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SYMPOSIUM

OUI, Québec needs a written constitution.

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Does Québec need a written constitution? My answer is unequivocally, YES. I will develop on this strong belief- which I have held many years¹- that Quebec should to exercise its constituent power and needs to adopt such a written constitution. Two reasons justify this course of action. The adoption of a *Québec Constitution* would give Québec its own constitutional identity (I). It could also help end the constitutional impasse which results from the repatriation the *Constitution of Canada* without the consent of Québec (II).

I- Quebec's constitutional identity

Within society, a formal constitution fulfills an undeniable "identity function". My colleague and distinguished academic, Professor Jacques-Yvan Morin, calls a constitution the "mirror of a nation". His plea for a Québec Constitution is as follows :

Undoubtedly, the mere fact of adopting a formal constitution does not provide a guarantee of good government and equal rights for all. Any hope for pure constitutional rationality constitutes magical thinking, to the extent that the norms are not securely attached to the realities, needs and aspirations. But if they can be and the conditions exist to allow a basic law to become a compendium of societal values, an

¹ For the collected texts that I have written on the issue of a Québec constitution, see Daniel Turp, *La Constitution québécoise – Essais sur le droit du Québec se doter de sa propre loi fondamentale*, Montréal, Éditions JFD, 2013. Such a belief is shared for many : see David PAYNE, « Que le Québec se donne une Constitution! », *Le Devoir*, 28 February 28. 1984, p. A-7 et 8; Jacques-Yvan MORIN, « Pour une nouvelle Constitution du Québec », (1985) 30 *R. de D. McGill* 171; Jacques DUFRESNE, *Le courage et la lucidité: essai sur la Constitution d'un Québec souverain*, Sillery, Septentrion, 1990; André BINETTE, « Pour une constitution du Québec », *Le Devoir*, December 11, 1992, p. B-8; Marc CHEVRIER, « Une Constitution pour le peuple québécois », (1995) 2 (10) *L'Agora* 13; Marc BRIÈRE, « L'acte fondateur de la nation – L'établissement d'un nouveau contrat social s'impose », *Le Devoir*, April 25, 2000, p. A-7; Guy LAFOREST, *Pour la liberté d'une société distincte – Parcours d'un intellectuel engagé*, Québec, Presses de l'Université Laval, 2004, p. 351; Denis MONIÈRE, « Le besoin d'une Constitution québécoise », (2005) 95 (2) *L'Action nationale* 30; André LAROCQUE, « Constitution et citoyenneté québécoise. Pourquoi pas? », *Le Soleil*, April 2, 2007. p. 17; Michel SEYMOUR, « Pour une Constitution québécoise », (2008) 222 *Spirale* 16; Marc CHEVRIER, *La République québécoise Hommages à une idée suspecte*, Montréal, Boréal, 2012; Danic PARENTEAU, *L'indépendance par la République — De la souveraineté du peuple à celle de l'État*, Montréal, Fides, 2015, p. 169-195.

pedagogical instrument for socio-political education, then one is entitled to give Quebec a "living" Constitution, its mirror, and at the same time its ideal portrait².

Morin, who was the former Deputy Premier of Quebec made explicit the identity dimension in his May 21, 1985 covering letter to the *Avant-projet de Constitution du Québec* (Draft Constitution of Quebec) which he drafted at the request Prime Minister René Lévesque. He wrote that « such a socio-economic and cultural project may not only be an instrument of progress for our society, but also a factor of identity »³.

In describing the values that should guide a political community and its institutions and thereby influence the governance of a State, a constitution becomes a tool to acquire an identity, both domestically and internationally. As I have had the opportunity to write and say for the last 18 years, a constitution is first and foremost a document aimed at establishing the foundations of the life of a nation. It organizes public life around a basic law which is likely to become an instrument to empower a people and enhance participation of its citizens in the democratic life of the nation.

Today, Quebec does not have a constitutional identity. Taken together, Québec's laws, whether ordinary or quasi-constitutional, do reflect such an identity. Our University of Ottawa, colleague, Benoît Pelletier, who was the former minister for Intergovernmental Affairs under Québec's Prime minister Jean Charest, seems to be of the same opinion when he writes :

Quebec already has a constitution in the material sense. It consists of measures contained in the constitutional laws, conventions and principles established by the courts. But something is missing in Quebec : a constitution in due form, a fundamental text which citizens can identify as having an indisputable authority from the legal or moral standpoint. [...]

Concerned that Quebec must preserve its identity, I firmly believe that one of the avenues to maintain such identity is to enshrine it in a basic law, that is to say, a constitution having precedence over any ordinary legislation enacted by the National Assembly.

The drafting of a document of such importance would allow Quebecers to take stock of their common values. Those values that bring us together are also those which distinguish us from any other society in North America. It seems imperative that we determine all together what we are and where we want to go in a collective way⁴.

Successive Quebec governments have refused the new constitutional identity that Canada enshrined in the *Constitution Act, 1982* and its *Canadian Charter of Rights and Freedoms*. The affirmation of the supremacy of God in the preamble of the *Canadian Charter* is hardly compatible with the progressive secularization of public institutions in Quebec. It also runs afoul of the maintenance and enhancement of the multicultural heritage of Canadians promoted by Article 27 of the Charter. In short, it is not consistent with the choice of interculturalism - rather than multiculturalism - made by Quebec.

The adoption without Québec's consent of constitutional language standards in Quebec and the impositions of official bilingualism have increased the rejection in Québec of a Canadian constitutional identity. And the repeated refusal to recognize its distinctiveness or to identify Québec as a people or nation in the *Constitution of Canada* have reinforced the opposition of Quebec to Canada's constitutional identity.

² See Jacques-Yvan MORIN, « Pour une nouvelle Constitution du Québec », (1985) 30 *Revue de droit de McGill* 171. p. 220 (author's translation). See also Jacques-Yvan, « Une Constitution nouvelle pour le Québec - Le miroir d'une nation », *Le Devoir*, July 15, 2008, p. A-7.

³ This letter is reprinted in Daniel TURP, *Essais sur la Constitution québécoise*, *supra* note 1, p. 416-417.

⁴ See Benoît PELLETIER, *Une certaine idée du Québec – Parcours d'un fédéraliste de la réflexion à l'action*, Québec, Presses de l'Université Laval, 2010, p. 165 (author's translation).

In terms of constitutional identity, some argue that it remains preferable to reform the *Constitution of Canada*. This should happen in 2017 to commemorate the 150th anniversary of the Canadian Federation. Québec's Prime Minister Philippe Couillard has suggested such an avenue. But it falls short of promoting a process that would allow Québec to adopt its first Constitution⁵. Others have argued that Québec must give itself a proper constitutional identity by initiating a process to adopt a first constitution of Québec⁶.

One might consider that the initiative to give Québec a constitutional identity could involve two steps, one being the amendment of the *Constitution of Canada* and the other the adoption of a Québec Constitution. Such a constitutional roadmap was proposed in 1967 by none other than Paul Gérin-Lajoie in his capacity as chairman of the Constitutional Affairs Committee of the Political Committee of the Québec Liberal Federation. That Committee proposed "two new constitutions, two deadlines" and the conclusion of the report included the following passage in this regard:

It is clear from the foregoing that Québec requires a new Constitution of Canada and a new Constitution of Québec. There was a time when a patch or a few specific amendments, could meet its needs. But the requirements of the present, both from the standpoint of the national symbol from the perspective of the effective functioning of government, require entirely new documents - documents designed at home, prepared at home, adopted at home, with the approval of the sovereign people⁷.

Hence, the author of the « doctrine Gérin-Lajoie » which provided - and still gives Québec the foundation of its international identity, believed almost 50 years ago that a *Constitution of Québec* was required to meet the needs of Québec. I share this view. And I am also convinced that the adoption of such a constitution could also, as I will now suggest, help resolve Canada's constitutional impasse.

II- Canada's Constitutional Impasse

If the adoption of a written one could provide Québec with its own constitutional identity, its drafting is also needed to bring to end the constitutional impasse resulting from the 1982 repatriation of the *Constitution of Canada* without the consent of Québec. In my view, the end of the impasse could come through the adoption of a *Québec Constitution* and a resolution to amend the *Constitution of Canada* in order to accommodate Québec's distinct constitutional identity or by adoption of a *Constitution of a sovereign and independent Québec* rendered necessary by the refusal by Canada to negotiate or to agree to changes that would allow Québec to develop its own basic law and constitutional identity.

⁵ In the speech he gave on March 16, 2013, Philippe Couillard declared : « I cannot conceive that one can get involved in Québec politics and choose Canada without the desire to see Québec return one day in the Canadian family. We cannot let fall into oblivion from symbolic perspective a major issue such as the absence of Québec's signature to Canada's *Constitution Act, 1982*. [...] It belongs to us, Québécois of all origins, French and English, to take the initiative of such discussion. It is to us to say who we are. It is in Québec's interest as much as in Canada's » : see Jessica NADEAU, « PLQ- Couillard élu nouveau chef », *Le Devoir*, March, 17, 2013, p. A-1 (author's translation).

⁶ Such is the case of Jacques-Yvan Morin, Benoît Pelletier et myself, but also Marc CHEVRIER, *supra* note 1, p. 239, André BINETTE, « La succession royale, la Constitution canadienne et la Constitution du Québec », *Bulletin québécois de droit constitutionnel*, numéro 3, hiver 2008, p. 1 and Jocelyn CARON, *Choisir le progrès national*, Montréal, Duide, 2013, p. 400 and ff.

⁷ See Paul GÉRIN-LAJOIE, *Rapport du comité des affaires constitutionnelles de la commission politique de la Fédération libérale du Québec*, Montréal, Octobre 1967. For a comment of this report, read Marc CHEVRIER, « La République associée du Québec et sa constitution », *Encyclopédie de l'Agora*, 1^{er} avril 2012 [online : http://agora.qc.ca/documents/constitution_quebecoise--la_republique_associee_du_quebec_et_sa_constitution_par_paul-gerin_lajoie] (accessed on March 28, 2016).

More than 30 years have elapsed since what one author called the 1982 "constitutional coup."⁸ It is not acceptable to trivialize this event and agree to be subject to a constitutional order against the will of Quebec. The constitutional question must both cease to be put on hold or be presented as being only a matter of "old bickerings", or the subject of repeated "moratoriums"⁹.

The adoption of a Québec Constitution could help to end the constitutional impasse in two ways. On one hand, the drafting of a Québec Constitution could help define both the standards of a new Quebec constitutional order and identify the amendments to the *Constitution of Canada* needed in order for the new Quebec constitutional order to be consistent with the Canadian constitutional order. A draft Québec Constitution could therefore be accompanied by a draft resolution containing the various amendments which may be necessary to ensure the coexistence of the constitutional orders of both Canada and Quebec. Preceded by the approval of the Quebec people in a referendum, the adoption by Québec's National Assembly of a draft Québec Constitution and a draft resolution to amend the Constitution of Canada would qualify as a legitimate attempt to change the Canadian Constitution. It would therefore, as stated by the Supreme Court of Canada in its *Reference re secession of Quebec*¹⁰, trigger "the corollary obligation of all parties to come to the negotiating table"¹¹. If negotiations succeeded and amendments to the Constitution of Canada proposed by Quebec were accepted, Quebec could bring its own constitution into force and accept the Canadian constitutional order as amended. Such actions would end the constitutional impasse.

If, on the other hand, the negotiations were not successful due to the fact that all parties did not agree to come to the negotiating table or refused, during negotiations, the constitutional amendments proposed by Quebec, the drafting process of Québec's Constitution would end the constitutional impasse and allow Quebec to adopt the constitution of a sovereign and independent country.

In fact, the obligation of Canada to negotiate with Québec the constitutional amendments required to allow the coexistence of the *Constitution of Canada* and a new Constitution of Québec will put Canada before a real choice : respect the will of Québec for more constitutional autonomy reflected in a draft Québec Constitution and also effect the changes in the Constitution of Canada desired by Quebec or face the possibility of Québec adopting the Constitution of a sovereign and independent Québec.

Without doubt, it is the content and scope of the constitutional amendments required by Quebec that would affect the outcome of negotiations. They could lead to the end of the constitutional impasse. Constitutional lawyers and scholars who promoted the idea of drafting a Québec Constitution have not always identified explicitly the constitutional changes that should be required to allow the coexistence of a new Quebec constitution and the Constitution of Canada. Others who promote the idea of an domestic constitution for Quebec have been vague on the constitutional amendments needed for coexistence. Benoît Pelletier speaks of "the exercise that

⁸ See Frédéric BASTIEN, *The Battle of London- Trudeau, Thatcher, and the fight for Canada's Constitution*, Toronto, Dundurn, 2014, p. 313.

⁹ See Jocelyn CARON, « Question constitutionnelle- La voie du progrès national- En niant le problème et en l'associant basement à des " vieilles chicanes ", les libéraux ont fini par faire oublier l'importance de la loi fondamentale » *Le Devoir*, March 28, 2013, p. A-9

¹⁰ [1998] 2 SCR 217.

¹¹ *Id.*, § 88. The full text of this paragraph reads as follows : " In Canada, the initiative for constitutional amendment is the responsibility of democratically elected representatives of the participants in Confederation. Those representatives may, of course, take their cue from a referendum, but in legal terms, constitution-making in Canada, as in many countries, is undertaken by the democratically elected representatives of the people. 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."

needs to be undertaken in order that a Constitution of Quebec is adapted to the federal context, in other words can co-exist seamlessly with the Constitution of Canada", while adding that "[obviously] the scope of each of the Constitutions would become difficult to delineate with precision."¹².

In the same fashion, the authors Alain-Gagnon and Raffaele Iacovinoqui¹³ do not define the constitutional changes that would allow Quebec to adopt a basic law in line with its aspirations. As for Jocelyn Caron, he presents three options in order to "clearly define Quebec demands in constitutional matters [...] a Quebec Constitution [...], a sketch of Canadian Constitution amended or a list of constitutional demands."¹⁴. He does not further define the ins and outs of his three options.

Two promoters of a Québec Constitution are slightly more explicit on the content of the constitutional amendments needed in order to allow the coexistence of a new Quebec constitution and the Constitution of Canada. Indeed, André Binette includes among the necessary amendments to "the provisions abolishing the Canada-British monarchy in Quebec, and the transformation of the Province of Quebec into an associated republic of Québec"¹⁵. These changes would be necessary to replace the lieutenant governor and appoint a governor or a president or to allow their election by universal suffrage or by the members of the National Assembly. In a later text in which he presents a model of the constitution of a more autonomous Québec, Binette suggests the transfer of some powers to Quebec over such matters as unemployment insurance and expresses the opinion that the adoption of a constitutionally more autonomous Québec "would require profound changes to the Canadian Constitution."¹⁶.

In introducing his sketch of a republican constitution, Professor Marc Chevrier affirmed that "it is not forbidden either in Quebec to want to go beyond the limits of Canadian constitutional law; if Québec wants to officially become a republic [and] extend its powers, it must clearly indicate the changes he wants, have them approved by a referendum and thus engage the rest of Canada in the negotiation of a constitutional reform it will have initiated with the support of the population."¹⁷. And before presenting the elements of such a republican constitution, he adds:

Among the proposals, two types of constitutional provisions should be distinguished: the first may come into force without using the amending procedure. These provisions would have immediate effects. The second would require amendments to the Canadian Constitution that the National Assembly could incorporate in the draft Constitution without putting them into force. The effect of these declaratory provisions would be delayed. The National Assembly has already resorted to this method to adopt legislation [...]. Following a successful referendum on a draft Québec Constitution, the declaratory provisions would automatically become the basis of a constitutional amendment proposal to the rest of the country over which the talks should engage in good faith¹⁸.

For many, the solution to the constitutional impasse therefore requires the adoption of a Constitution of Quebec whose initial contents should, as is stated by Marc Chevrier, be on the "menu of public discussion and constituents program"¹⁹.

¹² See Benoît PELLETIER, *supra* note 4, p. 171.

¹³ See Alain-G. GAGNON et Raffaele IACOVINO, *De la nation à la multination*, Montréal, Boréal, 2007, p. 222-230.

¹⁴ See Jocelyn CARON, *supra* note 6, p. 400.

¹⁵ See André BINETTE, *supra* note 6, p. 1. See also Gilbert PAQUETTE et André BINETTE, « L'accession du Québec à l'indépendance », dans Gilbert PAQUETTE, André BINETTE et Ercilia PALACIO-QUINTIN (dir.), *L'indépendance maintenant !*, Montréal, Éditions Michel Brûlé, 2012, p. 282-283.

¹⁶ See André BINETTE, *Le peuple québécois doit se donner sa propre constitution*, Notes for a speech delivered at the États généraux sur la souveraineté, April 6, 2013, p. 2.

¹⁷ See Marc CHEVRIER, *supra* note 1, p. 305.

¹⁸ *Id.*, p. 309-310.

¹⁹ *Id.*, p. 309.

To give an idea of what could be on such menu, I have drafted throughout the years several versions of a written Québec Constitution²⁰. At the beginning of the March 31st, 2016 Symposium, I intend to present my latest version of a draft *Québec constitution*. I will accompany this version with a draft *Constitution Amendment (Québec)* presenting the text of changes to be made the *Constitution Act, 1867* and the *Constitution Act, 1982* and whose adoption would be needed to ensure the harmonious coexistence of a first *Constitution of Quebec* and the *Constitution of Canada*.

I doubt that the answers to the question "Does Québec need a written constitution?" during the Symposium will be unequivocally positive as mine. Yet, I firmly believe that a Québec Constitution would consolidate Québec's identity and would finally confer Québec a long-awaited constitutional identity. And I am also convinced that the drafting of a first Constitution of Québec could reveal itself as a catalyst for the settlement of a constitutional impasse that has lasted much too long and could make Canada and Québec new constitutional partners or lead to Québec's accession to independence.

²⁰ See among others Bill 196 that I introduced in Québec's National Assembly on October 18, 2007 under the title *Québec Constitution* [online : <http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-196-38-1.html>] [accessed March 28, 2016]. The explanatory notes summarize its contents as follows : "The purpose of this bill is to entrench the fundamental values of Québec in a Québec Constitution. To that effect, the bill covers such topics as Québec citizenship and Québec's national territory, natural and cultural heritage, national capital, official language and national symbols. It affirms the supremacy of sections 1 to 48 of the Charter of human rights and freedoms and sections 2 to 6 of the Charter of the French language, and addresses the matter of Québec's legislative authority. In addition, the bill presents the state institutions of Québec, that is, the National Assembly, the Government and the courts of justice. Lastly, the bill provides for the revision and supremacy of the Québec Constitution".