil the right.

Although the Helsinki Declaration does include a right to external self-determination, Cassese gives the aspect a restrictive meaning. As the right befalls the whole population of a state, he argues, it must be read merely as a prohibition of changing the international status of a state without the free consent of the governed.[67]

3.1.3 Cultural Aspects

Within the scope of self-determination is also included a right for a people to preserve their culture[68]. If the political aspect is vague, the cultural one is even more so, and it is often overlooked.[69] The right should befall *a people* as a collective entity, and is therefore different from the guarantees often given to minorities, which befall individuals by virtue of belonging to a group, and not to the group as such.[70]

The politic-individualist stance discussed above is here problematic, as 'one person one vote' and non-discriminatory policies in no way guarantee a group sufficient influence to realise their cultural identity. Buchanan describes this as the condition of the 'permanent minority': a group whose interests are perpetually disregarded, not because of discrimination or lack of human rights, but simply by being outvoted by a majority,[71] a risk also Van Dyke warns against.[72]

On the other hand, too great a focus on the group can lead to equally undesirable results. The risk becomes especially poignant when examining the nation-states which developed during the inter-war period, where those not falling under the desired ethnic homogeneity were conceived

[65] Musgrave (1997) 99.
[66] Crawford (1997) para. 60.
[67] Cassese (1995) 287–288.
[68] *Here*: The combination of attributes forming the identity of a people, such as language, religion, custom and values.
[69] Van Dyke (1980) 1–2.
[70] See ICCPR art. 27; Van Dyke (1989) 6.
[71] Buchanan (2004) 360–361.
[72] Van Dyke (1980) 7.

as a foreign element.[73] A considerably less extreme example was Québec's insistence on obligatory French-language schools[74]. Such a policy is likely to further the collective interest of preserving the national language, but taking away the individual freedom of choosing the language of instruction for one's child.[75]

3.2 Significance for the Québécois

When measuring states by democratic standards, Canada holds a firm top-position. In 2019, it ranked seventh in the Economist's Democracy Index. Canada received close to perfect scores in the categories 'electoral process and pluralism' and 'civil liberties', while the score in 'political participation' was poorer. This is explained by political disinterest, which is the case for several other overall top-scoring states.[76]

Canada could, all things considered, be said to include all its citizens in the democratic process and to possess a representative government. To this should be added that Québec is enjoying an autonomous arrangement[77]. Following the reasoning of Musgrave and Crawford, the Québécois would therefore be enjoying a continuous right to self-determination in the meaning of res. 2625 and the Helsinki Declaration

However, this conclusion is not necessarily satisfying to the Québécois themselves. The group has demanded equality, not between citizens or provinces, but as one of two distinct and equal peoples constituting the state of Canada. Instead of political and individual liberty, the government of Québec has in their practice emphasised factors such as culture and language, with the ultimate objective being to safeguard their particular identity.[78] Before the second referendum in 1995, the Québec National Assembly declared that membership in Confederation did not guarantee them these things.[79]

[73] Musgrave (1997) chap. 3.
[74] See *A.G. (Que.)* v. *Québec Protestant School Boards* [1984] 2 SCR 66, where the Court partly declared the policy as unconstitutional.
[75] Van Dyke (1980) 20-21.
[76] The Economist Intelligence Unit (2020) 10, 42.
[77] See above pt. 2.2.
[78] See generally *Québec (Province) & Secrétariat* (1999).
[79] Bill 1, entitled An Act respecting the future of Québec, 449.

4. Unilateral Secession in International Law

4.1 Territorial Integrity as a Hindrance to Secession

Whether the right to self-determination also includes a right to secession is highly disputed. A paramount reason for the discord is that such a right would appear to directly contradict the right of the parent-state to territorial integrity. The latter right seeks to protect the unity of sovereign states by prohibiting forcible alterations of boarders, and appears *inter alia* in art 1(2) of the UN Charter and in res 2625[80]. It plays a fundamental role in a system based on a community of sovereign states, and the ICJ has even inferred to it the status of *jus cogens*.[81] On this basis, states firmly deny that self-determination would include a right to secession, an opinion mostly concurred to in doctrine.[82]

The protection of territorial integrity in res. 2625 is not categorical, however. Outside of a colonial setting, the wording has in literature been interpreted as including the possibility of remedial secession. According to such a theory, if a state failed to respect the right to self-determination and equal rights of a people within its territory, said people would be entitled to remedy the situation by creating their own state. Authors disagree on the scope of such a right, but agree that its application would be extremely restrictive.[83] Regardless of such a right's existence, Ratner states that the resolution 'at least signals that the "national unity" of a state is earned by its government, and is not a fait accompli.'[84]

4.2 Effectivity Principle

[80] Princ. 5, pars. 4, 7.
[81] *Military and Paramilitary Activities in and against Nicaragua* [73].
[82] See e.g. Musgrave (1997) 98; Henriksen (2019) 63; Crawford (1997) para. 60.
[83] See e.g. Musgrave (1997) 76; Cassese (1995) 118-119; Castellino (2000) 172.
[84] Ratner (1996) 611.

The experts consulted by the *Amicus Curiae*[85] in the *Québec Secession Reference* approached the issue differently. Abi-Saab argues that secession is a domestic matter, neither encouraged nor prohibited by international law. Only other states are barred from actions which would disrupt the territorial integrity of a state, not groups within said state. International law will then acknowledge the existence of an entity acting as an effective state[86], e.g. a government exercising sovereign organisation of a population within a given territory.[87]

Frack sanctions this principle of effectivity and proceeds to problematize the word 'right'. International law does not grant a right in the sense of entitlement to a people wishing to secede, but it does give them the privilege to attempt secession without international interference. Québec would, according to Franck, be permitted to secede, and Canada would be permitted to prevent it. International law would remain neutral, but would recognise a successful attempt.[88]

These arguments do not remain unchallenged. Crawford, consulted by the Attorney General of Canada, states that '[a] secessionist group which was advised that international law permitted them to secede […] might be disappointed at the sequel'.[89] Such a 'privilege' would only prove hollow, as the parent-state following a unilateral declaration of independence would be permitted to resort to all measures short of infringing non-derogatory human rights, while other states would be prohibited from aiding the group, Crawford argues.[90]

4.3 Conclusions Reached by the Court

In its decision, the Canadian Supreme Court stated that a people's right to self-determination must be practiced in compliance with the state's right to territorial integrity. There is not necessarily a dichotomy between them, as it is possible to fully exercise self-determination within the territory of the present state, i.e. through internal self-determination. International law only allows external self-determination, e.g. unilateral secession, to be effected as an

[85] Appointed by the Court as a representative for the secessionists, since Québec refused to participate in the litigation. See Bayefsky (2000) 14.
[86] See Montevideo Convention on the Rights and Duties of States 1933 art. 1.
[87] Abi-Saab (2000) 69–74.
[88] Franck (2000) at. 2.16, 3.10.
[89] Crawford (1998) para. 17.
[90] Ibid.

extraordinary measure. The Court mentions the case of peoples under colonial rule or foreign occupation. It also opens the possibility of such a right for people 'blocked from the meaningful exercise of its right to self-determination internally' (par. 133).[91]

Given the absence of the above-mentioned circumstances, the Court states:

> [a] state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law'.[92]

When applying this general rule on the specific case, the Court emphasis the rights and freedoms enjoyed by Quebeckers at the provincial and national level alike, and concludes that because Canada respects Québec's right to self-determination, they in turn are entitled to respect for their territorial integrity. Québec therefore does not have a right to unilateral secession.[93]

As for the Effectivity Principle advanced by experts for the *amicus curiae* the Court concedes that a state could be created through international recognition of a political fact. It denies firmly, however, that such recognition retroactively could create a *right* to unilateral secession. Although unwilling to speculate, the Court nonetheless implies the unlikeliness of Québec receiving widespread support following a UDI.[94]

[91] *Québec Secession Reference* [217], [126–134].
[92] Ibid [130].
[93] Ibid [136], [138].
[94] Ibid [143–144].

5. Secession by Virtue of Democracy

5.1 Meaning of Democracy

Originating from ancient Greek for 'popular government', the term democracy is today often defined as a system of government where the inhabitants participate in the political process through elected representatives.[95] However, the definition leaves many questions unanswered. The one which will here be examined further is: what is required to make a 'democratic' government legitimate?

The traditional view, favoured by among others John Locke, was that the government needed the consent of a majority of the population to be legitimate. The majority was then entitled to steer the course for all of society.[96] 140 years later, James Madison stated that *lex major partis* was the least imperfect form of government.[97]

This view has however been widely criticised in later times. Mill warned against the will of the people coming to equate 'tyranny of the majority', where the many dominate the few.[98] The development of a human rights regime in the post-war period has in many ways limited the scope of majority-rule, not in the least through extensive protection of minority rights.[99]

The contemporary relationship between human rights and democracy is made clear in the Paris Charter of 1990, where the CSCE refined their Helsinki Doctrine on self-determination[100]. The document *inter alia* states '[d]emocracy has as its foundation respect for the human person and the rule of law. Democracy is the best safeguard of freedom of expression, tolerance of all groups of society, and equality of opportunity for each person.'[101] It is in other words today necessary for a state to subscribe to certain values in order to be considered democratic.[102]

[95] OED Online (2020).
[96] Locke (1690, 1980) 96–100.
[97] Britannica Academic, 'Democracy'.
[98] Mill (1865) chap. I para. 3.
[99] See e.g. preamble of European Convention on Human Rights; ICCPR art. 27; CERD generally.
[100] See above at 3.1.2.
[101] Charter of Paris for a new Europe para. 7.
[102] Cf. Britannica Academic, 'Democracy'.

5.2 Democracy in the *Québec Secession Reference*

The Québécois-claim to a right of secession was based largely on principles of democracy and self-government. Following support by a majority in a referendum, it was argued that the National Assembly would be entitled to declaring independence, as 'We, the people of Québec […] are free to choose our future'.[103]

However, in the *Reference*, the Court dismisses these arguments as a misinterpretation, declaring that '[o]ur principle of democracy […] is richer [than simple majority rule].'[104] Positive legal norms are necessary, but they must be founded in moral values, such as respect for the identity and culture of minorities.[105] These values thus protect groups such as the Québécois from the condition of the permanent minority, as suggested by Buchanan[106].

One way in which Canada seeks to ensure said protection is through federalism and constitutionalism. Confederation hoped the former would 'reconcile diversity with unity'[107] by giving the provinces a high degree of independence to safeguard their particular identity, while the state could still unite towards common objectives.[108] The latter is the source of all state power and safeguards the democratic principles. Changing the Constitution therefore requires an 'enhanced majority' where the interests of all involved are considered.[109]

Federalism also means that there are two equally legitimate majorities to be taken into account when in this case determining 'the will of the people': the population of Québec and the population of Canada.[110] There are furthermore minority groups within Québec[111], such as Anglophones and Aboriginal Groups, who also benefit from constitutional protection.[112]

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[103] Bill 1, entitled An Act Respecting the Future of Québec.
[104] *Québec Secession Reference* [76].
[105] Ibid [64], [67].
[106] See above at 3.1.2.
[107] *Québec Secession Reference* [43].
[108] Ibid [58–59].
[109] Ibid [72–74], [77].
[110] Ibid [93].
[111] See Couture (2019).
[112] *Québec Secession Reference* [79–82].

A unilateral secession would consequently go against both the structures of Canadian governance and its constitutional principles. The Court therefore concludes that the Constitution does not allow for the effectuation of a unilateral secession[113].

5.3 Secession Through a Democratic Process

A distinction has to be made, however, between unilateral and consensual secession. It would be unconstitutional for Québec to gain independence through one-sided actions, i.e. without acceptance from Ottawa and the other provinces.[114] Consensual secession, on the other hand, could be achieved through negotiations, either pertaining to secession directly, or to a constitutional amendment allowing for secession. [115]

Nothing in international law prevents the parent-state from wavering its territorial-integrity in such a way.[116] It is therefore primarily a domestic matter. Canadian law would require a constitutional amendment to allow for secession; which is fully within the right of the Canadian people to make, if that is their wish.[117]

One of the inherent features of democracy is the right of discussion. The minority has a right to voice their grievances, and the majority has a corresponding obligation to take these concerns seriously.[118] The Court states that '[t]he democratic principle […] would demand that considerable weight be given to a clear expression by the people of Québec of their will to secede from Canada'.[119] If such clear and unambiguous support is expressed, the provinces and Ottawa would be obligated to enter into negotiations with Québec. The obligation would go far beyond a symbolic gesture, but in no way would Québec be guaranteed the ultimate outcome of secession.[120]

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[113] Ibid [104].
[114] Ibid [86].
[115] Buchanan (2005) 338.
[116] Ibid.
[117] *Québec Secession Reference* [85], [97].
[118] Ibid [68-69].
[119] Ibid [87].
[120] Ibid [88–96].

The conditions set out in the judgement for entering into negotiations were further specified by the Canadian legislature in the Clarity Act[121]. True to its name, the act requires clarity concerning several factors: a clear expression of the will to secede (s. 2.4), expressed by a clear majority of Québeckers (s. 2.2), as answer to a clearly worded referendum question (s. 1.4). Certain circumstances pertaining to negotiations would also preclude secession, namely the lack of address to Aboriginal and other minority rights (s. 3.2).

All matters considered, there cannot be a right to unilateral secession by virtue of democracy, since such an argument fundamentally fails to account for what democracy truly means. A democratic state is built on mutual respect and reciprocal obligations. Québec is bound by obligations to Canada through Confederation and has to look beyond the interests of the Québécois provincial majority. In the same way, Canada has a moral obligation, given certain circumstances, to negotiate secession with Québec.[122] As expressed by the Attorney General of Saskatchewan in his submission to the Court '[t]he threads of a thousand acts of accommodation are the fabric of a nation […]'[123]

[121] Bill C-20, 2d Sess., 36th Parl., 2000, c. 26.
[122] See Buchanan (2005) 362–363.
[123] Quoted in *Québec Secession Reference* [96].

6. Conclusion

6.1 Summary and Analysis

This study set out to examine the phenomena of self-determination and secessionism, not in the context of a people repressed, but for a people who enjoy membership in a liberal democracy. The focal point has been Québec and Canada, and the *Québec Secession Reference* has therefore played a major role.

Question (1) concerned the nature of the Canada-Québec relationship. Their unity has ebbed and flowed in the 250 years since the British conquest. While the parties at times have managed to unite for a common goal, such as during Confederation; they have at others, indeed, been two nations warring in the bosom of a single state.

Québec has always refused assimilation, and instead emphasised their own uniqueness as French-Canadians. This national identity has managed to stay intact over the centuries, due to factors such as the strong influence of the Roman Catholic Church and the long-lived relative isolation of the community. For the most part, English Canada has been accepting of their neighbours, which translated into a federal structure where the people of Québec could preserve and develop their way of life.

The tensions during the 20th century can largely be translated into disagreement over what Confederation meant and what it ought to mean in the future. Québec desired equality as one of two nations, while Canada had to attempt accommodating all of its provinces, new and old. The divide was made clear through the unilateral patriation of the Constitution.

Questions (2) and (3) of the study sought to establish the meaning of self-determination and the possibility for secession in international law. The right to self-determination, as expressed in *inter alia* res. 2626, is vague, but has in state practice and doctrine often been seen as the participation of all citizens, on equal terms, in the democratic process. It therefore primarily represents liberal and individualistic values and ought to be fulfilled already through internal self-determination. The Court concurred this view: Canada is as a democracy entitled to its territorial integrity, and Québec therefore has no right to secession.

Meanwhile, the Québécois struggle to preserve the cultural identity of their Francophone island in an otherwise Anglophone continent. They therefore, naturally, move focus from the individual to the group whom the rights demanded should befall collectively.

Through the *Québec Secession Reference*, the Court confirmed the highly restrictive scope international law gives to collective human rights, as even the right of *peoples* to self-determination is to be fulfilled primarily on an individual level. Once a state has fulfilled this minimum requirement, it has earned its right to territorial integrity.

The effectivity principle is mentioned as another possible way of gaining statehood. The Court did not deny the possibility, but dismissed arguments of it retroactively creating a *right* to secession. Even if possible in theory, it is highly unlikely to succeed in practice, as the entity having declared independence is forbidden from getting international assistance, and not guaranteed recognition.

The implementation of self-determination and a potential secession thereafter in reality becomes a matter of national jurisdiction. For secessionist groups, this can be seen as unsatisfactory. Adopting an argumentation *de lege ferenda,* the question becomes whether international law *should* be concerned with the matter. Interference with an issue clearly within the mandate of state sovereignty would undermine a system whose primary objective is stability. Rather than helping a people who already enjoy a dignified existence to pursue a potentially irrational dream, international law is better suited to fight human right violations or help states develop democratic institutions on a voluntary basis.[124]

If democracy is enough to negate a secessionist cause in international law, it can also be its saving grace on the national level. Relative to question (4), the Court ascribes to democracy a deeper meaning than majority rule. It includes respect for the interest and wishes of all groups within the state. This would protect minorities from what Mill called 'the tyranny of the majority' by guaranteeing them a voice and protection of the cultural aspect of self-determination. Given secessionist aspirations of a certain magnitude, other actors have a democratic duty to enter into negotiations. There cannot however be a democratic *right* to

[124] Cf. discussion by Buchanan (2004) 363.

secession, as that would blatantly disregard interests of other groups who also them enjoy similar rights.

6.2 Concluding Remarks

Despite its nature as a Canadian national judgement, the *Québec Secession Reference* ought to carry international weight. The argumentation of democracy as a set of values guaranteeing mutual consideration to all groups within a multi-ethnic state is poignant, and seen against the Paris Charter must be considered of general relevance. A state based on democratic values therefore ought to take seriously and negotiate the grievances of a group with secessionist ambitions, and a people wishing to secede ought to remain open to other options, if they find also these satisfying their wishes.

In conclusion, self-determination is a collective human right which allows a people to express themselves and preserve their way of life, as long as it does not infringe on individual rights or the rights of other groups in an unacceptable way. There is a strong presumption against self-determination including a right to secession from an independent state. Seen in the light of democratic principles, a people can use their right to self-determination to express their will to secede, and to have this wish respected by others. The democratic process might lead to a state of one's own, or it might not. In the end, it is all about striking a balance between conflicting interests, through thousand acts of accommodation.

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