Centre for International Governance Innovation

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Brexit: The International Legal Implications | Paper No. 6 – December 2017

Lessons from Brexit: Reconciling International and Constitutional Aspirations

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About the Series

Brexit: The International Legal Implications is a series examining the political, economic, social and legal storm that was unleashed by the United Kingdom's June 2016 referendum and the government's response to it. After decades of strengthening European integration and independence, the giving of notice under article 50 of the Treaty on European Union forces the UK government and the European Union to address the complex challenge of unravelling the many threads that bind them, and to chart a new course of separation and autonomy. A consequence of European integration is that aspects of UK foreign affairs have become largely the purview of Brussels, but Brexit necessitates a deep understanding of its international law implications on both sides of the English Channel, in order to chart the stormy seas of negotiating and advancing beyond separation. The paper series features international law practitioners and academics from the United Kingdom, Canada, the United States and Europe, explaining the challenges that need to be addressed in the diverse fields of trade, financial services, insolvency, intellectual property, environment and human rights.

The project leaders are Oonagh E. Fitzgerald, director of the International Law Research Program at the Centre for International Governance Innovation (CIGI); and Eva Lein, a professor at the University of Lausanne and senior research fellow at the British Institute of International and Comparative Law (BIICL). The series will be published as a book entitled *Complexity's Embrace: The International Law Implications of Brexit* in spring 2018.

About the Author

As director of CIGI's International Law Research Program, Oonagh E. Fitzgerald established and oversees CIGI's international law research agenda, which includes policy-relevant research on issues of international economic law, environmental law, intellectual property law and innovation, and Indigenous law.

She has extensive experience as a senior executive in the federal government, providing legal policy, advisory and litigation services, and strategic leadership in international law, national security, public law, human rights and governance.

As national security coordinator for the Department of Justice Canada from 2011 to 2014, Oonagh ensured strategic leadership and integration of the department's policy, advisory and litigation work related to national security. From 2007 to 2011, she served as the Department of National Defence and Canadian Forces legal adviser, leading a large, full-service corporate counsel team for this globally engaged, combined military and civilian institution. Before this, Oonagh served as acting chief legal counsel for the Public Law Sector of the Department of Justice and special adviser for International Law.

Oonagh served as assistant secretary Legislation, House Planning/Counsel at the Privy Council Office from 2000 to 2003. Prior to this, she held various positions in the Department of Justice: senior general counsel and director general, Human Resources Development Canada Legal Services Unit; general counsel and director, International Law and Activities Section; senior counsel for Regulatory Reform; and legal adviser, Human Rights Law Section.

Oonagh has taught at the University of Ottawa, Carleton University, l'Institut international du droit de l'homme and the International Institute of Humanitarian Law.

Oonagh has a B.F.A. from York University (1977). She obtained her LL.B. from Osgoode Hall Law School (1981) and was called to the Bar of Ontario in 1983. She obtained an LL.M. from the University of Ottawa (1990), a doctorate of juridical science (S.J.D.) from the University of Toronto (1994) and an M.B.A. from Queen's University (2007).

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

Executive Summary

From an international and constitutional law perspective, the fallout from the Brexit vote has been and continues to be dramatic. Pursuing such radical change necessarily raises questions about the legitimacy of the process of disengagement, and about whose voices will be heard and considered in the ensuing debate about political reordering. Both the European Union and its member states gain strength and vulnerability from their constituent communities, and the United Kingdom is certainly no exception.

This paper examines the recent United Kingdom Supreme Court (UKSC) *Miller* decision on the invocation of article 50 of the Treaty on European Union (TEU), as well as the reasoning of the Supreme Court of Canada (SCC) in the *Reference re Quebec Secession* to see what guidance might be found regarding the subtle complexity of both sustaining and reforming a constitutional democracy. This analysis suggests that there are difficult lessons to learn from Brexit about constitutional fundamentals, constitutional complexity and the interconnection between international and constitutional aspirations. It would seem that the legitimacy of withdrawal from the European Union will in some measure be judged by how well the leaders heed the voices of constituent communities and work to accommodate them in the new international and constitutional ordering.

Introduction

For some time, the myth of the Westphalian model of the sovereign equality of states defined by territory[1] has provided only a cracked and tarnished mirror to reflect the aspirations of minority populations or distinct peoples incorporated within nation-states. The Brexit vote and Britain's reversing trajectory from greater European integration to isolationism and extraction from the European Union draw into focus the expectations of minority populations and distinct peoples, and raise questions about their possible role in international and constitutional change affecting the nation-state. This paper examines the recent UKSC *Miller* decision[2] on the invocation of article 50 of the TEU,[3] as well as the reasoning of the SCC in the *Reference re Quebec Secession*[4] to ascertain what can be learned about the subtle complexity of both sustaining and reforming a constitutional democracy.

The analysis suggests that majority rule is only one of a collection of core conventions, principles and laws that operate together to sustain constitutional democracy. Emphasizing majority rule above all other relevant conventions, principles and laws in pursuing the Brexit constitutional reform project risks undermining both feasibility and legitimacy. This paper proceeds in three parts: The First Lesson: The *Miller* Decision and Constitutional Fundamentals; The Second Lesson: The Quebec *Secession Reference* and Constitutional Complexity; and The Third Lesson: Negotiating International and Constitutional Change, followed by a brief conclusion.

1 Stéphane Beaulac, "The Westphalian Model in Defining International Law: Challenging the Myth" (2004) 8:2 Austl J Leg Hist 181, online: <www.austlii.edu.au/au/journals/AJLH/2004/9.html>.

2 *R v Miller*, [2017] UKSC 5 [*Miller*].

3 *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, [2007] OJ, C 306/01, art 50 (entered into force 1 December 2009) [TEU].

4 [1998] 2 SCR 217 [*Secession Reference*].

The First Lesson: The *Miller* Decision and Constitutional Fundamentals

The *Miller* decision,[5] issued by the UKSC on January 23, 2017, put to rest an important debate about who, under the British Constitution, has the authority to issue the notice under article 50[6] that would formally commence the withdrawal by the United Kingdom from the European Union. Not surprisingly, the court concluded that, because this notice would trigger a cascade of events that would lead to radical changes in UK law and, ultimately, withdrawal from the European Union, only the British Parliament through legislation, rather than the executive through prerogative action, could authorize the article 50 notice. Responding to the judgment, British Attorney General Jeremy Wright expressed disappointment, but undertook to seek parliamentary authorization.[7]

Two months later, the Theresa May government succeeded in getting a hurried bill through both Houses of Parliament, authorizing the government to invoke article 50, and, on March 29, 2017, the article was triggered by the prime minister writing to the European Council's President Donald Tusk.[8] With her hasty actions, the prime minister appears to have alienated Scottish and Northern Irish populations, the majority of whom voted to remain in the European Union. Since then, an opportunistic election call that May expected would grant her a strong majority to lead the Brexit negotiation has backfired, resulting in an unstable minority government. The delivery of Brexit has become more complex and tenuous.

As the May government takes the United Kingdom ever closer to Brexit, and potentially its own dissolution, it is poignant to note that, in the *Miller* decision, the UKSC did not decide, but took as "common ground" between the parties, that article 50 notice was not revocable.[9] One gathers that there may be more debate on this in the future, and the powder may still be dry on this question. This is an important footnote to the *Miller* decision because, after considering the complexity, difficulty and cost of negotiating Brexit and establishing laws, institutions and international relationships to take the place of EU membership, it is conceivable that the British people might conclude that staying in the European Union is better than Brexit, on the terms being offered.

Constitutional democracy is far more subtle and complex than the advocates for Brexit allowed, and for all their nationalist fervour, their disregard for hallowed English constitutional principles was surprising. They acted as though majority rule was overriding, when constitutional democracy involves various nuanced relations between political convention and law. History has resulted in the evolution of the rule of law, the role of judges, the role of the executive and the role of Parliament.

5 *Miller*, *supra* note 2. The majority judgment was delivered by Lord Neuberger, with whom Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge agreed.

6 *Ibid* at para 25:

> The Treaty of Lisbon introduced into the EU treaties for the first time an express provision entitling a member state to withdraw from the European Union. It did this by inserting a new article 50 into the TEU. This article (article 50) provides as follows:
>
> 1. Any member state may decide to withdraw from the Union in accordance with its own constitutional requirements.
> 2. A member state which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that state, setting out the arrangements for its withdrawal…
> 3. The Treaties shall cease to apply to the state in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the member state concerned, unanimously decides to extend this period.

7 Owen Bowcott, Rowena Mason & Anushka Asthana, "Supreme court rules parliament must have vote to trigger article 50", *The Guardian* (24 January 2017), online: <www.theguardian.com/politics/2017/jan/24/supreme-court-brexit-ruling-parliament-vote-article-50>.

8 UK, Prime Minister's Office, "Prime Minister's letter to Donald Tusk triggering Article 50" (29 March 2017), online: <www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50>.

9 *Miller*, *supra* note 2 at para 26: "In these proceedings, it is common ground that notice under article 50(2)…cannot be given in qualified or conditional terms and that, once given, it cannot be withdrawn. Especially as it is the Secretary of State's case that, even if this common ground is mistaken, it would make no difference to the outcome of these proceedings, we are content to proceed on the basis that that is correct, without expressing any view of our own on either point."

The Brexit question must contend with all of this, as well as with the legal requirements of the TEU.[10]

Citing A. V. Dicey, Sir Edward Coke, the Bill of Rights 1688[11] and the Claim of Right 1689,[12] the majority judgment in *Miller* provides a constitutional law primer to explain what should have been self-evident: parliamentary sovereignty means that the Crown in Parliament has the right to make and unmake any law, and neither the sovereign nor any branch of the executive can interfere with law so made.[13] The dualist system reinforces parliamentary sovereignty by constraining the royal prerogative to conduct foreign affairs, such that when "a proposed action on the international plane will require domestic implementation," the executive must seek parliamentary sanction.[14] Complete withdrawal from the European Union would "constitute as significant a constitutional change as that which occurred when EU law was first incorporated in domestic law by the 1972 Act."[15] Just as Parliament, through the 1972 Act,[16] gave effect to the United Kingdom's membership in what is now the European Union, "constitutional propriety" required "prior Parliamentary sanction for the process" of withdrawal.[17]

This meant that the executive branch did not have the power to change law, with or without the backing of a referendum. The executive could only try to persuade Parliament to change the law. A referendum could result in a change in law if Parliament provided for this by making the coming-into-force of a law conditional on obtaining a certain majority of votes in a referendum. As this was not done in the case of the Brexit referendum, the UKSC concluded that the referendum result was only advisory and could not usurp Parliament to become a new source of law-making authority.[18]

The judgment of the UKSC is circumspect and avoids commenting on the merits of the Brexit referendum. The majority explains that the court had to address the constitutional issues because of their importance, but implied EU membership itself was not one such issue. Some of the most important issues of law that judges have to decide concern questions relating to the constitutional arrangements of the United Kingdom. These proceedings raise such issues. As already indicated, this is not because they concern the United Kingdom's membership of the European Union; it is because they concern "(i) the extent of ministers' power to effect changes in domestic law through exercise of their prerogative powers at the international level, and (ii) the relationship between the UK government and Parliament on the one hand and the devolved legislatures and administrations of Scotland, Wales and Northern Ireland on the other."[19]

It is noteworthy that these were the two issues distilled from the litigation under appeal, although the Leave vote was fundamentally about leaving the constitutional frame of the European Union. The manner in which the United Kingdom's domestic law and governance have been shaped by EU

10 One might ask whether the Brexit team was prepared for First Minister Nicola Sturgeon's calls for a referendum on Scottish independence prior to finalizing Brexit negotiations: "Nicola Sturgeon's consultation on a new Scottish independence referendum gets her out of a tight spot", *The Economist* (13 October 2016), online: <www.economist.com/blogs/bagehot/2016/10/canny-bluff>; Siobhan McFadyen, "Sturgeon public consultation on Referendum 2 — No 10 doesn't even waste time dismissing it", *Sunday Express* (20 October 2016), online: <www.express.co.uk/news/uk/723446/Sturgeon-independence-referendum-snubbed-by-Downing-Street>; Matt Broomfield, "Nicola Sturgeon's speech in full: SNP leader calls for second Scottish independence referendum", *Independent* (13 March 2017), online: <www.independent.co.uk/news/uk/politics/nicola-sturgeon-scottish-independence-speech-in-full-second-referendum-snp-leader-first-minister-a7627166.html>.

11 England, *Bill of Rights Act 1689*, 1 William & Mary Sess 2, c 2.

12 Scotland, *Claim of Right Act 1689*, c 2.

13 *Miller*, *supra* note 2 at paras 43ff.

14 *Ibid* at paras 54–57, citing Campbell McLachlan, *Foreign Relations Law* (Cambridge, UK: Cambridge University Press, 2014) at para 5.20. The majority also referred to the Ponsonby Convention, whereby it became standard practice to lay all treaties, including those that would not impact on domestic law, "before both Houses of Parliament at least 21 days before they were ratified, to enable Parliamentary objections to be heard" (*Miller*, *supra* note 2 at para 58). See also a blog by Jean Leclair in which he suggests "affording a role to Parliament in the triggering of Article 50 does not mean trumping the will of the people. Rather it amounts to complementing their will with a type of public deliberation for which the referendum campaign did not allow." Jean Leclair, "Brexit and the Unwritten Constitutional Principle of Democracy: A Canadian Perspective" (3 November 2016), *UK Constitutional Law Association* (blog), online: <https://ukconstitutionallaw.org/2016/11/03/jean-leclair-brexit-and-the-unwritten-constitutional-principle-of-democracy-a-canadian-perspective/>.

15 *Miller*, *supra* note 2 at para 81.

16 *European Communities Act 1972* (UK), c 68.

17 *Miller*, *supra* note 2 at para 100.

18 *Ibid* at para 124: "Thus, the referendum of 2016 did not change the law in a way which would allow ministers to withdraw the United Kingdom from the European Union without legislation. But that in no way means that it is devoid of effect. It means that, unless and until acted on by Parliament, its force is political rather than legal. It has already shown itself to be of great political significance."

19 *Ibid* at para 4.

law since 1972[20] is treated as mere background to inform the constitutional analysis, rather than as a core part of the constitutional order being scrutinized by the court. In other words, only the formal and non-substantive aspects of undoing 44 years of European political, legal, economic and social integration would be considered by the court. This may reflect a national psyche that, despite the depth, breadth and duration of integration, remains ambivalent and alienated from the European project. Not treating the United Kingdom's integration into the European Union as "constitutional" may seem at odds with the majority justices' characterization of the United Kingdom as not having "a constitution in the sense of a single coherent code of fundamental law which prevails over all other sources of law. Our constitutional arrangements have developed over time in a pragmatic as much as in a principled way, through a combination of statutes, events, conventions, academic writings and judicial decisions...[to be] 'the most flexible polity in existence.'"[21] One might wonder why more than 40 years of European integration had not become part of this evolving British Constitution.

The judgment addresses the question of the legal rights of devolved Parliaments in a minimalist way, noting the existence of the Sewel Convention[22] on consultation and referring to an SCC decision to point out that constitutional convention is neither legally binding nor enforceable in the courts. Popular media emphasized this point, provoking anxiety and legitimacy concerns for Remain voters in Northern Ireland and Scotland.

Citing the SCC's decision in the *Patriation Reference*,[23] Lord Neuberger, for the majority of the UKSC, asserted, "It is well established that the courts of law cannot enforce a political convention."[24] In support of this conclusion, he quoted the SCC majority judgment's comments on the nature of political questions: "The very nature of a convention, as political in inception and as depending on a consistent course of political recognition by those for whose benefit and to whose detriment (if any) the convention developed over a considerable period of time is inconsistent with its legal enforcement."[25]

Lord Neuberger also relied on the dissenting judgment of Chief Justice Laskin and Justices Estey and MacIntyre, who pointed out that "a fundamental difference between the legal...and the conventional rules is that, while a breach of the legal rules...has a legal consequence in that it will be restrained by the courts, no such sanction exists for breach or non-observance of the conventional rules"; rather, "the sanction for non-observance of a convention is political in that disregard of a convention may lead to political defeat, to loss of

20 *Ibid* at paras 14–16:

> On 22 January 1972, two days after that later debate, ministers signed a Treaty of Accession which provided that the United Kingdom would become a member of the EEC on 1 January 1973 and would accordingly be bound by the 1957 Treaty of Rome, which was then the main treaty in relation to the EEC, and by certain other connected treaties. As with most international treaties, the 1972 Accession Treaty was not binding unless and until it was formally ratified by the United Kingdom.
>
> A Bill was then laid before Parliament, and after it had been passed by both Houses, it received Royal assent on 17 October 1972, when it became the European Communities Act 1972. The following day, 18 October 1972, ministers ratified the 1972 Accession Treaty on behalf of the United Kingdom, which accordingly became a member of the EEC on 1 January 1973.
>
> The long title of the 1972 Act described its purpose as "to make provision in connection with the enlargement of the European Communities to include the United Kingdom." Part I of the 1972 Act consisted of sections 1 to 3, which contained its "General Provisions," and they are of central importance to these proceedings.

21 *Ibid* at para 40, citing AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (London, UK: Macmillan, 1915) at 87.

22 *Miller*, *supra* note 2 at paras 137–38:

> The convention takes its name from Lord Sewel, the Minister of State in the Scotland Office in the House of Lords who was responsible for the progress of the Scotland Bill in 1998.... The convention was embodied in a Memorandum of Understanding between the UK government and the devolved governments originally in December 2001 (Cm 5240). Para 14 of the current Memorandum of Understanding, which was published in October 2013, states:
>
> > "The UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government."

23 *Reference re Resolution to Amend the Constitution*, [1981] 1 SCR 753 [*Patriation Reference*].

24 *Miller*, *supra* note 2 at para 141.

25 *Patriation Reference*, *supra* note 23 at 774–75. See also *ibid* at 882–83: "It is because the sanctions of convention rest with institutions of government other than courts...or with public opinion and ultimately, the electorate, that it is generally said that they are political."

office, or to other political consequences, but will not engage the attention of the courts which are limited to matters of law alone. Courts, however, may recognize the existence of conventions."[26]

Lord Neuberger concludes this brief discussion by compartmentalizing constitutional convention as simply outside the purview of the courts. Asserting that the court does "not underestimate the importance of constitutional conventions, some of which play a fundamental role in the operation of our constitution," he concluded that "the Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures...but the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law."[27]

The Second Lesson: The Quebec *Secession Reference* and Constitutional Complexity

Perhaps if there had been less political, public and media pressure directed at the judges and claimants in the Brexit cases, the UKSC might have considered guidance from another SCC decision, the 1998 *Reference re Quebec Secession*,[28] which could have shed more light on the subtle complexity of making momentous constitutional change. This case offers some important practical guidance and realism for future politicians, citizens, lawyers and courts in attempting to unravel the United Kingdom's relationship with Europe. The case has relevance to Brexit in two ways. First, it might help in understanding and addressing the dynamic within the United Kingdom after a divisive referendum revealed the polarized ambitions of its constituent nations. Second, it might assist in appreciating that through the United Kingdom's ratification of the TEU, the UK Parliament's implementing legislation and the resulting integration with Europe and European laws and regulations, a profound constitutional transformation occurred in both Europe and the United Kingdom, the undoing of which will be fraught with political, social, economic and legal risk.

Just as Britons were tensely awaiting the *Miller* ruling from the UKSC,[29] so were Canadians enthralled by the issues at stake in the *Secession Reference*. In the *Secession Reference*, the question was whether the Province of Quebec had a right to secede unilaterally from Canada in the event of a provincial referendum in favour of separation. Finding that the international law right of self-determination was not applicable to the people of Quebec because they enjoyed full political rights and representation in the provincial and federal governments,[30] the SCC focused its attention on secession in accordance with the Canadian Constitution.

Somewhat in contrast to the *Miller* decision's taciturnity, the unanimous judgment of the SCC is striking for its eloquence and profundity in dealing with the sensitive question of how to undo

26 *Miller*, *supra* note 2 at para 142, citing from *Patriation Reference*, *supra* note 23 at 853.

27 *Miller*, *supra* note 2 at para 151.

28 *Secession Reference*, *supra* note 4.

29 For an interesting English perspective on what hung in the balance, see Mark Elliot, "Brexit, Sovereignty, and the Contemporary British Constitution: four perspectives on *Miller*" (16 December 2016), *Public Law for Everyone* (blog), online: <https://publiclawforeveryone.com/2016/12/16/brexit-sovereignty-and-the-contemporary-british-constitution-four-perspectives/>.

30 *Secession Reference*, *supra* note 4 at para 138:

> In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions. Accordingly, neither the population of the province of Quebec, even if characterized in terms of "people" or "peoples", nor its representative institutions, the National Assembly, the legislature or government of Quebec, possess a right, under international law, to secede unilaterally from Canada.

the Canadian state.[31] In the *Secession Reference*, the SCC observed that "the evolution of our constitutional arrangements has been characterized by adherence to the rule of law, respect for democratic institutions, the accommodation of minorities, insistence that governments adhere to constitutional conduct and a desire for continuity and stability."[32] The court identified "four foundational constitutional principles," "the vital unstated assumptions," these being "federalism, democracy, constitutionalism and the rule of law, and respect for minority rights," which "inform and sustain the constitutional text" and "function in symbiosis" such that no one principle can "trump or exclude the operation of any other."[33] The court explained the complex balance of these principles:

> 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.
>
> Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas" (*Saumur v. City of Quebec*, supra, at p. 330).... No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.[34]

The guidance provided by the SCC in these passages shows that a majority vote is an important indicator of the popular will, but taking action in furtherance of that expression is complex; it must be in accordance with the constitutional framework and take into account the other constitutional principles of accommodation of

31 As Warren J Newman notes, "The brilliance of the Supreme Court of Canada's ruling in the Quebec Secession Reference lies in the Court's having had the vision to wed the value of constitutional legality with that of political legitimacy." See Warren J Newman, "Reflections on the Tenth Anniversary of the Supreme Court's Opinion in the Quebec Secession Reference" (22 August 2008), *The Court* (blog), online: <www.thecourt.ca/reflections-on-the-tenth-anniversary-of-the-supreme-courts-opinion-in-the-quebec-secession-reference/>. See also Warren J Newman, "Grand Entrance Hall: Backdoor or Foundation Stone? The Role of Constitutional Principles in Construing and Applying the Constitution of Canada" (2001) 14 SCLR (2d) 197. See also Sébastien Grammond, "Canadian Constitutional Jurisprudence and the Brexit Process" (12 July 2016), *UK Constitutional Law Association* (blog) [Grammond, "Brexit Process"], online: <https://ukconstitutionallaw.org/2016/07/12/sebastien-grammond-canadian-constitutional-jurisprudence-and-the-brexit-process/>. Grammond suggests the court's generous constitutional interpretation "arguably filled gaps in the constitutional text, to ensure that those 'compacts' or 'historic bargains' between the country's constituent parts are upheld." There has been considerable commentary on the *Secession Reference*. The following is a sample: James T McHugh, "Making Public Law Public: An Analysis of the Quebec Reference Case and its Significance for Comparative Constitutional Analysis" (2000) 49:2 Intl Comp LQ 445 at 461–462; Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27 Queen's LJ 389; Richard S Kay, "The Secession Reference and the Limits of Law" (2003) 10 Otago LR 327; Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford, UK: Oxford University Press, 2005); Hugh Mellon, "Secession and Constitutional Principles: Working with the Supreme Court's Statement of Principles" (2007) 20:2 Brit J Can Stud 211. Not all commentaries were laudatory. See e.g. Sujit Choudhry & Robert Howse, "Constitutional Theory and the Quebec Secession Reference" (2000) 13 Can JL & Jur 143 at 170, in which the authors express dissatisfaction with its "pragmatic perspective" and call for more clarity and justification for the judicial role in constitutional adjudication. The influence of the *Secession Reference* on constitutional developments in Eastern Europe, especially in Bosnia and Herzegovina, is also noteworthy: Zoran Oklopcic, "The Migrating Spirit of the Secession Reference in Southeastern Europe" (2011) 24 Can JL & Jur 347 at 348.

32 *Secession Reference*, *supra* note 4 at para 48.

33 *Ibid* at para 49.

34 *Ibid* at paras 67–68.

minority rights[35] and federalism or, in the case of the United Kingdom, regional interests.

The UKSC decision in *Miller* centred on the importance of following the constitutional framework, such that Crown prerogative was constrained by parliamentary sovereignty. Thus, even though the executive could exercise Crown prerogative to negotiate, enter into and withdraw from treaties, it could not do this when it had the effect of making or unmaking domestic law. That could only be done by Parliament. The significance of this constitutional principle was highlighted by the fact that withdrawing from the European Union would result in an unprecedented and massive unravelling of UK domestic law that had resulted from the 1972 Act, which enabled the flow-through of EU law into UK domestic law.[36]

The fundamental order of a constitutional democracy is usually maintained by techniques of entrenchment that make amendment more significant and difficult to achieve.[37] Entrenchment of the core rules of a society gives stability and relative permanence to those rules by imposing special requirements for their amendment. There is a passage in the *Secession Reference* on the entrenchment of rights in a Constitution that, on reflection, may have some relevance to the kind of "entrenchment" confirmed by the UKSC, by which article 50 of the TEU can only be invoked on the authority of an act of Parliament.[38] This may seem like an unusual kind of entrenchment, but it certainly has features of entrenchment: article 50 invocation cannot be done easily and certainly not by executive action; it must accord with domestic constitutional requirements; in particular, Parliament must enact a law authorizing invocation — a vote on a Parliamentary motion is insufficient; then, the terms of separation must be successfully negotiated with the remaining EU countries.

The SCC in the *Secession Reference* stated, "An understanding of the scope and importance of the principles of the rule of law and constitutionalism is aided by acknowledging explicitly why a constitution is entrenched beyond the reach of simple majority rule."[39] The court identified three overlapping reasons: first, to safeguard fundamental human rights from government interference; second, to protect vulnerable minority groups from "assimilative pressures of the majority"; and, third, to allocate "political power amongst different levels of government."[40]

It is worth considering whether the 1972 Act bringing EU law into the United Kingdom, had these purposes and characteristics of

35 In a comment on the *Secession Reference*, Craig Scott noted, "Despite not having a definition given in his mandate, the [Organization for Security and Co-operation in Europe] OSCE High Commissioner on National Minorities in 1994 gave a speech that in effect gave a definition even while diplomatically characterizing it as a non-definition: 'The existence of a minority is a question of fact and not of definition....First of all, a minority is a group with linguistic, ethnic or cultural characteristics, which distinguish it from the majority. Secondly, a minority is a group which usually not only seeks to maintain its identity but also tries to give stronger expression to that identity.'" See Craig Scott, "The Québécois Form a Nation within a United Canada: No Help from International Law" (17 January 2007), *The Court* (blog), online: <www.thecourt.ca/the-quebecois-form-a-nation-within-a-united-canada-no-help-from-international-law/>.

36 *Miller*, *supra* note 2 at paras 18–19:

> Section 2 of the 1972 Act was headed "General Implementation of Treaties." Section 2(1) of the 1972 Act was in these terms:
>
> > "All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly."
>
> Section 2(2) of the 1972 Act provided that "Her Majesty may by Order in Council, and any designated Minister or department may by regulations, make provision...for the purpose of implementing any Community [now EU] obligation of the United Kingdom," which is defined as any obligation "created or arising by or under the Treaties" or "enabling any rights...enjoyed...by the United Kingdom under or by virtue of the Treaties to be exercised", and for ancillary purposes, including "the operation from time to time of subsection (1)."

37 Peter Hogg, "Supremacy of the Canadian Charter of Rights and Freedoms" (1983) 61:1 Can Bar Rev 69 at 76–78, online: <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1638&context=scholarly_works>.

38 For some discussion of possible limitations on UK Parliamentary sovereignty, see *R (Jackson) v Attorney General*, [2005] UKHL 56, [2006] 1 AC 262.

39 *Secession Reference*, *supra* note 4 at para 73.

40 *Ibid* at para 74:

> First, a constitution may provide an added safeguard for fundamental human rights and individual freedoms which might otherwise be susceptible to government interference. Although democratic government is generally solicitous of those rights, there are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection. Second, a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority. And third, a constitution may provide for a division of political power that allocates political power amongst different levels of government. That purpose would be defeated if one of those democratically elected levels of government could usurp the powers of the other simply by exercising its legislative power to allocate additional political power to itself unilaterally.

entrenchment at the time of its passage, or whether it acquired this character of entrenchment over time. The majority in *Miller* is reluctant to go so far, downplaying the complex constitutional implications of Brexit. While acknowledging that "in constitutional terms the effect of the 1972 Act was unprecedented"[41] and "the content of the rights, duties and rules introduced into our domestic law as a result of the 1972 Act is exclusively a question of EU law,"[42] the majority considered that "the 1972 Act can be repealed like any other statute"[43] as "the constitutional processes by which the law of the United Kingdom is made is exclusively a question of domestic law."[44] Therefore, the *Miller* majority stated, "we would not accept that the so-called fundamental rule of recognition (i.e. the fundamental rule by reference to which all other rules are validated) underlying UK laws has been varied by the 1972 Act or would be varied by its repeal."[45] By suggesting that Brexit is just a matter of Parliament repealing and replacing domestic law, the UKSC misses the incommensurable and uncertain constitutional complexity alluded to in the *Secession Reference*.[46]

The Third Lesson: Negotiating International and Constitutional Change

Drawing analogies between the secession of a province from the Canadian federation and Brexit can make one's head spin, but there are points of comparison worth absorbing in order to understand what is at stake in the British government's current effort to withdraw from the European Union. To follow this analogy, one must imagine replacing the province of Quebec with the United Kingdom, to see whether the considerations relevant to the Cree Nation, and English and other minorities in Quebec are analogous to the perspectives of Northern Ireland, Scotland and Wales, and whether the interests of the rest of the provinces, territories and the federal government of Canada bear some resemblance to the interests of the remaining states of the European Union and Brussels.

The SCC in the *Secession Reference* described the process of constitutional change as beginning "with a political process undertaken pursuant to the Constitution itself....The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire."[47]

Consider how these words might apply by analogy to the situation in the United Kingdom. As Sébastien Grammond astutely observes, "the principles identified by the Court could apply, first at the level of the negotiations between the United Kingdom and the European Union, and second, within the United Kingdom."[48] At the international level, the expression by a majority of British voters of their desire to leave the European Union, and their government's lawful invocation of article 50 gives rise to a concomitant duty on the other members of the European Union to negotiate in good faith. This is a political process undertaken pursuant to the Constitution of the European Union, that is, the TEU. At the domestic level, implementing the referendum result requires a negotiation with the constituent parts of the United Kingdom: the devolved governments, affected minorities and other stakeholders.

The SCC then explained that "the corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table....The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government

41 *Miller*, *supra* note 2 at para 60.

42 *Ibid* at para 62.

43 *Ibid* at para 60.

44 *Ibid* at para 62.

45 *Ibid* at para 60. See also the discussion at paras 61–63.

46 Brian Davey, "Brexit and complexity", Foundation for the Economics of Sustainability (Feasta) (10 May 2017), online: <www.feasta.org/2017/05/10/brexit-and-complexity/>.

47 *Secession Reference*, *supra* note 4 at para 88.

48 Grammond, "Brexit Process", *supra* note 31.

to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed."[49]

In that negotiation, all parties' conduct would be governed by the constitutional principles of "federalism, democracy, constitutionalism and the rule of law, and the protection of minorities."[50] These principles led the court to reject "absolutist propositions."[51] There was neither a legal right to unilateral secession nor a legal right to ignore the results of a clear referendum. The court reiterated that "the democracy principle, as we have emphasized, cannot be invoked to trump the principles of federalism and rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole."[52] Equally, the court observed, "The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada."[53] As a consequence of these competing constitutional claims, "negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec."[54]

The court pointed out that, although the requirement to negotiate in good faith and adhere to constitutional principles would not determine whether or not secession in fact proceeded, the manner in which the negotiation occurred would substantially affect the legitimacy of the result, whatever it might be, legitimacy being a crucial factor in both domestic and international acceptance of that result. A breach of the "constitutional duty" to engage in principled negotiation "undermines the legitimacy of a party's actions…and may have important ramifications at the international level….Thus, a failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's claim to legitimacy which is generally a precondition for recognition by the international community. Conversely, violations of those principles by the federal or other provincial governments responding to the request for secession may undermine their legitimacy."[55]

It is arguable that these dynamics are now playing out in the context of Brexit, within the United Kingdom and at the international level, with the launch of negotiations with the European Union. Majority rule is only part of constitutionalism, and those who fail to recognize this are unlikely to be effective negotiators in their own cause. The court's advice is deeply practical, as it explained the risks in allowing majority rule to trump all other constitutional values, which is what Quebec's assertion of a right to unilateral secession would do:

> Those who support the existence of such a right found their case primarily on the principle of democracy. Democracy, however, means more than simple majority rule. As reflected in our constitutional jurisprudence, democracy exists in the larger context of other constitutional values such as those already mentioned. In the 131 years since Confederation, the people of the provinces and territories have created close ties of interdependence (economically, socially, politically and culturally) based on shared values that include federalism, democracy,

49 *Secession Reference, supra* note 4 at para 88. See also David R Wingfield, "The Brexit Case: Does the Constitution Have a Place for Democracy?" (2016) 35 U Queensland LJ 343 at 348, emphasizing that the expression of democratic will obligates action by the executive and Parliament to take steps to leave the European Union:

> Should the analysis of the Supreme Court of Canada be considered in the UK, the question raised before the Divisional Court might be answered quite differently. The answer would be that the executive branch of the Government has the political legitimacy and a corresponding constitutional duty to take those steps required under international law (which only the executive has the power to do) to bring about the departure of the UK from the various treaties that comprise its membership in the EU and Parliament has the political legitimacy and corresponding constitutional duty to take those steps required under domestic law (which only Parliament has the power to do) to remove EU law from the UK.

50 *Secession Reference, supra* note 4 at para 90.

51 *Ibid*.

52 *Ibid* at para 91.

53 *Ibid* at para 92.

54 *Ibid* at paras 92, 103.

55 *Ibid* at para 152. Speaking of legitimacy, a crucial but only obliquely addressed issue in the *Secession Reference* was the claim of the Cree Nation that a unilateral declaration of independence by Quebec would have drastic and deeply unjust consequences for them, as it would force them out of Canada, dividing the Cree Nation between two countries. In their own referendum on the question, they had "overwhelmingly rejected (by over 95%) being separated from Canada without their consent." See Claude-Armand Sheppard, "The Cree Intervention in the Canadian Supreme Court Reference on Quebec Secession: A Subjective Analysis" (1999) 23 Vermont L Rev 845 at 850–51. If Quebec ever does try to negotiate an exit from Canada, how the issue of Cree sovereignty is addressed will likely be crucial in the quest for legitimacy.

> constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly secession of a province "under the Constitution" could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.[56]

This examination of the *Secession Reference* in the context of Brexit demonstrates that constitutional principles — including democratic principles that allow for the voices of distinct groups within a nation, relevant political conventions and rule of law, and respect for minorities — all need to be taken into account in negotiating Brexit. It is not a simple task, and the legitimacy of the outcomes will be judged by the way in which the processes adhere to these principles of inclusion. The judgment of the UKSC in *Miller* is clear that ministers are not legally compelled to consult the devolved governments. However, the guidance of the SCC in the *Patriation Reference*[57] and the *Secession Reference* indicates adherence to the Sewel Convention and other relevant democratic principles will be important for making constitutional changes that are viewed as legitimate within the United Kingdom and internationally. Reflecting on the *Secession Reference* years before the Brexit vote, Mark Walters considered what guidance is needed when legal systems become pathological:

> The [*Secession Reference*] confirms that these underlying constitutional principles are no less legal than the written ones they support, but that, as political allegiance to positive sources of law begins to unravel and the idea of revolution is mooted seriously, adherence to the customary or unwritten constitution will become essential if peace and basic order in society is to be maintained. In other words, when the condition of a legal system is "pathological," only universal legal principles, not specific written ones from the system itself, will secure the ends of the rule of law.[58]

This prescription seems highly relevant in the aftermath of the Brexit vote. The early Brexit rhetoric was simplistic and polarized, implying that a majority vote was all that counted to move forward and even suggesting the courts had no role in guiding the process. This was both incorrect and inconsistent with the underlying historical and constitutional values that define the United Kingdom. Constitutional democracy and the rule of law could be victims of an inordinate emphasis on the referendum. Rather, the referendum should be treated as a first step, indicating a desire to engage in negotiation.

The terms of the negotiation, however, must address the full range of constitutional principles — respect for minorities, rule of law, constitutionalism and the democratic interests of distinct regions. To ignore these key points would sow seeds of conflict and disintegration within the United Kingdom. Fundamentally, the people of the United Kingdom need to ask whether they want separation at any cost, including to the integrity of the United Kingdom, or whether the trajectory of shared history and reconciliation that created the integrated United Kingdom is more important. If the latter, then much more political discussion needs to take place to set the negotiating terms for a new relationship with the European Union.

The European Union, in this analogy from the *Secession Referen*ce, is Canada, the remaining provinces and minorities within the Province of Quebec. The European Union and its citizens, including Remain voters in the United Kingdom, have vested interests in the United Kingdom remaining within the European Union. They have organized their affairs confident in a future within the European Union. Their families, education, careers and businesses are now in a state of uncertainty and trepidation. These are the kind of minority rights and regional considerations that need to be addressed fairly if the Brexit process is to have legitimacy. After the disastrous election results, the UK government has started to confront the complexity of momentous constitutional change with stepped-up rhetoric about consultation with devolved governments and

56 *Secession Reference*, *supra* note 4 at para 149.

57 *Patriation Reference*, *supra* note 23.

58 Mark D Walters, "Nationalism and the Pathology of Legal Systems: Considering the Quebec Secession Reference and its Lessons for the United Kingdom" (1999) 62:3 Mod L Rev 371 at 384.

other affected stakeholders, such as internationally focused businesses and the consideration of EU workers.[59] The government has announced the contours of its Brexit negotiating plan, including the Great Repeal Bill[60] and the rejection of the Charter of Fundamental Rights of the European Union[61] (the Charter), ostensibly on the grounds it created no new rights, freedoms or principles and added considerable complexity.[62] The Department for Exiting the European Union website reads like a community bulletin board in a (self-generated) state of emergency as it attempts to provide updates and answers to a wide array of increasingly anxious stakeholders.[63]

While the *Secession Reference* envisioned the possibility that good faith negotiations could fail to result in satisfactory terms of separation, article 50 suggests that even if negotiations fail, exit from the European Union may happen automatically. To state the obvious, there is no guarantee that the European Union will accept the terms that the United Kingdom proposes. The more the UK government adheres to constitutional principles of democracy, rule of law and respect for minorities, the more likely it will be able to ascertain whether Brexit is indeed a viable path for the United Kingdom, or whether it is a road leading toward the breakup of not only the European Union but also the United Kingdom itself. If, through a more

59 See e.g. UK, Department for Exiting the European Union (DEEU), News Release, "Minister Robin Walker visits the South West: Government engages with sectors at the heart of the region's economy" (31 July 2017), online: <www.gov.uk/government/news/minister-robin-walker-visits-the-south-west>; UK, DEEU, News Release, "Brexit Minister concludes two day tour of Scotland: the visit comes as the UK Government has stepped up its engagement with businesses from all parts of the UK" (28 July 2017), online: <www.gov.uk/government/news/brexit-minister-concludes-two-day-tour-of-scotland>; UK, Home Office, News Release, "The Home Secretary has today (27 July) commissioned the Migration Advisory Committee to examine the role EU nationals play in the UK economy and society" (27 July 2017), online: <www.gov.uk/government/news/home-secretary-commissions-major-study-on-eu-workers>. The government site offers the following helpful notice: "There is no need for EU citizens living in the UK to do anything now. There will be no change to the status of EU citizens living in the UK while the UK remains in the EU. If you would like to find out the latest information you can sign up for email updates." See UK, Home Office, UK Visas and Immigration & DEEU, "Status of EU citizens in the UK: what you need to know", online: <www.gov.uk/guidance/status-of-eu-nationals-in-the-uk-what-you-need-to-know>.

60 UK, DEEU, "Factsheet 4: Power to implement the withdrawal agreement" in *Information about the Repeal Bill*, (London, UK: DEEU, 2017), online: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/642864/Factsheets_-_Power_to_Implement_the_Withdrawal_Agreement.pdf>.

61 The Charter was given legal effect by the Lisbon Treaty on its entry into force in December 2009. Article 6(1) of the TEU provides for the Charter to have the same legal status as the EU treaties. See UK, DEEU, "Factsheet 6: Charter of Fundamental Rights" in *Information about the Repeal Bill* (London, UK: DEEU, 2017), online: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/642866/Factsheets_-_Charter_of_Fundamental_Rights.pdf>. Other considerations for this decision may have been the Tory government's desire not to be subject to the European Court of Justice or to expand human rights. Meanwhile, a proposal to repeal the UK Human Rights Act was criticized as likely to have a negative impact in the "devolved nations": "Human rights are entrenched in the devolution settlements of Scotland, Wales and Northern Ireland in a way that they are not under the UK's constitution: acts of the devolved legislatures can, for example, be quashed by courts for non-compliance with the European Convention on Human Rights or the EU Charter." See UK, House of Lords European Union Committee, "The UK, the EU and a British Bill of Rights" HL Paper 139, 9 May 2016 at para 180, online: <https://publications.parliament.uk/pa/ld201516/ldselect/ldeucom/139/139.pdf>.

62 In the *UCL Brexit Blog*, Ronan McCrea opined:

> The most likely means through which a withdrawal agreement under Article 50 could be challenged is by means of a referral of the agreement to the Court of Justice under Article 218(11) of the Treaty on the Functioning of the European Union. Under this article, any Member State, the European Parliament, the Council and the Commission are all entitled under to seek the opinion of the Court of Justice "as to whether an agreement envisaged is compatible with the Treaties". The same Article makes it clear what occurs if incompatibility is found between the proposed agreement and the Treaties: "Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised".
>
> As with so many elements of the Brexit process, the means by which the UK can attain what may have seemed rather clear objectives, are very unclear. Escaping from the control of the Court of Justice and avoiding the prospect of decisions of UK authorities being overturned on the basis that they violate EU fundamental rights norms was one of the key goals of those who supported Brexit....Compliance with EU fundamental rights, and indeed with the basic constitutional norms of the EU, will be part of any withdrawal agreement under Article 50.

See Ronan McCrea, "Can a Brexit Deal Provide a Clean Break with the Court of Justice and EU Fundamental Rights Norms?" (17 October 2016), *UCL Brexit Blog* (blog), online: <https://ucl-brexit.blog/2016/10/17/ronan-mccrea-can-a-brexit-deal-provide-a-clean-break-with-the-court-of-justice-and-eu-fundamental-rights-norms/>. See also Albert Sanchez-Graells, "Why an Appeal of the High Court Parliamentary Approval of Brexit Judgment Will Bring the Litigation to CJEU" (3 November 2016), *How to Crack a Nut* (blog), online: <www.howtocrackanut.com/blog/2016/11/3/why-an-appeal-of-the-high-court-parliamentary-brexit>, in which Sanchez-Graells argues that "the UKSC has an absolute and inexcusable obligation to request a preliminary ruling on the interpretation of Article 50 TEU from the CJEU the moment the appeal against the High Court's Judgment (eventually) reaches its docket. Otherwise, the UKSC risks triggering an infringement of EU law and eventually creating liability in damages under the Kobler/Traghetti del Mediterraneo strand of case law on State liability."

63 UK, DEEU, online: <www.gov.uk/government/organisations/department-for-exiting-the-european-union>.

inclusive negotiation process consistent with constitutional principles, the UK government finds a viable path for Brexit, the resulting departure from the European Union will also be more widely viewed as legitimate. With Brexit negotiations getting off to a rocky start, perhaps the last hope is that, as noted above, the UKSC did not decide, but took as "common ground" between the parties, that article 50 notice was not revocable. In other words, if the Brexit negotiations and the fraying relations with Northern Ireland, Scotland and Wales become too problematic, it may be necessary to explore the possibility of an exit from Brexit. After peering over the brink of Brexit at the complexity, difficulty, cost and acrimony that it entails, internal reconciliation with its own constituent nations and external reconciliation with the remaining EU nations may be a much-needed option for the United Kingdom to explore.

Conclusion

Pursuing momentous constitutional and international change such as the United Kingdom's exit from the European Union raises questions about whose voices will be included in the ensuing debate.[64] While the European project is a case study in pluralism, even its reluctant member, the United Kingdom, is not homogenous and gains both strength and vulnerability from its constituent communities. Recasting the lead characters in the *Secession Reference* allows access to a wealth of insights about the practical interplay of constitutional principles and conventions that could be useful for negotiators — whether for a devolved government, the United Kingdom or the European Union — to bear in mind. Casting the United Kingdom in the role of Quebec, one can imagine that the concerns of the Cree Nation and English and other minorities in Quebec bear some analogy to those of Northern Ireland, Scotland and Wales, and that the interests of the rest of the provinces, territories and the federal government of Canada are analogous to the interests of the remaining states of the European Union and Brussels. While there are many obvious legal and political differences in the facts underlying the *Secession Reference* and Brexit, this analysis suggests that, beyond the matters decided in *Miller*, there may be other constitutional issues to consider, such as the interests of devolved governments, Remain voters, European governments and European citizens.

James Tully illustrates the complexity and diversity that lurk beneath the surface of modern nation-states:

> Philosophers of multiculturalism, multinationalism, Indigenous rights and constitutional pluralism have elucidated struggles over recognition and accommodation of cultural diversity within and across the formally free and equal institutions of constitutional democracies. Theorists of empire, globalisation, globalisation from below, cosmopolitan democracy, immigration and justice-beyond-borders have questioned the accuracy of the inherited concepts of self-contained, Westphalian representative nation-states in representing the complex, multilayered global regimes of direct and indirect governance of new forms of inequality, exploitation, dispossession and violence, and the forms of local and global struggles by the governed here and now. Finally, post-colonial and post-modern scholars have drawn attention to how our prevailing logocentric languages of political reflection fail to do justice to the multiplicity of different voices striving for the freedom to have an effective democratic say over the ways they are governed.[65]

Tully outlines a "subaltern" school of political thought in which "questions of politics are approached as questions of freedom," where one asks "what are the possible practices of freedom in which free and equal subjects could speak and exchange reasons more freely over how to criticise, negotiate and modify their

64 The subtleties have been missed by many. Ringo Starr probably spoke for a large swath of disgruntled Brexiters when he commented, "The people voted and, you know, they have to get on with it....Suddenly, it's like, 'Oh, well, we don't like that vote.' What do you mean you don't like that vote? You had the vote, this is what won, let's get on with it." See Harriet Gibsone, "Ringo Starr wants people of Britain to 'get on' with Brexit", *The Guardian* (14 September 2017), online: <www.theguardian.com/music/2017/sep/14/ringo-starr-wants-britain-to-get-on-with-brexit>.

65 James Tully, *Public Philosophy in a New Key*, vol 1 (Cambridge, UK: Cambridge University Press, 2008) at 19–20, online: <https://moodle.ufsc.br/pluginfile.php/1221563/mod_resource/content/1/Tully%20-%20Political%20Philosophy%20as%20Critical%20Activity.pdf>.

always imperfect practices," and in which it is a "permanent task" to ensure "practices of governance…do not become closed structures of domination under settled forms of justice but are always open to practices of freedom."[66]

There are difficult lessons to learn from Brexit about constitutional fundamentals, constitutional complexity and the interconnection between international and constitutional aspirations. Moments of dramatic international and constitutional change such as the Brexit project provide natural opportunities for dissent and discontent to be spoken out loud. The legitimacy of the Brexit project will in some measure be judged by how well the leaders heed these alternative voices and work to accommodate them in the new international and constitutional ordering.

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66 *Ibid* at 38.

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