UNIVERSITÉ DU QUÉBEC À MONTRÉAL

REFLECTIONS ON CONFLICTING CONCEPTIONS OF RIGHTS AND THE ENTRENCHMENT OF THE CHARTER OF RIGHTS AND FREEDOMS IN CANADA— QUEBEC'S VIEW OF RIGHTS IN A MULTINATIONAL FEDERATION.

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RÉFLEXIONS SUR LE CONFLIT DES CONCEPTIONS DES DROITS ET L'ENCHÂSSEMENT DE LA CHARTE CANADIENNE DES DROITS ET LIBERTÉS DANS LA CONSTITUTION CANADIENNE. — LA VISION QUÉBÉCOISE DES DROITS AU SEIN D'UNE FÉDÉRATION MULTINATIONALE.

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RÉSUMÉ

Le but de ce mémoire de maîtrise est de réexaminer le conflit constitutionnel sur la *Charte canadienne des droits et libertés* entre le Québec et le gouvernement fédéral canadien. À cet effet, les différences entre les conceptions des droits tenues par les politiciens et intellectuels au Québec et par les autres gouvernements au Canada, en particulier par le gouvernement fédéral canadien, seront examinées.

Depuis l'adoption de la *Loi constitutionnelle de 1982*, il y a eu un fossé persistant entre le Québec et le reste du Canada. À notre avis, ce fossé résulte de la différence de points de vue quant aux « droits » qui devraient être reconnus. Ainsi, là où la société québécoise semble considérer les droits comme issus de la collectivité, le reste du Canada envisage ces droits sous un angle individualiste libéral. Pierre E. Trudeau, l'architecte de la Charte canadienne, a fondé sa conception du droit sur l'individualisme libéral, et s'est donc opposé à la politique linguistique du Québec. Contrairement à l'opinion de Trudeau voulant que la société québécoise soit illibérale, Charles Taylor a essayé de combler le fossé entre les deux sociétés, en reconnaissant que la société québécoise est une société certes différente, mais libérale.

Cette divergence de vues relativement à l'origine des droits a influencé la conscience des Canadiens, persuadés de la nature collectiviste de la société québécoise. Ainsi, la perçoivent-ils non seulement comme étant différente, mais également comme pouvant restreindre leur liberté individuelle. Cependant, un tel présupposé est-il un point de départ approprié pour discuter des différences entre le Québec et le reste du Canada ?

Pour répondre à cette question, nous souhaitons reconsidérer ce débat à la lumière des discussions intergouvernementales qui ont précédé et accompagné le rapatriement de 1982 et clarifier la signification du fédéralisme multinational canadien en recourant principalement à une perspective de recherche historique. Nous souhaitons ainsi montrer le caractère dualiste de la conception des droits par les gouvernements et intellectuels québécois, en ce qu'elle est à la fois individualiste et collective, et non strictement collectiviste comme certains l'ont prétendu.

SUMMARY

The purpose of this paper is to reconsider the constitutional conflict over the Canadian Charter of Rights and Freedoms between Quebec and Canada by examining the differences in the conceptions of rights between Quebec and the rest of Canada.

Since the enactment of the 1982 constitution, there has been the divide between Quebec and the rest of Canada. In my opinion, this divide results from the dichotomy in the perspective viewpoints on what "rights" should be recognized, namely where Quebecois society views rights as originating in collective society, whereas the rest of Canada views them from a liberal individualistic frame. Pierre Trudeau, the founder of the Charter, based his conception of rights on liberal individualism and thus opposed to the Quebec language policy. Unlike Trudeau's opinion that Quebec society is illiberal, Charles Taylor tried to bridge the two societies, recognizing that Quebecois society is a different but liberal society. However, this dichotomy has influenced the consciousness of English speaking peoples, where they have come to view the collective nature of Quebecois society as not just different, but as potentially as a constraining influence over their individual liberty. However, is such a dichotomy really an appropriate starting point for discussing differences between Quebec and the rest of Canada?

Therefore, I would like to reconsider this dichotomy in order to clarify the significance of multinational federalism by focusing my examination on the constitutional conflict between Canada and Quebec surrounding the Canadian Charter through historical research because the multinational federalism often is recognized as the system defending the collective society such as the Quebecois society by English Canadians. Alternatively, in this master thesis I would like to point out that governments and intellectuals in Quebec shared a conception of rights which is both individual and collective, and not strictly collectivist as many asserted.

INTRODUCTION

The purpose of this thesis is to reconsider the constitutional conflict over the Canadian Charter of Rights and Freedoms between the Québec and the federal governments by examining the differences in the conceptions of rights held by politicians and intellectuals in Québec and in the other provincial and federal governments. Since 1967, Prime Minister Pierre Elliott Trudeau has sought to form a federal system based on the principle of a national State. In contrast to this, there was the argument by academics such as Kenneth McRoberts[1] and Alain-G. Gagnon, that a multinational federal system is suitable for the Canadian political system because, from the beginning, Canada (and especially Québec) was a multinational State composed of the English, the French, and aboriginal nations. Therefore, in our understanding, the conflict, which has existed well before the establishment of the Constitution Act, 1982 has been centered on a fundamental disagreement regarding two visions of federalism: between a territorial and symmetrical federation based on a national state, and a multinational federation. However, in order to examine the constitutive differences underpinning these political systems, it is necessary to move the discussion to deeper aspects of legal and normative consciousness backing these conceptions about federations, that is, legal and rights ethos. In order to understand the aspects of these ethos

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[1] Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity* (Toronto: Oxford University Press, 1997). Alain-G. Gagnon, *La Raison du plus fort: Plaidoyer pour le fédéralisme multinational* (Montreal: Québec Amérique, 2008).

more clearly, it is necessary to study the disputes about conceptions of rights regarding the entrenchment of the Canadian Charter. In analyzing these disputes, important differences between Trudeau and the Québec premiers become evident. In the following sections we would like to state the purpose of this thesis in more detail.

In Canadian constitutional history, it is often said that the constitutional reforms of 1982 was an important turning point in the history of the Canadian political system because it determined the character and purpose of the Canadian State on the principle of individualism.[2] The 1982 Constitutional reform introduced two critical elements: the entrenchment of the Charter of Rights and Freedoms and a new formula for Constitutional amendment. The Charter of Rights and Freedoms guarantees fundamental freedoms such as the freedom of thought, democratic rights such as the right to vote, legal rights, which aim mainly at the protection of individual rights in criminal proceedings and equality rights. In these provisions of the Charter, Trudeau's brand of liberal individualism is evident. Concerning the general formula for amending the Canadian Constitution, the approval of seven provinces representing at least 50 % of the population of all provinces is stipulated as being enough for most of reform items, meaning that Québec is not able to wield veto power over proposed constitutional reforms, except when unanimity or bilateral agreement are

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[2] Guy Laforest, *Trudeau and the End of a Canadian Dream* (Montreal/Kingston: McGill-Queen's University Press, 1995), 135-139. Eugénie Brouillet, *La Négation de la Nation* (Sillery: Éditions du Septentrion, 2005), 381.

required. Although there was Honoré Mercier who espoused the theory of a pact between the provinces regarding interpretation of the "Confederation", Québec governments have claimed that Québec should have the right to veto powers on the ground that the Confederation was formed by a pact between the two founding peoples,[3] the English and French Canadian peoples, but this claim was not reflected in the Canadian Charter.

Moreover, in 1982, the Constitution was enacted along with the Canadian Charter without the consent of Québec. From the middle of 1980's to early 1990's there were some attempts to break the deadlock of this constitutional problem because the political situation was changed both in federal and Québec politics. In federal politics, the Conservatives of Brian Mulroney replaced the government of the Liberals. Mulroney sought to tackle the constitutional problem with a positive attitude because he wanted to get more votes in Québec on the federal election. In Québec politics, the government was changed from the Parti Québécois of René Lévesque to the Parti Libéral of Robert Bourassa. While insisting that he espouses federalism, Bourassa proposed five conditions such as the recognition of Québec's status as a distinct society, under which Québec accepts the 1982 Constitution. In 1987, the discussions between Mulroney and all provincial premiers on Meech Lake resulted in the Meech Lake Accord meeting Québec's five demands. However, most of English

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[3] *Quebec's Positions on Constitutional and Inter governmental issues from 1936 to March 2001,* http://www.saic.gouv.qc.ca/institutionnelles_constitutionnelles/table_matieres_en.htm, 13.

Canadians was vehemently opposed to the clause of distinct society of the Meech Lake Accord on the ground that recognizing the clause means giving the Québec special powers, which brings about inequalities between provinces. In the end, since the Meech Lake accord wasn't ratified in two provincial parliaments until the deadline, it resulted in failure. In 1992, the federal government proposed again a new package of the amendments to the constitution, later called Charlottetown Accord. However, the Accord also failed without meeting demands of both the Québec and the rest of Canada.[4]

After the failure of both Meech Lake and Charlottetown Accords for accommodating the Québec, the national unity of Canada has been a central issue for majority of the academics.[5] The significant question for them is to seek a formula in which 'Canada' can be reconceived, and Québec can be re-integrated into the Canadian constitution. Thus, for some academics, recognizing Canada's multinational character in a new brand of multinational federalism has been a landmark approach in reuniting Canada as it recognizes Québec as nation within Canada.

However, as strong opposition to the distinct society clause in English Canada suggests, multinational federalism is opposed by them. In our opinion, this can be explained

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[4] Kenneth McRoberts, *Misconceiving Canada*, op.cit., 190-199.

[5] See, Charles Taylor, "Shared and Divergent Values" in *Reconciling the Solitudes* (Montreal/Kingston: McGill-Queen's University Press, 1993), and Will Kymlicka, *Multicultural citizenship* (Oxford: Oxford University Press, 1995)

by their fear that the clause of distinct society will clash with the principle of superiority of individual rights entrenched in the Canadian Charter. It is Trudeau's philosophy that played an important role in shaping their views of the Québec society.

Trudeau himself, as founder of the Charter, has never recognized the particular character of 'multinational Canada' because he was a rigid believer in liberal individualism. One example would be when he violently objected to the Québec language Act, the Charter of the French Language (called Bill 101), which had been enacted by the Parti Québécois government in 1977 because, according to him, the provision saying that only English parents born in Québec can send their children to public English school (section 73, the Charter of the French Language) seemed to infringe on individual freedom of choice of language. While referring to the phrase of the French thinker Ernest Renan, 'No-one is a slave of history,' Trudeau argued from the philosophical position that the community should not make it impossible for the individual to change his language, or even citizenship. Trudeau finally concluded that the Québec language Act, Bill 101, was illiberal as it fomented 'aggressive nationalism,' namely, nationalism at the expense of the individual.[6]

In recent scholarship, a lot of criticism has been raised against Trudeau's views, which we have outlined above. We would like to examine Charles Taylor's arguments for multinational federalism, which has been one of the most influential views within these

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[6] Cité libre, « Entretien avec Pierre Elliott Trudeau », (vol.26 n°1,1998), 104-105.

criticisms. Charles Taylor emphasizes the importance of recognition in politics, as, according to him, a crucial feature of human life is its fundamentally dialogical character; the foundation of identity requires contribution from others. In the public sphere of modern society, the politics of equal recognition necessitate the politics of difference (an individual's sense of his or her own distinctive identity), in addition to the equal dignity of all citizens to be upheld (the equalization of rights and entitlements).[7] Conflicts between these paradigms of thinking are reflected in the context of Canadian politics. Here, according to Taylor, two liberal conceptions of rights have confronted English Canadians and French Canadians; the principle that all citizen should be treated equally and the principle that demands cultural autonomy in the name of collective rights.

Unlike Trudeau's opinion of Québec society as illiberal, Taylor tried to bridge the two societies, recognizing that Québécois society is a different but liberal society. However, as Charles Taylor points out, this dichotomy has influenced the consciousness of English speaking peoples, where they have come to view the collective nature of Québécois society as not just different, but as potentially as a constraining influence over their individual liberty.[8] However, is such a dichotomy really an appropriate starting point for discussing differences between Québec and the rest of Canada?

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[7] Charles Taylor, *Multiculturalism and "The Politics of Recognition": An Essay by Charles Taylor* (Princeton: Princeton University Press, 1992), 32-38.

[8] Taylor, "Shared and Divergent Values" in *Reconciling the Solitudes,* op.cit, 173-179.

Therefore, as the subject of my research, we would like to reconsider this dichotomy in order to clarify the significance of multinational federalism by focusing my examination on the constitutional conflict between Canada and Québec surrounding the Canadian Charter through historical research because multinational federalism often is recognized by English Canadians as the system defending the collective aspirations of a society such as the Québécois society. Therefore, our research question is: Can we correctly perceive the constitutional conflict between Canada and Québec from the dichotomous viewpoint that Québécois society has more "collectivist" tendencies, and where the rest of Canada is framed as a more "liberal individualistic" society? Alternatively, in this master thesis we would like to point out that Québécois society is both individual and collective. For example, although a language act normally assumes the form of collective rights, the Québec government sought to expand each *individual right* through the language act. Moreover, each individual participates in making the language law through the representative democracy of the National Assembly. That is, the language act guarantees that legislative results are derived from the choices of individuals. Therefore, a reconsideration of the aforementioned conception of Québécois society can further the legitimacy of multinational federalism.

In this aim, my research is centered mainly on the temporal process by which the Canadian Charter of the Rights and Freedoms has been adopted. This is because the conflict over the Charter was an ideological one that brought about, among other things, the present divided situation between Canada and Québec. The Constitution Act of 1982 was enacted as part of a repatriation process (a term which describes the process by which the final

constitutional authority was "brought home" to Canada from British Parliament) that has been occurring since the time of Mackenzie King in 1927. However, since the appearance of Trudeau in 1960's, the meaning of 'repatriation process' has been re-interpreted to include the entrenchment of the Charter of Rights, which implies a radical transformation of Canadian federalism. Thus, my research deals with Canadian constitutional history in the 1960s, 1970s, and 1980s briefly in order to set the context in which the process of repatriation by Trudeau took place. Specifically, we will look at periods in which important constitutional conferences took place, such as the 1980 and 1981 federal-provincial conferences, because the period between 1980 and 1981 federal-provincial conferences was a decisive turning point of the political process leading to the enactment of the Constitution Act of 1982.

Survey of the literature concerning the Québec question

Within our research, we refer to previous historical and political studies and normative analyses about Canada and the Québec question. Firstly, we would like to consider previous works that deal with the nature of Canadian federalism and the Québec question in general.

With respect to Canadian constitutional history, seminal works by English speaking academics, such as Peter Russell's *Constitutional Odyssey*[9] and Kenneth McRoberts, *Misconceiving Canada* appeared prominently[10], but studies by French-speaking academics also are found within the literature, among the notable ones: Guy Laforest, *Trudeau and the end of a Canadian dream,*[11] François Rocher "La dynamique Québec- Canada ou le refus de l'idéal fédéral,"[12] Alain-G. Gagnon and Raffaele Iacovino, *Federalism, Citizenship, and Quebec,*[13] and Eugénie Brouillet, *La Négation de la nation.*[14]

Peter Russell stresses the ideological transition from Edmund Burkian organic constitutionalism to the John Lockean social contract in Canadian constitutional politics. In the theory of social contract, sovereignty is attributed to people that forms the constitution. Therefore, the question at issue is the definition of national identity, that is, who is the Canadian people? The politics for national identity has unfolded (mega constitutional politics) on the constitutional agenda. The Canadian Charter of Rights and Freedoms is the

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[9] Peter Russell H, *Constitutional Odyssey : Can Canadians become a Sovereign People? Third Edition* (Toronto: University of Toronto Press, 2004).

[10] Kenneth McRoberts, *Misconceiving Canada,* op.cit.

[11] Guy Laforest, *Trudeau and the End of a Canadian Dream* (Montreal/Kingston: McGill-Queen's University Press, 1995).

[12] François Rocher, « La dynamique Québec-Canada ou le refus de l'idéal fédéral », dans Alain G. Gagnon, (dir.), *Le fédéralisme canadien contemporain : Fondements, traditions, institutions* (Montréal, Les Presses de l'Université de Montréal, 2006).

[13] Alain-G. Gagnon, and Raffaele Iacovino, *Federalism, Citizenship, and Quebec: Debating Multinationalism* (Toronto: University of Toronto Press, 2007).

[14] Brouillet, *La Négation de la Nation,* op.cit.

foundation of mega constitutional politics.[15] Moreover, according to Russell, the political purpose of the Charter is to function as a symbol of Canadian nation-building. This is based on Trudeau's vision for a one-nation strategy, which attempts to treat everyone explicitly as "Canadian," regardless of what language they speak or which cultural identity they belong to. In fact, according to Russell, it is clear that the federal government sought to enact the Charter in order to use it as a counterweight to Québec nationalism.[16] As stated above, Russell points out the ideological transition of the constitutional politics (from the evolutionary development such as the one advocated by Edmund Burke to a single document drawn up at a particular point in time) and the purpose of the Canadian Charter. However, Russell did not insist that Canada should be a multinational State.

On the other hand, McRoberts insisted that Canada is indeed a multinational State and should thus recognize Québec as a nation within the federation. He describes Canadian constitutional history focusing on Trudeau's national unity strategy, which envisions a Canada composed of rights-bearing individuals. He describes how the promotion of this framework of rights brought about the present divide between Canada and Québec. According to him, Trudeau did not share the traditional French Canadian view of 'compact theory' in Canadian federalism, and attempted to unite Canada based on a vision of a single

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[15] Russell, *Constitutional Odyssey*, op.cit., 3-11.

[16] Peter Russell, "The Political purposes of the Canadian Charter of Rights and Freedoms," *Canadian Bar Review* 61(1983), 31-35.

Canadian nation, which was to be built. The hallmark achievement of his personal philosophy was the Constitution Act of 1982 and the Charter of Rights and Freedoms.[17]

Laforest also indicates that the enactment of the 1982 constitution puts an end to the dualism of French and English Canadians. He examines Trudeau's intention of enacting the 1982 constitution in particular, and revealed that the purpose of the Canadian Charter was to function as a symbol of Canadian nation-building. According to Trudeau, the Canadian Charter was the principal stuff in a strategy aimed at binding the Canadian nation together against Québec nationalism.[18] Moreover, as to the impact of the Constitution Act of 1982 and the Canadian Charter of Rights and Freedoms, Laforest primarily constructed his work on the foundations of John Locke's social contract theory, explaining that the Constitution and the Charter lack legitimacy because Trudeau's proposal for the renewal of Canadian federalism during the 1980 referendum campaign presumed that trust existed between those who govern and those who are governed. Nevertheless, Trudeau betrayed the trust of the people of Québec, which amounted to nothing less than a theoretical dissolution of the government.[19] Therefore, since 1982, in terms of political identity and belonging, Québec has not been properly integrated into the new Canada, a period which he terms 'the internal

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[17] McRoberts, *Misconceiving Canada*, op.cit., xi-xvi.
[18] Laforest, *Trudeau and the End of a Canadian Dream*, op.cit., 125-128.
[19] Ibid., 54-55.

exile of Quebecers in the Canada of the Charter'.[20] Trudeau made decisive reforms that endangered Québec's status through the Constitution Act of 1982.

According to Gagnon and Iacovino, the important point concerning Canadian constitutional history is that Canadian federal government has not recognized Québec as a nation. Therefore, they propose that Québec should adopt for itself a formal constitution that would serve as a symbol of Québec's self-determination in order to restart the constitutional discussion with the rest of Canada.[21]

On the other hand, François Rocher stresses not only the autonomy of Québec but also the requirement of interdependence between the federal government and the Québec government, which is a fundamental principle of federalism often overlooked in Québec. According to him, federal principles are concerned with the combination of self-rule and shared rule. In the Canadian constitutional history, English speaking academics have interpreted the federal regime as a highly centralized system, placing emphasis on the effectiveness of policies. On the other hand, French speaking academics have put emphasis on the autonomy of the provinces. However, it is important to take into consideration the

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[20] Guy Laforest, 'The internal Exile of Quebecers in the Canada of the Charter,' in James B. Kelly and Christopher P. Manfredi, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: University of British Colombia Press, 2009), 54-55.

[21] Alain-G. Gagnon, and Raffaele Iacovino, *Federalism, Citizenship, and Quebec,* op. cit., 166-177.

principle of interdependence which is channeled through the multiple mechanisms of federal-provincial collaboration.[22]

Eugénie Brouillet describes Canadian constitutional history by examining how Canadian federalism has managed the question of the preservation and promotion of Québec's distinct cultural and national identity from 1867 to this day. According to her, from 1867 to the end of the Second World War, Canadian federalism was relatively generous towards the preservation and promotion of Québec's culture and identity. However, since the second half of 20th century, this generosity has gradually eroded through the following two steps: beginning at the end of the 1940s, the first step is characterized by the adoption of Canadian citizenship, followed by the extension of the Canadian Welfare State through spending power, and the second step started with the abolition in 1949 of appeal to the Judicial Committee of the Privy Council. Since that time, the position of the Supreme Court of Canada has been shifting towards an orientation unfavorable to Québec. Yet it was the second step which has had a more decisive impact on Québec's pursuit of nationhood. This second step began with the repatriation of the Constitution Act of 1982 along with the entrenchment of the Charter of Rights and Freedoms. According to Brouillet, this change had

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[22] François Rocher, « La dynamique Québec-Canada ou le refus de l'idéal fédéral », op.cit.,99-119.

some influence in denying the founding principle of the 1867 Confederation, namely *plurinationalism*.[23]

In sum, these academics have paid special attention to the 1982 Constitution and the Charter of Rights in Canadian constitutional history concerning the Québec politics. In the next section, we would like to examine influence of the Charter on the Québec politics through judicial rulings in order to clarify more the meaning and legal impact of the Charter.

Survey of the jurisprudence applying the Canadian Charter to Québec.

An important effect of the Charter on Canadian politics and the "Québec problem" is the empowerment of the Canadian judiciary to exert the authority to interpret the Charter (with particular reference to Supreme Court Judges).[24] Judicial opinions as rulings are legally binding; once they have been made by the Supreme Court, they are very difficult to reverse. Charter rulings are thus framed as part of the constitution, and opposing it would seem to be against the principle of freedom and the integrity of individual rights, or any other principle

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[23] Eugénie Brouillet, *La Négation de la Nation*, op.cit., 380-381.

[24] Frederick L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000), 149-150.

entrenched in the constitution. Moreover, the political influence of judges on Canadian federalism is an important part of the court system of Canada that needs to be taken into consideration. In this system, all judges of provincial superior courts, as well as judges of the Supreme Court of Canada are appointed by the federal cabinet.[25] According to Marc Chevrier, Québec governments and intellectuals have been opposed to the nomination of judges by the federal cabinet and have demanded that a special constitutional court be established using the European model. However, Trudeau clearly refused the request of Québec on the grounds that it would disrupt the Canadian judicial system and diminish the authority of the Supreme Court of Canada.[26]

In fact, since the enactment of the 1982 constitution, the rulings of the Supreme Court of Canada have been incrementally undermining the autonomy of the National Assembly of Québec. For example, judgments such as *Québec Protestant School Boards v. Québec Attorney General of 1984*[27], *Ford v. Québec Attorney General of 1988*[28], and *Devine*

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[25] Michel Seymour, « L'État fédéré du Québec » dans Jocelyn Maclure et Alain- G.Gagnon, *Repères en mutation : Identité et citoyenneté dans le Québec contemporain* (Montréal: Québec Amérique, 2001), 367-368.

[26] Marc Chevrier, « Contrôle judiciaire et gouverne démocratique : de la " législation judiciaire " au Canada depuis 1982 » Thèse pour le doctorat de l'institut d'etudes politiques de Paris (2000), 47-50. For further details see also, Marc Chevrier, *La République québécoise : Hommages à une idée suspecte* (Montréal : Boréal,2012), 316-318.

[27] *A.G. (Que.) v. Quebec Protestant School Boards*, [1984]2 S.C.R.66.

[28] *Ford v. Quebec (Attorney General)*, [1988]2 S.C.R.712.

v. Québec Attorney General of 1988[29], are cases by which the powers for the national assembly of Québec to preserve its language and culture were diminished.

In the case of *Protestant School Board v. Québec*, the clause of the French language Act prescribing that only English speaking parents born in Québec had the right to send their children to public English school (section 73, the Charter of the French Language) was found to be unjustified under the Canadian Charter prescribing that English or French language minority can have rights to send their child to English or French school (section 23, Constitution Act, 1982).[30] In the case of *Ford v. Québec*, the French language Act (Act 101) regarding the exclusive use of French in public signs and commercial advertisements was held to be unconstitutional. The issue raised in this case is that the law prescribing the exclusive use of French is an unreasonable infringement of freedom of expression, although the purposes of the Québec law were regarded as legitimate, i.e. the enhancement of the French language within the province. Therefore, it was contended that it restricted unnecessarily the freedom of expression prescribed by the Canadian Charter of Rights and Freedoms (Section 2b) as well as the Québec Charter of Rights and Freedoms (Section 3).[31]

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[29] *Devine v. Quebec (Attorney General)*, [1988]2 S.C.R.790.

[30] *A.G. (Que.) v. Quebec Protestant School Boards*, [1984]2 S.C.R.66.

[31] The judgment is as follows: The appeal should be dismissed. Sections 58 and 69 of the *Charter of the French Language*, and ss. 205 to 208 thereof to the extent they apply to ss. 58 and69, infringe s. 3 of the Quebec *Charter* and are not justified under s. 9.1 of the Quebec *Charter*. Section 69, and ss. 205 to 208 to the extent they apply to s. 69, infringe s. 2(*b*) of the Canadian *Charter* and are not justified by s. 1 of the Canadian *Charter*. Sections 58 and 69infringe s. 10 of the Quebec *Charter*.

The Judges' final ruling was that the joint or predominant use of the French language in public signs is allowed.[32] In the case of *Devine v. Québec*, the point at issue was whether the Québec French language act was valid provincial law and whether the provisions prohibiting English signs violated the right to freedom of expression under section 2(b) of the Canadian Charter, and if so, could it be saved under section 1 of the Canadian Charter. The judges accepted that provisions concerning the public poster of the French language act come under jurisdiction of the province because these provisions were in relation to commerce within the province, which was a matter within the provincial jurisdiction over property and civil rights in the province (section 92(13) Constitution Act, 1867). [33] However, these provisions of the French language Act were held unconstitutional because the judges held that the freedom of expression guaranteed by the Canadian Charter (section 2b) is infringed not only by a prohibition of the use of one's language of choice but also by a legal requirement compelling one to use a particular language.

As is evident, all three of the above rulings backed up the principles underlying the clauses of the Canadian Charter. What is remarkable regarding this issue can be read in the following remark of the judges of Supreme Court in the case of *Protestant School Board v. Québec*.

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[32] *Ford v. Quebec (Attorney General)*, [1988]2 S.C.R.712.
[33] Peter W.Hogg, *Constitutional Law of Canada* (Toronto: Carswell,1999), 56-4.

> The Court cannot accept the argument that the denial of certain individual rights can be justified as a consequence of the limitation of collective rights.[34]

The judges state that collective rights cannot limit individual rights. However, in our opinion, the very individual rights to which they refer are in fact collective rights because they are enacted in the Canadian parliament without the consent of the Québec legislature. The Canadian Charter can therefore be said to be collective rights legitimized by Canada without Québec. Therefore, the dichotomy of individual rights and collective rights referred to in the remarks of the judges may be viewed as too simplistic. The judges in this case rejected the appeal of Québec, stating that the Canadian Charter takes legal precedence to the French Language Act. These judgments can be considered as damaging to the democratic autonomy of the Québec legislature, as well as damaging to the scope of its ability to produce binding legislation.

After the judgment of the case regarding the language of public sign and poster, the Québec government used section 33 of the Canadian Charter (the notwithstanding clause) to avoid the result of the judgment. Then the Québec Premier Robert Bourassa used the notwithstanding clause to put aside some provisions of the Canadian Charter. This use of the notwithstanding clause resulted in provoking ill feeling among all Canadians,[35] and therefore,

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[34] *A.G. (Que.) v. Quebec Protestant School Boards*, [1984] 2 S.C.R.66, 14.
[35] André Binette, « Le pouvoir dérogatoire de l'article 33 de la Charte canadienne des droits et libertés et la structure de la Constitution du Canada », (2003), in Revue du Barreau, Tome 63 Numéro spécial, 118.

the provincial government would from then on be more hesitant in using it.[36] As Peter Hogg and Bushell Allison point out, section 1 of the Canadian Charter subjects the rights guaranteed by the Charter to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society", but this section is available only when a case is not against the objective of the Charter.[37] Thus, '*the dialogue between courts and legislatures*' is realized only when a reasonable settlement is reached within the scope of the objective of the Charter. In the other cases, '*the dialogue*' is extremely restricted. As Alain Cairns points out, this has the effect on both the federal and provincial governments. However, since the original purpose of the federal government is the application of the Canadian values, the federal government doesn't feel as unsatisfied as the provincial governments with the arrangement.[38] On the contrary, the uniform application of the Charter is not acceptable for Québec province, as it feels the strong need to maintain its values in order to protect its own language and culture.

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[36] David Schneiderman, "Human Rights, Fundamental Differences? Multiple Charters in a Partnership Frame" in Roger Gibbins and Guy Laforest, *Beyond the impasse toward reconciliation* (1998), IRPP, 156-157.

[37] Peter W. Hogg and Allison A. Bushell, "The Charter Dialogue Between Courts and Legislatures" (1997), in Osgoode Hall Law Journal Vol. 35 No.1, 84-94.

[38] Alan C. Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (1992), McGill Queens University Press, 76-77.

The significance of multinational federalism and the research question

The philosophy underlying the Canadian values at issue in the aforementioned argument is the one that Canada is a national state based on liberal individualism. The vision of the state is completely different from the vision of multinational state. In the multinational state, each minority nation in the state has the right of nation-building. Michel Seymour states that the solution to Canada-Québec question is to protect the culture and language of Québec by recognizing that Canada is a multinational State.[39] The view that the Canadian constitutional order should be changed from the current Trudeau-style federalism to a new, decentralized, multinational federalism has been shared by some Canadian scholars. Recently, we have founded this opinion not only in the words of French-speaking analysts such as Michel Seymour, François Rocher,[40] Réjean Pelletier,[41] and Alain-G. Gagnon,[42] but also among English-speaking scholars such as Will Kymlicka, Charles Taylor, and Kenneth McRoberts.

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[39] Michel Seymour « L'État fédéré du Québec », 351-354. See also Michel Seymour, *De la tolérance à la reconnaissance* (Montréal: Boréal, 2008), 558-566.

[40] François Rocher, « La dynamique Québec-Canada ou le refus de l'idéal fédéral ».op.cit.

[41] Réjean Pelletier, « L'asymétrie dans une fédération multinationale : le cas canadien » dans Linda Cardinal, *Le fédéralisme asymétrique et les minorités linguistiques et nationales* (Sudbury: Éditions Prise de parole, 2008).

[42] Alain-G. Gagnon, *La Raison du plus fort*. See also Gagnon and Iacovino *Federalism, Citizenship, and Quebec*, op.cit.

The concept of multinational federalism has gained much salience among Canadian academics since the collapse of the Meech Lake Accord. As to the institutional dimension of multinational federalism, Philip Resnick proposed the archetypes of "multinational federation" and "territorial federation", the former being a federation whereby minorities are constituted as "nations" in a country. The latter concept, "territorial federation," is based on the principle of one nation-state where formally equal powers are given to the provinces.[43] Moreover, Kymlicka suggested the establishment of an asymmetrical model of federalism as the way to realize multinational federalism in the political community. He maintains that generally, nationally-based units seek greater powers, while region-based units are less likely to do so. Therefore, he defines asymmetrical federalism as federalism that gives more powers to a specific province, so that a "nation" living therein has the rights to autonomy for preserving its own culture and language. Kymlicka states as follows:

> In a federal system that contains both region-based and nationality-based units, it seems likely that demands will arise for some form of *asymmetrical federalism*: a system in which some federal units have greater self-governing powers than others.[44]

Kymlicka distinguishes "nation" from "immigrant groups" because the term "nation" means a historical community, more or less institutionally complete, occupying a given

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[43] Philip Resnick, "Toward a Multinational Federalism: Asymmetrical and Confederal Alternatives", in F. Leslie Seidle (ed.), *Seeking a New Canadian Partnership* (Montreal: IRPP, 1994), 71.

[44] Will Kymlicka, *Finding our way: Rethinking Ethnocultural Relations in Canada* (Oxford: Oxford University Press, 1998), 141.

territory or homeland, sharing a distinct language and culture.[45] On the contrary, "immigrant groups" are defined as groups which do not occupy their homeland, and their distinctiveness is manifested primarily in their family lives and in voluntary associations and they wish to be assimilated into culture of the host society in the future.[46] Nations, however, possess their own culture (what Kymlicka terms the *societal culture*), that is, a culture which provides its members with "meaningful ways of life" across the full range of human activities, including social, educational religious, recreational, and economic life, encompassing both public and private spheres. These cultures tend to be territorially concentrated, and based on a shared language. Therefore, nations such as French Canadian and aboriginal peoples can have rights to their autonomy. That means that these nations can demand special powers in Canadian federation, a form of federal organization he terms "asymmetrical federation".

Regarding multinational federalism, Resnick developed its institutional aspect. He reflected on the institutional possibility of asymmetrical federalism that provides one province with special powers. In order to balance the province given special powers with other provinces, he thought it a useful option to decrease the powers that the 'selected' province wields in federal politics, namely, the representatives it has in the federal legislature. This option stipulates a trade-off, whereby representatives from the province with special

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[45] Ibid., 11.
[46] Ibid., 14.

powers would not participate in discussions in the federal legislature if the subject matter does not concern the jurisdictional reach of the 'selected' province in question.[47]

On the other hand, Kymlicka examined asymmetrical federalism in terms of sociological reasoning, including definitions of nation and immigrant groups. However, these sociological terms alone are insufficient for examining the merits of asymmetrical federalism because, a constitutional arrangement and the legal system that emerges from it is underpinned by elements that run deeper in the human psyche, such as the ethos of a citizenry, commonly held views of political and legal legitimacy, and justice. Thus, multinational federalism should be examined not only in its institutional aspect but also in its normative aspect.

In the process of ratifying the Meech Lake Accord, multinational federalism was criticized by English-speaking Canadians on the grounds that the recognition of the distinct society clause brings about the inequality between the provinces, giving the Québec a special status. The reason behind this is that they have judged the Québécois society to be an illiberal

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[47] Philip Resnick, "Toward a Multinational Federalism: Asymmetrical and Confederal Alternatives", op. cit., 80-81.

society. It is Charles Taylor that tried to solve the problem from the viewpoint of differences in rights conceptions and propose the significance of multinational federalism.

Taylor's solution for post-1982 Canada reunification is as follows: While citizens in the rest of Canada are united around the principle of procedural liberalism (a view that individual rights must always come first and must take precedence over collective rights) embedded in the Charter of Rights and Freedoms, Québec society has a rather different model of a liberal society, that is, society which can be organized around a definition of the good life (collective goals), without this being seen as a depreciation of those who do not personally share this definition.[48] Therefore, there are two incompatible views of liberal society in post-Meech Lake Canada. According to him, the way of reunification is that procedural liberals in English Canada just have to acknowledge, first, that there are other possible models of liberal society and, second, that their francophone compatriots wish to live by one such alternative.[49] That is, English speaking provinces should recognize this type of society through the asymmetrical federalism. The term he uses for this is '*deep diversity*', where the way of being a Canadian for French-speaking people in Québec is by their belonging to a constituent element of Canada, "la nation québécoise."[50]

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[48] Taylor "Shared and Divergent Values" op.cit., 173-177.

[49] Ibid., 178.

[50] Ibid., 182.

Certainly, Taylor seeks to take into consideration the trend that Québécois want to preserve their own language through their own language law (for example, the Charter of the French language, commonly called Bill 101), and demand their autonomy and sometimes even independence as the collective goal. However, this model portrays an oversimplified duality where Québec is depicted completely as "collective", and the rest of Canada is epitomized as embodying "procedural and individualistic liberalism." Therefore, multinational federalism for English Canadians still seems to be a system designated to benefit the collective tendencies of Québécois society. Alternatively, multinational federalism is a form of federalism where each nation is both an individual and collective society, entitled as such to the process of nation-building.

Can we correctly perceive the constitutional conflict between Canada and Québec from Charles Taylor's dichotomous viewpoint that Québécois society has more "collectivist" tendencies, and where the rest of Canada is framed as a more "liberal individualistic" society? Therefore, we would like to construct the following hypothesis: In the Canada-Québec constitutional conflict, the discussion that the conflict is framed as being between individual and collective rights is overly simplistic, because Québec's view of rights, in particular, René Lévesque's conception of rights, includes the individual and the collective simultaneously.

In reconsidering the Taylor's dichotomy, the examination of opinions about rights in Québec, 'Quebec's view of rights' has great significance. Here, we would like to define the

concept of 'the Québec's view of rights' as opinions of Québec politicians and intellectuals about rights. Through the examination of these opinions, the argument on rights in Québec includes both aspects of the collective and the individual. In this master thesis, we would like to stress the genuine conception of rights of the former premier of Québec, René Lévesque, namely the necessary complementarity between individual rights and collective rights.[51]

In order to examine the Québec's conception of rights, in particular, Lévesque's conception, we employ a qualitative and historical methodology in order to examine theoretical statements and opinions by statesman and intellectuals concerned in the conflict over the Constitution Act, 1982 and the Canadian Charter. In particular, to stress the originality of statement of René Lévesque in the federal-constitutional conferences of 1980 and 1981, in this study we place an emphasis on debates that occurred during these constitutional conferences. However, to clarify the similarity and differences between Lévesque and other Québec statesmen and intellectuals, we need to examine the thoughts of these statesmen and intellectuals, and the debate in the national assembly. Firstly, we would like to examine the work of Gary Caldwell "Le Québec ne doit pas se donner une constitution"[52] and the work of Léon Dion "Séance pléniere: synthèse et prospective"[53]

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[51] René Lévesque, *René Lévesque: Textes et Entrevues 1960-1987 Textes colligés par Michel Lévesque en collaboration avec Rachel Casaubon* (Montréal: Presses de l'Université du Québec, 1991), 240.

[52] Gary Caldwell, « Le Québec ne doit pas se donner une constitution», *Philosophiques* vol. XIX, 2 (1992).

because these articles afford us better understanding of the reason why Québec intellectuals insist on the significance of parliamentary democracy. Secondly, we would like to examine the debate in national assembly[54] between Jérôme Choquette and Jacques-Yvan Morin because the debate reveals that there are differences in opinions about parliamentary democracy in Québec. In examining the debate, we would like to refer to the work of Morin, "Une charte des droits de l'homme pour le Québec"[55] in order to consider the argument of Morin in more detail. Thirdly, we would like to examine the work of Claude Ryan *Regards sur le fédéralisme canadien*[56] and the work of Fernand Dumont *Raisons communes*[57] because these works clarify that there is difference in conception of rights between Québec intellectuals.

As to the Chapter 2, we would like to use mainly primary documents in order to examine the political conflict over the conception of rights. Québec governments have been opposed to the entrenchment of the Charter of Rights and Freedoms into Constitution since 1967, and they have demanded the establishment of the special constitutional court on the

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[53] Léon Dion, « Séance pléniere : synthèse et prospective » dans la Conférence sur le parlementarisme britannique, *Le parlementarisme britannique anachronisme ou réalité moderne ?: documents et débats* (Québec : Assemblée nationale, 1980).

[54] Gouvernement du Québec, Ministère des Relations internationales, *La démocratie québécoise par les textes. (Études & Documents) Textes choisis et présentés par Marc Chevrier* (Québec city, 1998), 95-103.

[55] Jacques-Yvan Morin, « Une charte des droits de l'homme pour le Québec », *McGill Law Journal* vol. 9 (1963).

[56] Claude Ryan, *Regards sur le fédéralisme canadien* (Montréal: Boréal, 1995).

[57] Fernand Dumont, *Raisons communes 2e éd.*(Montréal: Éditions du Boréal, 1997).

European model for the purpose of protection of provincial autonomy.[58] About these subjects, the public document entitled *Québec's Positions on Constitutional and Inter governmental issues from 1936 to March 2001* [59] published by the secrétariat aux Affaires intergouvernementales canadiennes is well worth referring to. Some intellectuals in Québec, also, have been opposed to entrenchment of the Charter and demanded the constitutional court. One of them is Jacques-Yvan Morin. He insisted on establishment of the special constitutional court on Austrian model[60].

As to the Chapter 3 and 4, some documents published by federal government are worth referring to. For example, we can grasp the main point of federal constitutional conferences held before 1980 from the document entitled 'resume of federal-provincial constitutional conferences: 1927-1980.' we think that the debate over entrenchment of the Charter came to a climax between two constitutional conferences; federal-provincial constitutional conferences of 1980 and 1981 because there was a turning point in the debate

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[58] André Tremblay, *La Réforme de la constitution au Canada* (Montréal: Les Éditions Themis, 1995), 114-119.

[59] Gouvernment du Québec, Secrétariat aux affaires intergouvermentales canadiennes, *Quebec's Positions on Constitutional and Inter governmental issues from 1936 to March 2001*, http://www.saic.gouv.qc.ca/institutionnelles_constitutionnelles/table_matieres_en.htm. The French version is entitled, *Positions du Québec dans les domaines constitutionnel et intergouvernemental de 1936 à mars 2001* (Québec city, 2001).

[60] Marc Chevrier, « Contrôle judiciaire et gouverne démocratique : de la « législation judiciaire » au Canada depuis 1982 » Thèse pour le doctorat de l'Institut d'etudes politiques de Paris (2000), 46-47.

over the Charter of Rights. After the constitutional conferences ended in disagreement of opinions between participants, eight provinces (excluding Ontario and New Brunswick) held meetings and came to agreement about their own plan for a constitution in April 1981. The resolution and discussion of these conferences held by eight premiers also are worth referring to. During the constitutional conference of 1981, the alliance of eight provinces broke up and seven English speaking provinces came to agreement about the plan proposed by the federal government. There was difference in the conception of rights between Québec and the rest of Canada in this constitutional conference. Therefore we would like to put my examination especially on originality of Lévesque's conception of rights and the difference between Lévesque's and the Trudeau and English Canadian premiers' conception of rights.

CHAPTER I

QUÉBEC'S CONCEPTIONS OF RIGHTS

1.1 The position of Québec government about the rights: from Jean Lesage to René Lévesque government.

In examining Lévesque's conception of rights, it is helpful to understand what kind of conception of rights the Québec governments since the latter half of 1960's have had. The proposal on Constitutional reform and the Charter of Rights and Freedoms put forward by Trudeau, (who just took the post of prime minister of Canada) was a turning point in the Québec government's thinking on rights. Though Canada was formed as a kind of federation in 1867 by the British North America Act and a dominion of the British Empire, in fact Canada has never been a confederation but a quasi-federation, an 'unitary federal state'. The reason of it is that the British North America Act had the highly centralized character.[61] Although until the end of the Second World War, Canada has acquired most of the powers necessary for self-governance, but the power to revise its own constitution independently has remained in the hands of the British parliament. Therefore, Canada needed to repatriate the

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[61] Carl J. Friedrich, *Trends of Federalism in Theory and Practice* (London: Pall Mall Press, 1968), 119.

powers to revise its constitution by reforming the British North America Act. Since the federal-provincial constitutional conference held by Mackenzie King (Premier Minister of Canada in 1927), there have been a number of conferences held concerning the way to address the problem of amending formula. In particular, Trudeau's appearance on the federal political scene animated the process of constitutional revision because it added the new issue of the entrenchment of the Charter of Human Rights to the constitutional revision agenda.

In the federal-provincial constitutional conference of January 1968, Trudeau announced four purposes for the Canadian federation. The first one was to maintain the character of federalism in Canada. The second one was to respect the rights of individual Canadians (including language rights, namely rights for English or French Canadians to use either English or French in public institutions). The third one was to make the individual development of Canadian citizens a main purpose of Canadian federation, which concerns every aspect of individual development, encompassing the economic, social and cultural spheres. Canada was charged with the responsibility to provide every Canadian with the opportunity to enhance every aspect of his or her own development. The fourth one was to ensure that Canada is ranked in the international community as an active contributor to international peace. Trudeau sought to insert these four purposes in a new Canadian constitution. The aim of his action in doing so was, by way of describing the purpose of

Canada in the Constitution, to clearly define the rights, interests and purposes of the Canadian nation and promote a sense of unity in Canada.[62]

How then, have Québec governments responded to the proposals originally tabled by Trudeau? Québec governments have repeated demands for its autonomy since the Quiet revolution of 1960, when the Jean Lesage government began to insist on the special status of Québec in Canada. According to him, Québec, as the cornerstone of French Canada, is asking for the equality of Canada's two founding ethnic groups (groupes ethniques). It is seeking a status that respects its special characteristics.[63]

This means the positive affirmation of autonomy in economical, social, and cultural spheres. In the Fulton-Favreau Formula of 1964, Lesage agreed to the Formula because he thought it limited the powers of federal government. However, public opinion was vehemently opposed to this proposal on the ground that the formula makes it impossible for

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[62] Pierre Elliott Trudeau, *The constitution and the people of Canada: An approach to the Objectives of Confederation, the Rights of People and the Institutions of Government* (Ottawa: Government of Canada, 1969), 2-16.

[63] Gouvernement du Québec, Secrétariat aux affaires intergouvermentales canadiennes, *Positions du Québec dans les domaines constitutionnel et intergouvernemental de 1936 à mars 2001* (Québec city, 2001), 26.

Québec to have a veto and additional powers. Finally, Lesage withdrew his consent to the Formula.[64]

In his work titled *Égalité ou indépendance*, Daniel Johnson of the Union Nationale clarified the Québec provincial government position in insisting that Canada cannot merely be perceived as a federation consisting of ten provinces, but should also explicitly state that it is a union of two nations; one English and the other French, which are equal in rights under this union.[65] He came to power in the Québec general election of 1966, when his party defeated the Parti libéral under Lesage. In the federal-constitutional conference of 1968 proposed by federal government where entrenchment of the Charter of Rights firstly appeared on the agenda of amendment formula, Johnson suggested that Québec should have its own charter of rights to be administered by the Québec government, in addition to the Canadian Charter of Rights under the jurisdiction of the federal government. That is, he suggested that Canada should have Charters of Rights at both federal and provincial level. He stressed that the entrenchment of the Canadian Charter was just one of the questions which must be studied under the ambit of a total review of the Constitution during the constitutional conference of 1968.[66] Among his proposals, which reflected a decentralization-oriented

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[64] Russel, *Constitutional Odyssey,* op.cit., 73-74.
[65] Daniel Johnson, *Égalité ou indépendance* (Montréal : Éd. renaisssance, 1965).
[66] Fogarty, Stephen, *Resume of federal-provincial constitutional conferences: 1927-1980* (Ottawa: Research Branch of the Library of Parliament, 1980), 19.

thinking, was a significant one, such as the establishment of a special constitutional court. He stated as follows:

> Dans un pays unitaire dont la société est homogène, il est possible de concevoir les déclarations de droits comme résumant la philosophie morale acceptée par toute la population, et d'en faire découler tous les droits des citoyens. Ceci a alors pour résultat de consacrer dans la Constitution une tendance à l'homogénéité des conceptions éthiques dont l'application relève des tribunaux.[67]

Following his thinking, in a federal system, particularly Canada, enacting the constitution in this way makes a serious political mistake. The tradition of civil law in Québec and the way that it recognizes and protects fundamental rights are markedly different from the court procedures in a system of common law. Therefore, he makes the insistence that a special constitutional court should be established.[68] Without the special constitutional court, the unilateral definition of rights by the supreme court of Canada uniformly is applied to the Québec. According to Johnson's proposal for the special constitutional court, at least 2/3 judges of the court should be appointed by the provinces and the composition of this court should reflect the federal character of common institutions and the Canadian cultural duality, unlike the existing Supreme Court whose judges are appointed by federal government. [69]

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[67] Gouvernement du Québec, Secrétariat aux affaires intergouvernementales canadiennes, *Positions du Québec dans les domaines constitutionnel et intergouvernemental de 1936 à mars 2001* (Québec city, 2001), 35

[68] Ibid.

[69] Ibid.,34.

It was under the Robert Bourassa government of 1970 that Québec first established its own Charter of Rights. In his time in politics, Bourassa has sought cultural autonomy, widely known as the 'distinct society' argument. On the other hand, Bourassa has also been supportive of the Charter of Rights proposed by the federal government to the extent that it did not prevent the establishment of the Québec Charter of Rights. In addition, he has demanded the establishment of a constitutional court for Canada as Johnson did.[70]

From the preceding arguments, it was found that Québec governments have maintained a tradition of arguing in support of the significance of provincial parliament as well as of pressing demands for the establishment of a Canadian constitutional court. Since these requests embody Québec's desire to determine its own rights by its own hands, in this respect it can be characterized as collectivist. However, Québec sought to establish its own Charter of Rights that aims at the protection of individual rights, which then as a consequence exposes the main problem with the argument of Pierre Trudeau who maintains that Québec is an illiberal society.

In the construction of the Québec Charter of Rights, regarding the type of autonomy pursued by different Québec governments, there are differences in the type of autonomy advocated between the Québec liberal Party and Parti Québécois. In order to

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[70] Ibid., 48.

elucidate this difference, it is helpful to study arguments over the establishment of the Québec Charter of Rights in the next section.

1.2 The 1974 debate around the Québec's Charter in National Assembly.

As we examined in the preceding section, since Trudeau proposed the original plan for the entrenchment of the Charter of Rights, Québec governments have demanded the right to a separate charter of rights. The Québec Charter of Rights was enacted in 1975 under the Québec liberal party, Robert Bourassa's government. The purpose of this Charter is clearly to give legal protection to individual rights and freedom. Moreover, the Charter of Rights was more in advance of the times than other Canadian provincial Charter of Rights because the Charter included also social and economic rights.[71] While it is generally said that collective rights are placed over individual rights in Québec, the existence of this charter is important counter evidence to the contrary.

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[71] André Morel, « La Charte québécoise des droits et libertés : un document unique dans l'histoire législative canadienne » dans Revue juridique Thémis, vol. 21, (1987), 16-17.

However, on the question of the opportunity of enacting a Québec Charter of Rights, there was disagreement between the Liberal Party of Québec and the Parti Québécois: the disagreement between Jérôme Choquette, the Québec minister of justice and member of Québec liberal party, and Jacques-Yvan Morin, member of Parti Québécois in the National assembly. After graduating from McGill University and practicing law in Montreal, Choquette has been a representative of the Québec liberal party since 1966 and has served as Minister of justice under the Bourassa government from 1970 to 1975. Morin, on the other hand, entered the sovereignty movement of Québec and has acted as representative of the Parti Québécois in 1973 after similarly, graduating from McGill University and having taught law at the University of Montreal. In the 1973 general election of Québec when the Parti Québécois failed to take power, René Lévesque (the leader of the party) even lost in his own riding. Therefore, Lévesque appointed Morin the leader of the National Assembly of Québec. At that time, since the Parti Québécois held the position of the official opposition party, following the demise of the Union Nationale, Morin assumed the leadership of the official opposition in the National Assembly.

Firstly, we would like to examine the argument put forth by Choquette. In the debate in the National Assembly in 1974, Choquette stated that the first aim of the Québec Charter of Human Rights and Freedoms is to make Québec follow the same current of legislative development among Western countries, with respect to individual rights and freedoms, every western countries has a dedicated law which aims to defend individual rights and freedoms, which was a normative standard for being a "Western country". The second

aim of the Charter is to integrate the principle that has been cultivated over generations in Québec, namely, democratic values and respect for the individual, while ensuring a degree of legal flexibility in order to accommodate values that Québec's society may come to accept in the future. The third aim is to enable the values which individual rights and freedoms include to develop in the future. The fourth and final aim is to provide the relief measures in case individual rights and freedoms are violated, by establishing a commission of the Charter of Human Rights and Freedoms.[72] In sum, the aim of the Québec Charter of Human Rights and Freedoms proposed by Choquette was to defend individual rights and freedoms.

Morin of the Parti Québécois didn't have any objection to the idea of Québec having its own Charter for the purpose of protecting individual rights and freedoms.[73] In fact, Morin had proposed his own version of a plan to establish a Québec Charter of Rights as early as 1963. In an article of his in the McGill Law Journal, he argued that Québec also should participate in the trend of protecting Human Rights and fundamental freedoms.[74] Moreover, according to him, while in Québec collective communitarian ties used to be respected, they were rapidly becoming less significant. The gradual disappearance of communitarian ties is a common trend among industrial societies based on the organizing principle of individual self-interest, and is described as a civilisational feature of North America. Under these

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[72] Assemblée nationale du Québec, *Journal des Débats*, deuxième session-30[e] Législature, vol.15, No. 79, (1974), 2741-2743.
[73] Ibid., 2750.
[74] Jacques-Yvan Morin, « Une charte des droits de l'homme pour le Québec » *McGill Law Journal* vol. 9 (1963), 273.

circumstances, it is necessary to invent new modalities of pursuing communitarian life, and thus actively seek to redefine the social aim of the group within which individuals occupy. For this purpose, the Québec Charter of Rights and Freedoms is seen to be ideal measures for fostering a sense of social composition.[75]

Although Morin also agreed with Choquette on the necessity of enacting the Québec Charter of Rights, he pointed out that as to the legal status it was not enough. Choquette insisted that the Québec Charter should be an ordinary law and not superior to other laws because Québec has a strong tradition of parliamentary democracy. He advocated England's approach to individual rights, whereby individual rights and freedoms are determined by a variety of legal documents of varying statutes, which are amended by succeeding parliaments and representatives of people in the parliamentary tradition, rather than establishing a constitutional order with absolute principle.

In contrast to this, Morin intended to put the Québec Charter in a position similar to a constitution because, according to him, the Québec Charter of Rights was not simply an act of ordinary law, but one which defines both the demands from individuals and groups and the social, economic, political, cultural rights, and fundamental rights of Quebecers. Thus it would be a standard reference for all other laws to be passed. According to him, the second

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[75] Assemblée nationale du Québec, *Journal des Débats*, deuxième session-30[e] Législature, vol.15, No. 79, 1974, op.cit , 2750.

paragraph of section 45 of the Charter prescribes that the Charter should not be interpreted as revising or restricting every ordinary law. But, this Charter is neither a Charter nor a fundamental law. This is an ordinary law, which can be denied by other ordinary laws. Subsequently, this law should not be generally called a Charter in constitutions and legislation of other countries."[76]

This reveals that Morin wanted to give the Charter the position similar to a constitution. However, Morin also did not ignore the long tradition of parliamentary democracy in Québec. He stated that within parliamentary democracy (that is the sovereignty of parliament), this kind of Charter can be enacted. According to him, Albert Dicey's constitutional theory of parliamentarism[77] (on which Choquette's proposal was based) is insufficient. It is true that parliament cannot deny the discretion of its own and its succeeding law makers. While it is true that with regards to the legitimate legislative rights forming the foundation of parliament, it is not possible to deny legislative discretionary powers to successive generations of legislators. However, Morin referred to the theory of Sir Ivor

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[76] The original text is as follow : « La charte ne doit pas être interprétée de manière à modifier ou restreindre la portée de toute autre loi....C'est abuser du mot « charte » que d'y inclure un article comme 45e. Ce mot signifie : loi fondamentale...Le projet qui nous est proposé ce soir n'est ni une charte, ni une loi fondamentale. C'est une loi ordinaire qui peut être contredite demain par une autre loi. » Ibid., 2755.

[77] His main works are as follows; Albert Dicey, *An Introduction to the Study of the Law of the Constitution 10h edition* (London: Macmillan, 1962).

Jennings[78] (English scholar of constitutional theory in the 1930's). In his *the law and the constitution*, Jennings argued as follows,

> "Legal sovereignty" is merely a name indicating that the legislature has for the time being power to make laws of any kind in the manner required by the law. That is, a rule expressed to be made by the Queen, "with the advice and consent of the Lords spiritual and temporal, and Commons in this present Parliament assembled, and by the authority of the same," will be recognized by the courts, including a rule which alters this law itself. If this is so, the "legal sovereign" may impose legal limitations upon itself, because its power to change law includes the power to change the law affecting itself.[79]

Based on this theory, Morin stated that in establishing a rigid constitutional formula, it is justifiable, in a sense, to restrict the discretionary powers of parliament with regards to the Charter[80].

From the preceding arguments it can be concluded that, although there were differences between the Québec Liberals and the Parti Québécois towards the Québec Charter of Rights, we can find agreement between them on the points of the overall necessity of the Charter of Rights, as well as the respect for the parliamentary democracy.

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[78] His main works are as follows, Sir Ivor Jennings, *The British constitution* (Cambridge: Cambridge University Press, 1967) and *The law and the constitution fifth edition* (London: University of London Press, 1959).

[79] Sir Ivor Jennings, T*he law and the constitution fifth edition* (London: University of London Press, 1959), 152-153

[80] Assemblée nationale du Québec, *Journal des Débats*, deuxième session-30[e] Législature, vol.15, No. 79, (1974), op.cit., 2756.

Québec government's faith in parliamentary democracy is the main reason for its opposition to the Canadian Charter, which from their view causes the politicization of the judiciary as the Supreme Court of Canada interprets the Canadian Charter. In fact, according to Léon Dion, parliament is the source of true sovereignty in democratic societies, and there can be no democracy in a society that has no parliament.[81] Gary Caldwell argued that the sovereignty of parliament is absolute and no one can violate it. He cited the words of Edmund Burke, saying that "...the House of Commons cannot abandon its authority. The engagement and contract of society are going on under the name of the constitution."[82]

However, as the discussion surrounding the Québec Charter of Rights has shown, it is evident that the overlap between judiciary and legislature was not the only subject of contention. As Morin stated that his support for necessities of the Québec Charter of Rights does not contradict the principle of parliamentary sovereignty (as was explained in the preceding argument), actually the problem is rather that, within Canada's judicial system all superior court judges are appointed by the federal government. Therefore, Québec governments have been making repeated demands for the reform of the Supreme Court nomination's process. The important question here is whether or not Quebecers can represent

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[81] Léon Dion, « Séance pléniere : synthèse et prospective », dans la Conférence sur le parlementarisme britannique, *Le parlementarisme britannique anachronisme ou réalité moderne ?: documents et débats* (Québec : Assemblée nationale, 1980), 227-229.

[82] Gary Caldwell, « Le Québec ne doit pas se donner une constitution : Il en a déjà une qu'il abandonnerait à ses risques et périls, » *Philosophiques*, vol XIX, 2 (1992), 196.

their will in parliament and courts, which have been charged with determining the concrete contents of abstract rights. Janet Ajzenstat, an English Canadian academic who supports the significance of notwithstanding clause of the 1982 Constitution from the viewpoint of parliamentary democracy, pointed out that parliamentary sovereignty according to Albert Dicey is not only based on the principle of parliamentary sovereignty but also on the rule of law (governments and officials should be subject to the law), thus parliament and the rule of law should be mutually reinforcing.[83] In fact, Dicey stated that the principle that parliament speaks only through an Act of Parliament greatly increases the authority of the judges on the following two grounds. The first one is that English judges have refused to interpret an Act of Parliament otherwise than by reference to the words of the enactment. The second one is that English Parliament as such has never exercised direct executive power or appointed the officials of the executive government.[84] In the light of this theory about coexistence of the parliament and the rule of law, Québec's claim for parliamentary democracy and Canadian constitutional court may be said to parallel that of Dicey.

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[83] Janet Ajzenstat, "Reconciling Parliament and Rights: A.V. Dicey Reads the Canadian Charter of Rights and Freedoms," *Canadian Journal of Political Science*, XXX4 (1997): 645.

[84] Dicey, *Introduction to the study of the law of the constitution Tenth Edition*, op.cit., 407-408.

After discussion in the National Assembly of Québec, a provision concerning supremacy of the Charter over other laws[85] was inserted into the Québec Charter of Rights and adopted in 1975 by the National Assembly of Québec. However, the Québec Charter put more emphasis on parliament than the Canadian Charter.

According to José Woehrling, the normative concept for rights for Québec and Canada are different. This is found to be so with respect to the Québec Charter of Human Rights and Freedoms. According to this text, the Québec Charter transfers less authority to the courts than the Canadian Charter does. According to his comparative study, the limiting provision of Section 9.1 of the Québec Charter prescribes that "in exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec. In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law. On the contrary, the limiting provision in Section 1 of the Canadian Charter corresponds more closely to a conception of rights as pre-existing the legislator's intervention, which inevitably restrains and limits them rather than providing a framework for their exercise.[86]

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[85] The section 52 of the Quebec Charter of Rights and Freedoms stipulates as follows:
No provision of any Act, even subsequent to the Charter, may derogate from sections1to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter.

[86] José Woehrling « Les conséquences de l'application de la charte canadienne des droits et libertés pour la vie politique et démocratique et l'équilibre du système fédéral » dans

Fernand Dumont, the distinguished Québécois sociologist, criticized the Canadian Charter, saying that it is only effective in establishing and maintaining individual rights and that it erodes the collective character of Québec. The philosophy underlying the Charter will lead to a state that 'assembles' individuals concerned solely with their own rights. The Canadian Charter, like Canadian multicultural policy, fragments social structure, accentuates the principle of individualism, and fosters a variety of interest groups (which refer directly to a state in order to defend their rights, and which results in veiling the particularity of Québécois nation within the Canada). Based on the reasons stated above, Dumont criticized the Canadian Charter for causing the superiority of the individual rights as its sole base.[87]

On the contrary, although Claude Ryan (who was then chief editor of *Le Devoir* and would later become the leader of the Québec liberal party) advocated the autonomy of French Canada, his political philosophy was liberal individualism. Therefore, he regarded the Québec Charter of Rights and Freedoms as important on the ground that it gave priority to individual rights.[88] For the same reason, he advocated for the Canadian Charter of Rights. Therefore, he went against Dumont's argument that the Canadian Charter fragments social structure, accentuates the principle of individualism, and violates collective rights. Ryan

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Gagnon, Alain-G., (dir.), *Le fédéralisme canadien contemporain: Fondements, traditions, institutions* (Montréal: Les Presses de l'Université de Montréal, 2006), 277.

[87] Fernand Dumont, *Raisons communes 2e éd.* (Montréal: Éditions du Boréal, 1997), 44-45.

[88] Olivier Marcil, *La raison et l'équilibre : Libéralisme, nationalisme et catholicisme dans la pensée de Claude Ryan au Devoir (1962-1978)* (Montréal: Éditions Varia, 2002), 212-213.

argued that there is nothing wrong with the fact that the Charter of Rights accentuates individualism, because it is the very essential purpose of the Charter of Rights. Although judges are appointed by federal government, Canadian courts generally judge all parties concerned in cases brought before them fairly, and fulfills its obligations about protection of individual rights with dignity, impartiality and humanity.[89]

These arguments of Ryan and Dumont came short of the complementarity between individual and collective rights because Ryan put emphasis on individual rights and Dumont stressed collective rights.

In sum, from Morin's arguments for the supremacy of the Québec Charter we can find that he sought to balance between the parliamentary sovereignty and the rule of law. However, as José Legault points out, it is true that an entrenched Charter can reduce political conflicts in rights problems, with the danger of undermining political discussion which plays important role in solution of conflicts between within individuals and within groups.[90] Thus, democratic discussion is important in deciding the concrete contents of rights, and in that point we can find the possibility of the complementarity between individual and collective rights, which René Lévesque would seek later.

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[89] Claude Ryan, *Regards sur le fédéralisme canadien* (Montréal: Boréal, 1995), 174-178.

[90] Josée Legault, « Les Dangers d'une charte des droits enchâssée pour un Québec indépendant », dans Michel Seymour (dir.) *Une nation peut-elle se donner la constitution de son choix ?*, (Montréal : Editions Bellarmin, 1995), 162-163.

In1976 René Lévesque took power in Québec and opposed to Trudeau's plans for a Canadian Charter. Under these circumstances, while the new leader of the Québec liberal party, Ryan, sided with Trudeau about constitutional problem, Lévesque developed his original conception of rights to achieve the complementarity between individual rights and collective rights in the debate over the Canadian Charter. Before examining his logic, it is helpful to begin with an examination of the constitutional conferences in 1970's.

CHAPTER II

A CONFLICT IN CONCEPTION OF RIGHTS BETWEEN CANADA AND QUÉBEC: THE DEBATE IN THE FEDERAL-PROVINCIAL CONSTITUTIONAL CONFERENCES FROM THE 1970'S TO 1980'S.

2.1 Federal-provincial conferences in the 1970's

As we mentioned in the previous chapter, before 1982 constitution, the discussion over the amending formula has been going on since the 1960's. In particular, the Fulton-Favreau project was important in proposing the rule of unanimity regarding modification of provincial powers.[91] However, as mentioned above, it resulted in failure. After that, the successive federal-provincial conferences were held in February 1968 and June 1969, and the subject for discussion at these conferences was not language rights and the

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[91] André Tremblay, *La réforme de la constitution au Canada*, (Montréal :Les Éditions Thémis,1995), 46-49.

Charter of Rights, but mainly economic matters such as federal taxation and federal spending power.[92]

It was in the 1970's that the subject of discussion again switched to the appropriate formula to be adopted for amending formula, which soon became an issue of hot contention. At the constitutional conference of 1970, Robert Bourassa, who was then newly elected premier of Québec, expressed more interest in the economic problem than constitutional one. Bourassa sought to shift the Québec liberal party's position to one more favorable towards Trudeau's thought, namely support for Canadian federation. Bourassa made this change because he was primarily concerned with Québec's economic issues, which he prioritized over the politicized arguments connected to the Repatriation debate. In this way, he expressed his intentions to make concessions to the federal government regarding some items in order to put an end to the constitutional conflict and reach a compromise as soon as possible.

However, unable to ignore the rising tide of nationalism in Québec, Bourassa instead hammered a position advocating Québec's cultural sovereignty. In order to realize this platform, it was necessary for his government to obtain greater jurisdictional authority in the fields of immigration and communication. Therefore, his first concern became the greater division of powers as Daniel Johnson and Jean-Jacques Bertrand have claimed, while on the

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[92] Stephen Fogarty, *Resume of federal-provincial constitutional conferences*: 1928-1980 (Ottawa: Research Branch, 1980), 18-20.

other hand supporting the Canadian Charter of Rights proposed by Trudeau.[93] Thus, Trudeau warmly welcomed Bourassa because he regarded Bourassa's government as a clear ally in his position on federalism.

With these political conditions in place, at a working group held in Ottawa on February 1971, Trudeau made the announcement that federal and provincial governments should tackle the question of constitutional repatriation as well as the amending formula as soon as possible.

In the middle of June 1971, a federal-provincial conference was held in Victoria, British Colombia, where Trudeau proposed a constitutional formula called the "Victoria Charter", which prescribed the suspension of the power for governors general to disavow provincial laws as well as gave constitutional veto rights for Ontario, Québec, and the Atlantic provinces, along with the right to opt out from the shared cost programs established by the federal government. Since this Charter allows Québec to have constitutional veto on most of constitutional amendments, Bourassa, the premier of Québec positively welcomed the Charter.[94] In addition, this Charter includes provisions concerned with the entrenchment

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[93] Resume of federal-provincial constitutional conferences: 1927-1980, (Ottawa; Research Branch, 1980), 27.

[94] Tremblay, *La réforme de la constitution au Canada*, op.cit., 51.

of basic political rights into constitution such as universal suffrage and free election. And it includes also provisions concerning language rights that French and English should be official languages in Canada.

Although Bourassa initially agreed to the Victoria Charter, following the conference, the provincial premiers returned to consult with their constituencies on the question of whether to accept or reject the federal proposal, with a deadline for reply set the 28th of June. As a result though, the population of Québec was largely opposed to the Victoria Charter. Ryan, then editor of Le Devoir, was one example of a prominent figure who campaigned against the Charter, and according to him, although this plan would provide Québec with a veto, it is insufficient because it constrains Québec to single passive position of rejecting unfavorable proposition or opposing so as to prevent other provinces from taking action. A passive veto in the place of positive initiative was not acceptable from this viewpoint. Moreover, most members of the Québec liberal Party were opposed to the Victoria Charter, in addition to the Parti Québécois, who criticized the veto by further pointing out that although the veto given by the Victoria Charter guarantees the right to opt out, it lacks financial compensation. In the end, confronted with increased opposition, Bourassa withdrew his support for the Victoria Charter[95].

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[95] Georges-Hébert Germain, *Robert Bourassa* (Montréal: Les Éditions Libre Expression, 2012), 172-176.

The failure of the Victoria Charter was a great shock to the federal government, and greatly slowed down the pace of constitutional repatriation negotiation. The decisive turning point was the Parti Québécois' accession to power in 1976, and the first referendum on sovereignty association held in 1980.

The next constitutional conference was held in November 1978, right after the general election of 1976, René Lévesque stated that it was doubtful whether large-scale decentralization for provinces was possible within the federal system that existed at the time, and clearly expressed opposition to the entrenchment of the Canadian Charter of Rights on the ground that it caused the judicialization of politics.[96] In 1980, René Lévesque held a referendum, where he introduced his own conception of State, namely, "sovereignty association," which outlines a plan whereby Québec has political sovereignty, yet maintains an economic union with the rest of Canada. During this campaign against sovereignty-association, Trudeau promised to change the constitution so that the Québec would be content with it. The referendum ended in a victory for the No camp, with 40 % voting "Yes," against 60 % voting "No". Trudeau declared that he was going to set about organizing a new constitutional round, and decided to open the federal-provincial constitutional conference in September 1980.

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[96] Fogarty, *Resume of federal-provincial constitutional conferences,* op. cit., 36.

2.2 The federal-provincial conference of 1980

From the 8th to the 12th of September, 1980, a federal-provincial conference took place in Ottawa, where Prime Minister Pierre E. Trudeau and ten provincial premiers gathered.[97] This conference was of such significance, that Trudeau, acting as chairman, declared it to be the most important conference since the Charlottetown Accord of 1864, in which the founding fathers argued about the foundation of Canada. According to Fernand Dumont, the repatriation project executed by Trudeau is described as a "the second foundation of Canada."[98]

In a public statement, Trudeau expressed his opinion about why the Charter of Rights and freedoms was necessary. According to him, the Charter is a matter related to the basic fundamental rights of the people. Therefore, he maintained that this matter should not

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[97] Provincial premiers who attended this conference were as follows;
William Davis, premier of Ontario, René Lévesque premier of Quebec, Richard Hatfield, premier of New Brunswick, John Buchanan, premier of Nova Scotia, Angus MacLean, premier of Prince Edward Island, Brian Peckford, premier of Newfoundland, Sterling Lyon, premier of Manitoba, Allan Blakeney, premier of Saskatchewan, Peter Lougheed, premier of Alberta, and Allan Williams, attorney General of British Columbia.

[98] Fernand Dumont, *Raisons communes 2e éd.* (Montréal: Éditions du Boréal, 1997), 46.

be an object of bargaining between provincial and federal governments, but held that the Charter should belong to people directly. It is a question of what basic fundamental rights are so sacred that neither the federal nor the provincial government should have the jurisdictional leeway to infringe upon those rights. However, as the formula for repatriation required unanimity between the premiers, it proved very difficult to reach a consensus. For example, in Victoria Charter, all premiers had agreed on an amending formula unanimously, but one province said no. As individual premiers tend to seek more individual powers, there is a tendency whereby one province will use its position to threaten consensus with a veto to leverage more powers for itself, even if doing so should compromise the collective efforts and progress made in negotiations. To address this, Trudeau announced his intention to change the rule of game, that is to say, the rule of unanimity.[99]

This conference dealt with 12 items,[100] and the main topics of the conference can be roughly classified into the following four categories; 1) Language rights, 2) Division of

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[99] Transcript of the Prime minister's Statement at the First Ministers Conference on September 8, 1980, document 800-14/050(1980), Federal–Provincial conference of first ministers on the constitution, publications officielles, bibliothèque de la ville de Montréal.

[100] Those items dealt with in the conference are as follows; 1) natural resources and inter-provincial trade 2) communication, 3) the Supreme Court, 4) family law, 5) Fisheries, 6) offshore resources 7) the equilibration of provincial finances, 8) the Charter of Rights, 9) constitutional repatriation and an amendment formula 10) financial control, 11) the preamble of the constitution, and 12) the Senate.

powers, 3) Definition of nation, 4) Canadian Charter of Rights, which will be discussed in order.[101]

Language Rights

Trudeau argued to entrench the protection of individual rights and official language rights in the constitution. Trudeau's aim was not to recognize the Québec as nation, but rather to integrate every citizen in Canada on an equal footing as Canadian. It would require making Quebecers personally identify with the Canadian federal government, as opposed to the Québec provincial government. The official language policy was important in promoting this aim. Trudeau expected that the policy would enable French-speaking peoples to live all over Canada because they would receive public services in French such as public education in French where numbers warrant.

It was the premiers of Ontario and New Brunswick that agreed with the language policy. William Davis, the premier of Ontario, stated that Ontario was ready to work on bilingual policy on its own initiative in order to promote Canadian unity. New Brunswick, which has the most French-speaking citizens next to Québec (approximately 30%), was in

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[101] The following arguments in the federal-provincial constitutional conference of 1980 is based on the document of Federal-Provincial conference of first ministers on the constitution, publications officielles, bibliothèque de la ville de Montréal, document 800-14/050 (1980).

favor of the official language policy. Richard Hatfield (premier of the province) stated that the respect for two-language policy has a good effect on promotion of the recognition of collective rights.

However, the other provinces kept distance from the language policy. Especially the western provinces, where few French speaking people live, were generally opposed to the federal language policy. Although Allan Williams (attorney general of British Columbia) stated that British Columbia was going to actively work on the preservation of the French speaking minority, he was opposed to the language policy being forced by the constitution. Sterling Lyon (premier of Manitoba) stated that fundamental rights and the democratic rights of individuals are different from language rights, and thus they should not be protected equally. Allan Blakeney (premier of Saskatchewan) stated that the introduction of language rights into the constitution resembled 'a political bargaining'.

René Lévesque also was opposed to the official bilingual policy tabled by federal government. Regarding the language law, the Parti Québécois government has enacted a language policy act called Bill 101 in 1977. Québec had defended its position of promoting French unilingualism as opposed to bilingualism. According to Lévesque, Québec is a unique society, having a different first language than the rest of North America, and thus Quebecers should be defined as a nation with its center as Québec territory. The primary government in the minds of many Quebecers is the Québec government rather than the Canadian one, and

therefore, it is not appropriate to criticize the fact that their chief concern is the preservation of the French language in their own national territory.

Trudeau criticized Lévesque's remarks saying that following the reasoning of the Québec government, the survival of the French speaking population is deemed to be contingent upon their existence within Québec, while the French speaking minorities outside of Québec would be unable to survive. If the French language were to be established as being the exclusive domain of Québec province only, Canada would be divided into two parts. In that scenario, this would lead to eventually opting out of Canada to become independent state. Against this case Trudeau proposed another vision of Canada in which the federal government regards negotiation with Québec government as an important feature of its governance. His logic is based on the understanding that the treatment of minorities has been shown to be a crucial aspect in the integrity of civility of countries. The reason that Switzerland is successful despite being composed of four nationalities is that the majority recognizes the rights of minorities and makes concessions to them. From this viewpoint, the provision in the language law enacted by the Québec government saying that only English parents born in Québec have the rights to send their children to English public school should be rewritten to the provision that every English Canadian living in Canada have the right to send their children to public English school. Finally, Trudeau stated that the best way to preserve the French linguistic minority was in making the constitution obligate provincial governments to preserve those minorities. The best vision for Canada is to make a country where French-speaking people feel at home everywhere.

In response to Trudeau's remark, Lévesque replied that, even under the French language act (the Charter of the French language), the English minority does not feel that it is in danger. While in fact, the English minority in Québec already enjoys protection and it therefore does not need constitutional protection, the French minority living outside of Québec is in a precarious situation, with few effective legal protections. Under these circumstances outlined in the argument, he described Trudeau's language policy as neither logical nor applicable. Trudeau's vision he said, wherein the French-speaking minority would come to think of all of Canada as their home, might sound appealing, but one must always consider the realism of such visions, and Trudeau's ideas, he said, are just not applicable. In addition, he pointed out the dangers of the heavy-handed implementation of such visions upon population. An ideal which has its origin at a lower level of the democratic system is inherently better, which relies on the formation of consent from below up. In other words, according to Lévesque, provincial level measures on minority language rights are inherently more 'democratic' and therefore better. Considering the fact that at the time, only two provinces (New Brunswick and Ontario) were in favor of the language policy proposed by federal government, Trudeau's language policy is not sufficient for being called a common idea yet. Therefore, even if it is inserted in the constitution, it is natural that the practicability of it would become a problem.

Next, we would like to examine the topics of division of powers at this conference.

The division of powers

The premiers of Ontario and New Brunswick were in favor of the plan proposed by federal government. William Davis, the premier of Ontario, stated that although Ontario regards the idea of the regional development as important, the formation of strong economic union within Canada is required as a primary means of ensuring a stronger, united Canada. Hatfield, the premier of New Brunswick, did not demand a change in the division of powers, arguing that maintaining a balance between the federal and provincial governments is important.

However, most of the other English provinces argued about their rights to administer natural resources found within their provincial territory. The attorney general of British Colombia stated that energy, transportation, and industrial policy are required for making a strong British Colombia. Allan Blakeney, the premier of Saskatchewan, demanded the right to tax resource goods and the right to have a say in deciding the rate at which they would be produced. The premiers of Nova Scotia and Newfoundland demanded the right to control their natural resources as well.

As these examples suggest, most provincial governments' demands were based on their provincial interests. However, all of them with the exception of Québec have agreed one important topic, that being, the definition of the term 'nation'.

Definition of Nation

Although most of provincial governments in attendance tabled arguments regarding their own domestic concerns, all of the provincial governments except Québec seemed able to reach a consensus on the question of one nation for Canada. William Davis (the premier of Ontario) stated that "...now is the just time when we should entrench democratic rights and freedom which leave no room for discussion in written constitution in order to preserve our people, and it is the progress from the viewpoint of Ontario province". Moreover, William Davis stated that the aim of Canadian constitution is to confirm what is best and the most dynamic within Canadian nation, to protect minority rights, and strengthen the economic union of the country. These things prove Canadian citizenship as people and solidarity as nation. Connecting us with fundamental principles, that is, the Charter of Rights, means that Canadian will be joined to each other as a people, and as a nation.

The premiers of Manitoba and Saskatchewan were opposed to the entrenchment of the Charter of Rights into the Canadian constitution on the grounds that the entrenchment of the Charter would result in shifting the legislative authority from Parliament to the courts, which would amount to a constitutional revolution entailing the relinquishment of the essential principle of Parliamentary democracy, the principle of Parliamentary supremacy.[102] However, they agreed with the idea of promoting the formation of a nation in Canada. For

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[102] Kenneth McRoberts, *Misconceiving Canada,* op.cit., 167.

example, Sterling Lyon, the premier of Manitoba, stated that although Manitoba has a different opinion about some matters like the Charter of Rights, it is going to collaborate positively in the history of a nation. Blakeney, the premier of Saskatchewan stated, "Although we have various differences between the regions, these differences are supported on the assumption that we are citizen in a united Canada". Angus Mclean, the premier of Prince Edward Island, declared that he has a great attachment to Canada as a nation as well as having pride in his province.

However, concerning the topic of a Canadian nation, René Lévesque expressed quite a different opinion from the other premiers. Lévesque argued that Canadian Confederation was formed from two equal nations, the English and the French, 'Le Canada est composé de deux nations égales entre elles,'[103] while the other provinces agreed on theory of a single nation.

The Charter of Rights

Concerning the entrenchment of the Charter of Rights, most provinces with the exception of Ontario and New Brunswick, were opposed because they feared that the

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[103] *Positions du Québec dans les domaines constitutionnel et intergouvernemental*, op.cit., 57.

entrenchment of the Charter would lead to shifting the locus of the decision-making power from parliament to the Supreme Court. Moreover, Peter Lougheed, (the premier of Alberta) stated that since in Canada, at that time, almost all of the provinces had their own Charter of Rights, the entrenchment of the Canadian Charter would lessen the significance of each provincial Charter of Rights. According to him, the fundamental rights of Canadians are defended by each provincial charter of rights and thus, they are not in danger. Allan Williams of British Columbia, stated that the entrenchment of the Charter of Rights into a constitution would restrict the freedom of Canadians rather than to strengthen it. In Canadian federal documents, the rights of life, liberty, and safety are described as the most fundamental three rights, however, when it comes down to who gets to interpret what these rights mean, judicial courts, not legislators, would decide concretely what these rights entail. Therefore, according to Williams, the defect of the entrenchment of the Canadian Charter is that the exact and concrete definition of what these freedoms entail is very difficult to ascertain. In the present Canadian system, when citizens collectively realize that if the current system of rights is mistaken vis-à-vis their own values, they can seek a revision through the provincial legislature and federal parliament. A one-shot solution (such as the entrenchment of a charter) to a complex, ever-shifting moral landscape is inherently too rigid and incapable of addressing these discrepancies. In effect, what has resulted from the entrenchment of the Charter is that while the federal government simply aimed at establishing a moral codification of freedoms that already existed in Canada, the actual effect was to sacrifice Canadian parliamentary democratic traditions to this moral codification.

René Lévesque, the premier of Québec has been very clear about the problems of the entrenching of the Charter of Rights. Here, we would like to examine a document titled "The position of the Québec government about the Charter of Rights" issued in July 1980.[104] In this document, the Québec government made its position clear in its commitment to preserve fundamental human rights. The document said that Quebecers unanimously supported fundamental freedoms such as the freedom of religion, thought, free speech and free press, and fundamental democratic principles such as popular suffrage, elections every four or five years, as well as parliamentary sessions held every year. These rights are already established and respected in Québec. Therefore, the area concerning the constitutional Charter of Rights proposed by federal government is not that Québec is not adequately concerned with defending the rights of its citizen, but rather, that it seeks an optimal means of providing those protections. When the individual rights are entrenched in the constitution, the following three points must be considered. The first point is whether the entrenchment of the Charter is the best way to defend the rights or not. The second point is whether the rights treated in the Charter represent the values common to every Canadian or not. Finally, the third point is whether the meaning and range of the rights are fully defined or not.

Then the Québec government compares the advantages with disadvantages of Charter entrenchment. The first advantage pointed out is that the entrenchment of the Charter

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[104] The Charter of Rights: Quebec's Position in Meeting of the continuing committee of ministers on the constitution (Toronto: Library and Archives Canada, 1980).

can protect the individual rights firmly because any organization (including any legislature) cannot violate the principles included in the Charter. The second advantage is that courts regard an entrenched Charter as more valuable than a Charter based merely on parliamentary legislation. The third advantage is that the ceremony involved with the entrenchment process has symbolic significance, and finally, the fourth advantage is that the entrenchment of the Charter can defend fundamental and individual rights uniformly across the whole of Canada.

As for the disadvantages, the first one is that the entrenchment of the Charter may encroach on the rights of the provincial government to legislate, depending on the number and the variety of rights included in the Canadian Charter.

The second disadvantage is that the entrenchment of the Charter leads to a "government of judges", that is, "the rule of judges," which doesn't constitute the most democratic means for the preservation of rights. Rights and freedoms are far reaching and are in a constant state of evolution. The entrenchment of the Charter into the constitution necessarily complicates and obstructs this evolution, depriving the elected assembly of the power to adapt rights according to democratic principles. The responsibility for guaranteeing rights shifts from the elected representatives to appointed judges. The Canadian political system is based on representation and sovereignty in legislation, and therefore, the shift from legislative powers to the courts deprive citizens of their most effective means of influencing the development of individual rights. In this respect, Lévesque indicated an important point, being that rights, in fact, are wide-ranging and continuously undergoing change and evolution.

From this viewpoint, imposing a temporally contingent definition of rights through the entrenchment of the Charter is not the right kind of approach to address the definition of the rights. What is noteworthy in this discussion is that the democratic process whereby citizens, through their elected representatives engage in the formation of their rights, is a right in and of itself.

Regarding the third disadvantage, Lévesque argued that the wider the range of the rights gets, the bigger the second problem (the judicialization of politics) indicated above grows. He cited as an example, the mobility rights in Canada proposed by the federal government.[105] Generally, the significance of these rights is not opposed by anyone. However, if the meaning, implication, and range of rights are considered, there may be differences of opinion between the Québec and others on these rights despite agreement in principle, because the application of this right may violate the jurisdictional rights of the Québec government to control the qualifications of professional occupations. It is a very important point of contention, because in Québec where most of the citizens are French speaking, the qualification system for lawyers and doctors is different from the one of other provinces. Since the qualification requirements in Québec are stricter than other provinces, it may conflict with the rights of mobility in Canada. Moreover, inclusion of the rights of mobility into the constitution may cause the standardization of the educational system all

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[105] This right is entrenched in section 6 of the Constitutional Act, 1982. See Section 6 of Constitution Act, 1982, Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2010), A-38.

over Canada, because differences between provincial systems may be interpreted by the courts as a barrier to mobility. In this case, Québec have to set in motion the process of amending the federal constitution in which this right had been entrenched, however this is likely far more difficult than it might initially seem because the Québec has to obtain consent of other provinces in order to meet the conditions necessary for constitutional amendment (resolutions of the legislative assemblies of at least two-thirds of the provinces[106]).

Language rights were the item that the Québec government was the most opposed to in the entrenchment of the Charter. Once language rights become entrenched in the constitution, it becomes impossible to revise provisions about language policy. However, if such a case were to arise under the Charter, Québec would need to obtain the consent of all the other provinces even regarding its own language policy to make revisions. It becomes obvious, then, that the real aim of the language policy proposed by the federal government is to modify the Québec's language law for reasons related to the individual freedom of choice regarding the language of education. According to Lévesque, no constitution can change the convictions and attitudes of people and force the provincial government to take the measures against its faith. Even though the general provision for minority protection is tightened, it is impossible to actually change the fate of linguistic minorities unless there is the actual political will to do so. Therefore, only concrete policies adopted for regional particularities

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[106] Section 38(b) of Constitution Act , 1982, Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2010), A-48.

can actually improve the status of minorities. Proof of this can be found in the fact that English-speaking citizens in Québec are offered better conditions than language minorities in any other province. Finally, the Québec government cited the following suggestions from the Pepin-Roberts commission as one of the best ideas for minority protection. The report suggests that provincial policy should seek to legislate on the subject of minority protection, while considering the diversity that exists in its various regions. From these legislative efforts, and in conjunction with similar projects undertaken in other provinces, if in that case, it is possible that when a consensus between provinces is formed on the appropriate treatment of minorities, such common clauses could *then* be taken up into a constitutional framework as the natural conclusion of a greater democratic process.[107]

What is interesting about Lévesque's statement is that he has a completely different perspective of rights from Trudeau. According to Trudeau, rights belong to the people and are fundamental rights, and it naturally follows to believe that they should be entrenched in a constitution. This perspective is characteristic of modern individualism. John Locke said in

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[107] Original text of the report connected with this argument is as follows. "In our opinion, the protection of linguistic rights at the provincial level can be treated, at this time, in either one or two ways: extending the constitutional guarantees of Section 133 to every or to some provinces, or removing these guarantees, inviting the provinces to legislate safeguards for their minorities, taking into account the diversity of local situations, with the hope that a consensus between the provinces might form on a common denominator which eventually could be included within the constitution of the country. After due consideration, we now think that the second option would be wiser and more likely to be successful in the long run, involve less confrontation, and be more in agreement with the spirit of the federal system". The Task Force on Canadian Unity: *Future Together Observation and Recommendations* (Ottawa: Canadian government Publishing Centre, 1979), 52.

his *Two Treatises of Government* that each individual formed the State to protect the mutual preservation of his life, liberty, and property, making a contract with each other. "And it is not without reason, that he seeks out, and is willing to join in Society with others who are already united, or have a mind to unite for the mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general Name, *Property.*" [108] Such natural rights are fundamental to political order and inherently belong to human beings. As is well known, Lockean idea has influenced on the *Declaration of Independence* of the United States of America. Thus, Trudeau also is greatly influenced by Thomas Jefferson. Trudeau stated that absolute and eternal value should be accorded to basic principles such as liberty and democracy rather than the political structures, citing the following words of Jefferson saying " Nothing then is unchangeable but the inherent and unalienable rights of man."[109] Therefore, Trudeau's idea that these rights should be entrenched in fundamental law is clear reflection of Lockean and Jefferson's political thought.

In contrast, Lévesque did not deny that rights are important. However, rights are not fixed by a single decision, but are rather made or remade continually in the process of discussion known as parliamentary deliberation. Therefore, it is desirable that the debate take place in a healthy political context whereby the individual is effectively interwoven into the

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[108] John Locke, *Two Treatises of Government; edited by Peter Laslette* (1960) Cambridge University Press, 350.
[109] Pierre Elliott Trudeau, *Federalism and the French Canadians*, (Montreal: Macmillan, 1967), 53.

political process. In such a case, each person can participate in the making of their own individual rights. Therefore, it is more desirable that provincial governments maintain their own charters of the human rights and freedoms, such as the Québec Charter of Human rights and freedoms, which is preferable to entrenching the Charter into the federal Canadian constitution. According to Lévesque, charters established at the provincial level already protect fundamental rights such as the freedom of expression and the freedom of religion. Therefore, he argued that the human rights of Canadian citizens can be effectively protected providing that the provincial charter model be reproduced nationwide. Keeping this in mind, why is it then that the federal government intends to entrench the Charter into the constitution? Lévesque revealed that the true intention of the federal government was not in protecting the rights of Canadian citizens, but in strengthening federal powers.[110]

In sum, Lévesque criticized the federal government for intending to centralize the Canadian federation by entrenching the Charter. As an alternative model, Lévesque proposed decentralizing the federation. The idea of decentralization is especially important for Québec because Québec has a distinct culture regarding its language differences, its unique history, and values different from other provinces with English-speaking majorities. In response, Trudeau argued that Lévesque's idea of decentralization should be feared because eventually it could 'break up' Canada. According to Trudeau, the one value that should be the long-term

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[110] Lévesque René, Transcript of Mr. René Lévesque's Remarks on the Charter of Rights, in *federal-provincial conference of the first ministers on the constitution, publications officielles* (Montréal: Bibliotheque de la ville de Montréal, 1980).

objective is Canadian unity, and in this aim the Charter would play a pivotal role as a keystone of national unity.

In the end, it can be found from the inter-governmental discussions held in the 1980 constitutional conference that Trudeau and Lévesque have expressed widely divergent views on the State. While Trudeau has expressed the view of Canada as a national state, Lévesque has maintained the view of Canada as a multinational state. Ontario and New Brunswick from the beginning took sides with the federal government led by Trudeau. It was true that some English provinces, especially the four western provinces, and the Québec province had similarities in that they opposed to the entrenchment of the Canadian Charter on the ground that it caused the judicialization of politics. However, the most important difference between the four western provinces and Québec is that these four provinces and the other English provinces viewed Canada as a nation state. Every English province ultimately took a position in support of Canadian unity under a single nation, while stating the importance of individual and provincial equality. Concerning the protection of individual rights, the western provinces were opposed to the entrenchment of the Charter of Rights into the constitution, but they were not opposed to the protection of individual rights *per se*.

Claude Ryan of the Québec liberal party (a Québec federalist), advocated for a federal system that was different from Trudeau's idea of federalism and recognized the

special status of Québec in Canada (In 1980, Ryan proposed the policy on constitutional reform titled 'A new Canadian federation' as the position of the Québec Liberal party[111]). However, in our opinion, concerning the role of the State, Ryan could not endorse the view that the State should provide adequately collective rights to the Québec nation. The reason of it was that Ryan's position remained a version of federalism based on modern liberal individualism. For example, during the discussion about the enactment of the Charter of the French Language, he insisted on the superiority of the Québec Charter of the Rights and Freedoms over the Québec Charter of the French Language in order to emphasize the priority of the individual rights over collective rights.[112]

However, against the Trudeau's view of the State, Lévesque's view of the State was quite different. Lévesque didn't abandon his view of the multinational State whereby Canada consists of two nations, and should therefore afford a greater degree of political autonomy to Québec, eventually leading to his position of advocating the idea of confederal union, that is, sovereignty-association platform. Thus, in this constitutional conference, there was already conflicting views on the appropriate position for Québec to take versus the federal government and the English provinces. However, at this stage, Québec was still allied with English provinces except Ontario and New Brunswick regarding the expansion of

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[111] Quebec Liberal Party, *A New Canadian Federation: the constitutional committee of the Quebec Liberal Party*, (1980).

[112] Olivier Marcil, *La raison et L'équilibre : Libéralisme, nationalisme et catholicisme dans la pensée de Claude Ryan au Devoir (1962-1978)* (Montréal: Éditions Varia, 2002), 213.

provincial powers. Therefore, the federal and provincial governments did not reach consensus by the end of this constitutional conference. Thus, Trudeau gave up on making an agreement with provinces and set about achieving unilateral repatriation of the constitution.

2.3 The political situation after the 1980 constitutional conference.

On 2nd of October, 1982, Trudeau announced in a television program that the federal government would unilaterally repatriate the constitution and pursue the entrenchment of the Charter. As Peter Russell, a well-known political scientist of Canada points out, Trudeau spoke directly to the people over the heads of provincial premiers.[113] Canadians, according to Trudeau, are those Canadians who owe their primary allegiance to Canada and his central institutions. Needless to say, there was no room for recognizing the special status for Québec within the Canadian federation.

In opposition to Trudeau's remark, Lévesque sought to adopt a unanimous resolution for denouncing Trudeau's unilateral repatriation formula in the National Assembly

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[113] Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People ?* (2004) University of Toronto Press, 111.

of Québec. At that time, Lévesque showed a flexible attitude, being ready to make concessions to Ryan (the leader of Québec liberal party), in order to achieve consensus on this important resolution. However, Lévesque remained opposed to Ryan's proposed 'exchange condition' where if Lévesque recognized the advantages of federalism Ryan would approve the resolution, and they were not therefore able to reach an agreement.[114]

Afterwards, federal government unilaterally advanced the process of constitutional repatriation in the House of Commons and agreement was nearly on the question of constitutional repatriation. Upon hearing this news, the eight provinces except Ontario and New Brunswick were rushed to make their own new constitutional amendment formula, and as such, the premier of Alberta proposed new constitutional amendment formula later called the Vancouver formula.

Next, eight provinces (with the exception of Ontario and New Brunswick) formed an alternative plan for repatriating the constitution on the 16th of April, 1981. This plan offered two conditions for repatriation. The first condition was that most constitutional amendments would require agreement between the federal and provincial governments representing two-thirds of the population. Second, provinces would have been able to opt out from any

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[114] Graham Fraser, *René Lévesque and the Parti Québécois in power* (Montreal/Kingston: McGill-Queen's University Press, 2001), 258-260.

amendments, transferring their powers to the federal government and would receive financial compensation. Due to the inclusion of the second condition, the plan was favored by Québec.

Moreover, the eight provinces brought a constitutional action against the unilateral repatriation of the federal government. The Supreme Court of Canada ruling essentially maintained that while unilateral repatriation is not unconstitutional, it is against Canadian political conventions. As the result of it, eight provinces (minus Québec) weakened the resistance to Trudeau because they felt it difficult to oppose the federal plan. Lévesque wanted to counter Trudeau's plan by some means or other and he introduced a resolution against federal unilateral repatriation in the National Assembly once again, on September 29, 1981. This time, Ryan agreed with the resolution.

While Jean Chrétien, then minister of Justice announced the victory of federal government for the reason that the Supreme Court judged the conduct of federal government legally constitutional but politically illegitimate, Trudeau felt the need to obtain the consent of the provinces once more and decided to hold another federal-provincial constitutional conference in November 1981.[115] This conference took place during five days from the 3rd to 8th of November at the Ottawa Convention Centre. In the following chapter, we would like

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[115] Ibid., 279-287.

to examine the difference in concept of rights between Trudeau and Lévesque in more detail, focusing on the argument between them in the federal-provincial constitutional conference of 1981.

CHAPTER III

THE RESULT OF THE CONFLICT IN CONCEPTIONS OF RIGHTS: THE FEDERAL-PROVINCIAL CONSTITUTIONAL CONFERENCE OF 1981

3.1 The conflict between Trudeau's and Lévesque's conceptions of rights

On the 3rd of November, Trudeau outlined two points about his plan of repatriation in his opening statement. The first one was that he intended to carry out repatriation at any cost. The second one was about finding common ground regarding the formula of constitutional amendment. The first point was not problematic because every province could agree on the fact that Canada needed to repatriate its constitution. The second point, however, was met with more controversy. In fact, René Lévesque in his statement objected that the problem was not with the fact that the constitution needed to be repatriated, but rather he objected to entrenching the Charter into the constitution. A one-time decision to entrench the Charter into the constitution would result in a situation where many political questions belonging to the legislature would be determined by unelected courts. Rights need to be continuously modified to stay relevant to changing patterns of thought, action and overall political context.

Lévesque denied Trudeau's argument that the demands of provinces for more powers had caused the failure of the repatriation so far. In fact, the plan that he, and seven other provincial premiers had proposed on 16 April of 1981, said nothing about demands for more powers. Regardless, Trudeau rejected the plan and Lévesque pointed out that the true aim of the federal government was to weaken the powers of provincial assembly through entrenching the Charter into constitution. Lévesque said as follows:

> Les droits que possède ce parlement, ce sont en fait les droits collectifs de tous les Québécois, ils sont comme les droits de tous les peuples, inaltérables et ne peuvent pas être limités sans consentement.[116]

Though there was a serious conflict of opinion between the federal government (allied with Ontario and New Brunswick) and the other eight provinces including Québec, the situation dramatically changed from that point. On the afternoon of the 3 of November 1981, Trudeau gathered members of his Cabinet and discussed the proposal of the provincial governments with them. There, they decided that they would put the question to the Canadian public by holding a referendum on the Charter of Rights, where the Victoria and Vancouver formula (advocated by the federal government and the eight provincial governments respectively), in order to resolve the issue.

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[116] Allocution de M. René Lévesque Premier ministre du Québec, Lundi le 2 novembre, conférence fédérale-provinciale des premiers ministres sur la constitution, Document 800-15/015(1981), publications officielles, bibliothèque de la ville de Montréal.

On the afternoon of the 4th of November, Allan Blakeney, (the premier of Saskatchewan) proposed a new amendment formula, which Lévesque was vehemently opposed to, because under this formula Québec would have lost its veto and the right to opt out. After this discussion, Trudeau again introduced the plan to hold a referendum to provincial premiers. The plan stated that if within the next two years the provincial governments could not reach an agreement among themselves, the issue would be put to a national referendum. The provincial premiers, with the exception of Lévesque, were opposed to that plan because they disliked the procedure of referendum on the grounds that it ran contrary to principles of parliamentary democracy. Lévesque was also skeptical of this plan, but was also concerned about the possibility of losing his alliance with other premiers. Afterwards, the real content of the plan was revealed, and according to it, if Trudeau's bill were passed in the House of Commons, it would be sent to British parliament and would only ask whether the provinces accepted the bill along with the referendum. Naturally, Lévesque was greatly angered by the plan.[117]

After the third day of the conference, while delegates from Québec (including Lévesque) went back to their Hotel in Gatineau, the representatives from seven English

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[117] Graham Fraser, *René Lévesque and the Parti Québécois in power*, op.cit., 294-296.

provinces remained in Ottawa because they were scheduled to stay at the Chateau-Laurier Hotel facing the conference center. During the night, in the kitchen of the Château-Laurier Hotel, Jean Chrétien (then minister of Justice) proposed to the seven provinces (excluding Québec) to put a 'notwithstanding' clause into the Charter. By using this clause, the provinces and the federal government could legislate against the Charter. However, using this clause would have to be in compliance with two conditions. The first one is that this clause cannot be used against democratic rights such as the right of mobility and minority language rights, and the second one is that if this clause is not reenacted, it would expire in five years. This was the concession to the western provinces, which were opposed to the entrenchment of the Charter of Rights.

Another part of Chrétien's proposal was about the formula of constitutional amendment. According to it, most constitutional amendments would require agreement between the federal government and two-thirds of the provinces representing 50 percent of the population. This formula was identical to the one proposed on 16th of April, except for the provision that one province can opt out the transfer of powers to federal government with economic compensation, which was deleted. Therefore, in this plan Québec loses its veto.

Seven of the provinces (except Québec) came to an agreement on Chrétien's plan, and René Lévesque was isolated. The Trudeau government felt satisfied from having achieved a level of consensus, and submitted this federal plan to the House of Commons in December of 1981. After the plan was passed by the House of Commons the federal

government decided to submit this plan to the English Parliament in March, 1982, and finally, in April 1982, Queen Elizabeth II formally signed the constitution. The political struggle around the 1982 Constitution ended in victory for Trudeau.

After enactment of the 1982 constitution, Lévesque government sought to apply the notwithstanding clause of the constitution to all the laws of Québec, which is achieved through the enactment of the omnibus law, preventing all laws of Québec from the application of many provisions of the Canadian Charter, through the notwithstanding clause.[118] This effort is representative of Lévesque's resistance against the enactment of 1982 constitution, and against Trudeau.

In the constitutional conference of 1980, Lévesque insisted that the right of the National Assembly of Québec to legislate on its own is a collective right. On the other hand, Trudeau insisted on the supremacy of individual rights and their entrenchment in the constitution.

As we mentioned above, the thinking underlying Trudeau's political philosophy is the primacy of individual rights. In an interview, he stated that although he respected the idea

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[118] André Binette, « Le pouvoir dérogatoire de l'article 33 de la Charte canadienne des droits et libertés et la structure de la Constitution du Canada », dans la revue du Barreau (numéro spécial, 2003), 118.
Loi concernant la loi constitutionnelle de 1982, ch. L-4.2,L.R.Q.

of community, he respected the sovereignty of individuals composing the community much more. According to him, the entrenchment of the Charter was the most important subject that he had been considering before he went into politics. " I wanted to make a just society and a democratic society. If the majority governs the minority in the country, province, or the city, we cannot have a just society. Therefore, I thought it indispensable to adopt the Charter of Rights in order to complete the democratic society of Canada and make the Canadian parliament and its interests.[119]"

As the above-mentioned shows, Trudeau argued that universal individualism and the promotion of one political Canadian identity for the purpose of Canadian unity, rather than an idea of French or English Canadians should be the priority. However, the Québec government has enacted its own Charter of Rights that respects individual rights.

In the 1980 and 1981 federal-provincial constitutional conferences, Lévesque's original thinking about rights was revealed, though he has already expressed his thought in an article on the complementarity between individual rights and collective rights in 1978. According to him, individual liberalism is important because without individual liberty a society becomes like a concentration camp. Though this has been true, in an era that has since elapsed, the collective or communitarian aspect of liberty also, that is, the 'group' aspect of liberty and rights has developed. The relation between individual rights and collective rights

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[119] Cité libre, « Entretien avec Pierre Elliott Trudeau », (vol.26 no1,1998), op.cit., 99.

needs to be oriented to greater complementarity. While Québec governments have always paid respect for individual rights and liberty, it is not easy to "draw exact boundary line for individual rights. Thus, Lévesque agreed with the remarks of the Supreme Court of Canada, saying " Qu'il est peu de concepts aussi galvaudés, parce qu'aussi peu précis, que celui des libertés fondamentales, des droits de l'homme ou autres expressions analogues" [120].

Lévesque gave a document from the European convention on Human Rights as evidence of the existence of a document adopted for the purpose of protecting collective rights in a complementary manner without denying individual rights as a consequence. He accepted that there also was a difference between individual rights and collective rights. Essentially, fundamental rights such as civil rights and political rights can be carried out immediately. That is, any individual whose fundamental rights were infringed upon can appeal to court in order to ask for the restoration of their rights. On the other hand, collective rights are essentially more evolutionary than individual rights. Since collective rights, such as social, economic, and cultural rights tend to assume a general form of statements of rights and principle, it is necessary to make them take a concrete form in order to guarantee the realization. As this is the case, it is first necessary to materialize abstract and general 'collective rights' by means of legislation and a suitable plan of action.

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[120] René Lévesque, *René Lévesque: Textes et Entrevues 1960-1987 Textes colligés par Michel Lévesque en collaboration avec Rachel Casaubon* (Montréal: Presses de l'Université du Québec, 1991), 239-241.

From another viewpoint, collective rights can provide a basic foundation for a wider system of individual rights, and thus be the minimum of object, ensuring that individual rights do not result in being meaningless. In this way, individual rights and collective rights can mutually complement each other because, if they are effectively adopted, they can promote fundamental rights of individuals and extend their rights to every citizen.[121]

Lévesque cited Bill 101, Québec's Language Act, as an example of a law that advances individual rights. In clarifying his reasoning, he gave the example of language conflict in Belgium. The text of the European Convention on Human Rights that was adopted in 1950 provides for the right to not be denied an education and the right for parents to have their children educated in accordance with their religious and other views. In the case of Belgium, in the north area where Flemish is spoken, they have public education only in Flemish, and in the south area where French is spoken, they have the public education only in French. However, both the Supreme Court of Belgium and the Commission of Human Rights concluded that restrictions on languages in Belgium's education system do not run contrary to the European Convention on Human Rights.[122]

In fact, every Belgian and their children living in the Flemish areas have the right to an education in Flemish without any distinctions. The same can be said for every French

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[121] Ibid., 243.
[122] Ibid., 245.

speaker living in French area. In sum, the right to education adopted in the European Convention on Human Rights is interpreted not as the right for each individuals of Belgium to receive the education in their language, but more fundamentally as the right for each society the means to provide every child with public and free education to do so.[123] Based on the above-mentioned ruling, Lévesque maintained the legitimacy of the Charter of the French language as follows. For him, it is quite normal to respect everyone's rights by relating them to everyone exclusively with public education in French language in Québec on the condition that everyone has the same rights, and it matches well with the guidelines for fundamental rights.[124]

To sum up Lévesque's thinking, while fundamental rights such as civil rights and political rights essentially are to be required immediately, collective rights require that they become substantiated by the means of legislation. This means that there is no absolute and universal right (the kind for which Trudeau argued), but are rather made by legislators and legislative bodies in a particular time and context. In other words, rights cannot be just if they are held to be independent of the legislative process.

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[123] "The right to education guaranteed by the first sentence of Article 2 of the Protocol by its very nature calls for regulation by the State, regulation that may vary in time and place according to needs and resources of the community and of individuals. It goes without saying that such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention". CASE "RELATING TO CERTAIN ASPECTS OF THE LAWS ON THE USE OF LANGUAGES IN EDUCATION IN BELGIUM" v. BELGIUM (MERITS), European court of human rights, 1968.

[124] Ibid., 246.

From Lévesque's remarks in the following 1980 and 1981 federal constitutional conferences, further development of Lévesque's thinking can be found. Importantly, what has played an important role in the formation of rights in Québec for a long time has been the National Assembly. It is here that each individual citizen of Québec can participate in the making of his or her own rights. Lévesque held that individual rights do not merely pertain to the conduct of each individual, but also to the aspect of participation in the formative process of the creation of rights, which for Québec includes the hope and sense of resolution that they will be able to continue living in their own culture and language.

Therefore, one of the problems with the universal individualism underlying Trudeau's thinking is that he only allowed for the inclusion of universal individual rights. Ironically, how individual rights are realized largely depends on how they are discussed within each society. Unless rights are formed in this way, they remain abstract and impracticable. This understanding of Lévesque seems to be similar to the Edmund Burke's claim about Human Rights. Burke opposed the idea of the French revolution whereby human rights were established in an absolute manner, and insisted that they should be made and remade through laws as concrete goods in complicated and changeable society.[125] Burke wrote as follows, "Government is not made in virtue of natural rights, which may and do exist in total independence of it....as the liberties and the restrictions vary with times and

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[125] Edmund Burke, *Reflections on the Revolution in France Oxford World's Classics* (Oxford: Oxford University Press, 1993), 58-62.

circumstances, and admit of infinite modifications, they cannot be settled upon abstract rule; and nothing is foolish as to discuss them upon that principle."[126]

This was the matter in question during the constitutional conflict. According to Lévesque, Citizens of Québec who felt themselves being a nation express their individual hopes about creating a society worthy of this national identity through the legislative process. It is clear that the best method of accommodating this is not the vision of Canada based on Trudeau's idea of a unitary nation-state, but rather a Canada defined as a multinational state.

The dichotomy whereby Québec insists on collective rights while the rest of Canada puts emphasis on individual rights based on the Canadian Charter is a popular topic among Canadian academics. According to Charles Taylor, English Canadians fear that a political society espousing the collective rights may run against the Charter of Rights and freedoms, and that collective action may restrict individual behavior and encroach on their rights. From their perspective, this fear was already realized by the Québec language legislation, Bill 101. English Canadians maintain that espousing collective goals on behalf of a national group can be thought to be inherently discriminatory because not all those living as citizens under a certain jurisdiction will belong to the national group thus favored.[127]

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[126] Ibid., 60.
[127] Taylor, *Reconciling the Solitude,* op.cit., 173.

However, we can understand that this objection is too simplistic if we consider the Lévesque's statement more carefully. Lévesque thinks that it is the right of the National Assembly to legislate not only for collective rights but also for individual rights. That each person can participate in making of their own rights is an individual right. A government as 'near' as possible to the citizen makes this possible, and Lévesque argued that the ability of an individual to determine his or her own rights is an individual right. What he was opposed to is if these rights are deprived from the responsibility of provincial government and entrenched into the federal constitution. In that situation, each person cannot participate in the making of his or her own rights, but judges at the courts determine these rights.

In sum, the issue of this argument is not conflict between individual rights and collective rights but a difference in the perception of the rights themselves. As Lévesque's thinking on rights outlined, they need to be dynamic and changeable and we should make and remake rights at various points in time. This idea of rights seems to be consistent with that of Burke. Based on this idea, Lévesque defines the rights of each individual to participate in the making of his own rights as an individual right which is different from the individualistic contents of rights. In addition, because Québec is a distinct society regarding language and culture, it is very important that the National Assembly makes laws for its citizens. In other words, this implies that the National Assembly of Québec needs to determine what rights are appropriate for its own citizens. To rephrase, it is important to emphasize that the National Assembly of Québec has a role in the survival and development of Québéc society as a nation. Lévesque describes the role of the National Assembly as the exercise of collective rights. For

example, when Bill 101 was enacted, the discussion in the National Assembly modified the original plan (le projet de loi I [128]) of the Parti Québécois proposed by Camille Laurin in order to protect the individual rights of citizens.

Lévesque's view about rights is related with his view on federalism. As Lévesque's view put emphasis on the role of the provincial assembly, his idea about federalism can be thought of as a type of decentralized regime. Lévesque insisted on a form of confederation called sovereignty-association, but after the 1980 referendum, realizing that Quebecers preferred decentralization to sovereignty-association, he leaned towards the decentralization of federation. This provoked some of the caucus of the Parti Québécois (such as Jacques Parizeau) to leave the party. However, Lévesque emphasized the democratic responsibility incumbent on politicians to follow the democratic will of the people and that it is important to think about the idea of federalism together. His self-identification with democratic ideals can also be said to have made him vulnerable to getting caught by Trudeau's trap for a national referendum.

With the repatriation issue as a turning point, Canadian constitutionalism began to head towards Trudeau's idea that places the Charter as the centerpiece of national unity. This project sought to overcome national unity crisis by making a Canada with a strong political

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[128] Assemblée nationale du Québec, Projet de loi I , *Le Devoir,* 28 avril 1977.

centre, based on modern individualism. In the end, this project provoked the biggest crisis in the national unity debate because it enforced the constitution without consent of Québec.

3.2 The aftermath of the constitutional conflict over rights

From the latter half of 1980s to 1990, the Meech Lake and Charlottetown accords sought to settle this problem. However, both accords ended in failure. Many social scientists proposed the theory of asymmetrical federalism as a way of dealing with the argument surrounding both accords, which was proposed as a way of accommodating minority nations. This is the same version of federalism that recognizes Québec as a nation in the constitution and gives special powers that other provinces do not possess to Québec for the purpose of cultural and linguistic survival and development, which is based on the grounds that Québec is a distinct nation. Beginning in the 1980's, the most distinguished social scientist for promoting the theory of asymmetrical federalism has been Charles Taylor. Taylor has been critical of the present version of Canadian federalism with regards to the Charter, stating that Canada has become a litigious society, and contended that modern individualism alone cannot maintain the diversity of society. Thus, asymmetrical federalism that enables individuals to use their own language as the means of communication within

separate national groups and at the same time communicate with others can be a means of stopping social fragmentation.

Taylor proposed the diversity of belonging. For example, Quebecers firstly belong to the community of Québec and through it Quebecers belong to Canada. On the other hand, English Canadians belongs directly to Canada. This is referred to as "deep diversity".[129] We think this way of thinking is an attempt to contain groups that possess their own collective goals within a modern state. However, Lévesque's arguments outlined in this master thesis are quite different from the Taylor's thinking. Lévesque's argument was that the Charter of Rights should remain at the provincial level because it enables each individual to participate in the making of his or her own rights, is indicative of the idea that collective rights exist in order to protect fully individual rights. Therefore, this thought cannot connect with Taylor's thought that since Québec society is a collective society it is different from the rest of Canada.

The constitutional conflict from 1967 to 1982 between Trudeau and Lévesque seemed to have ended in Lévesque's defeat. However, as we pointed out in the preceding chapter, he enacted the omnibus law to exclude the influence of the Canadian Charter on laws

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[129] Taylor, *Reconciling the Solitudes,* op.cit., 181-184.

of Québec. Moreover, in working against enactment of the 1982 constitution without the consent of Québec, he sought the possibility of enacting an internal constitution of Québec. He assigned Morin the task of preparing this constitution between 1982 and 1983.[130] The concrete content of the report of 1985 submitted by the committee remained unknown because this project was suspended after 1985 when Lévesque resigned. Therefore, it was not certain what his thinking was on the Québec Charter of Human Rights and Charter of the French Language in the Québec constitution. However, it was clear that he sought to enact the constitution as the symbol of national self determination.[131]

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[130] Jacques-Yvan Morin, « Une constitution nouvelle pour le Québec : Le pourquoi, le contenu et le comment », dans *Revue québécoise de droit constitutionnel volume 2* (2008), 10.

[131] Daniel Turp, « La constitution québécoise : une perspective historique » dans *Revue québécoise de droit constitutionnel volume 2* (2008), 23-25.

CONCLUSION

Finally we would like to restate the main findings of this master thesis. The research question of this master thesis was to reconsider Taylor's dichotomous viewpoint that Québécois society has more "collectivist" tendencies, and where the rest of Canada is framed as a more "liberal individualistic" society. Here again we would like to state Taylor's argument for confirmation. While citizens in the rest of Canada are united around the principle of procedural liberalism (a view that individual rights must always come first and must take precedence over collective rights) embedded in the Charter of Rights and Freedoms, Québec society has a rather different model of a liberal society, that is, society which can be organized around a definition of the good life (collective goals), without this being seen as a depreciation of those who do not personally share this definition.

In this master thesis we have studied that the problem with Trudeau's thought of universal individualism lies in that he sought to enforce only the abstract contents of universal individualistic rights. For, how we materialize rights of individuals and to what extent we should ensure the effectiveness of their rights depend on discussions in social groups which are deeply concerned in enforcement of their rights.

In reality, the problem at issue in the conflict over the entrenchment of the Canadian Charter between Canada and Québec was not the opposition between individual rights and collective rights but the different conceptions of rights. Concerning contents of rights and a

means of actualization of their rights, Lévesque argued as follows. Rights are changeable over time and thus should not be fixed in one point of time. Lévesque considered the rights of each individual to participate in the making of these own rights as such, different from the individualistic character of these rights. On the other hand, there is the fact that Québec is a special province in respect of language and history. The national assembly of Québec is therefore crucial for cultural and social maintenance and development of Québec as a nation. Thus, Lévesque considers the rights of each individual in the Québec to decide cultural and social development of Québec of their own will as collective rights.

From the preceding arguments, we can conclude that the Taylors dichotomy is too simple.

Moreover, the Lévesque's conception of rights we have clarified in this master thesis serves to further arguments on federal institution. The Québec citizen thought of themselves as a nation, expressed their demand for the society suitable for themselves and legislated for this purpose. Clearly, it is a Canada not as a uninational state but multinational state that can meet their demand. As we pointed out in the Chapter 1, the asymmetrical federalism as a form of multinational state has been to a certain extent remarkable for accommodating nations in a state. Today, this type of federalism seems to have had prime significance as the alternative to modern uninational state. However, the problem with the asymmetrical federalism is that collective rights as the special powers given to a national group may conflict with individual rights entrenched in the Canadian Charter. Kymlicka and Taylor

sought to wade in this problem. However, the analysis in this master thesis has raised the alternative possibility for legitimacy of asymmetrical federalism, different from their perspective.

Here, we would like to restate Taylor's argument for legitimacy of asymmetrical federalism. While citizens in the rest of Canada are united around the principle of procedural liberalism (a view that individual rights must always come first and must take precedence over collective rights) embedded in the Charter of Rights and Freedoms, Québec society has a rather different model of a liberal society, that is, a society which can be organized around a definition of the good life.[132] Therefore, there are two incompatible views of liberal society in post-Meech Lake Canada. According to him, the way of reunification is that procedural liberals in English Canada just have to acknowledge, first, that there are other possible models of liberal society and, second, that their francophone compatriots wish to live by one such alternative.[133] That is, English-speaking provinces should recognize this type of society through the asymmetrical federalism. The term he uses for this is '*deep diversity*', where the way of being a Canadian for French-speaking people in Québec is by their belonging to a constituent element of Canada, "la nation québécoise."[134]Taylor's argument for legitimacy

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[132] Taylor "Shared and Divergent Values," 173-177.

[133] Ibid., 178.

[134] Ibid., 182.

makes impression that Québec is completely "collective", and the rest of Canada is "procedural and individualistic liberalism".

In his book titled "*Politics in the Vernacular*", Kymlicka criticized Taylor's argument on the ground that it considered Québec society as society pursuing communitarian vision of common good. However, Kymlicka also could not but admit that the Québec's argument for language rights deviate from his liberal norms, namely freedom of individual choice. Therefore, Kymlicka sought to justify the asymmetrical federalism on the ground that national minority with societal culture has the right to nation-building. According to him, because national minority as Québec is the group which has had a societal culture, that is, territorially-concentrated culture, centered on a shared language, national minority has the rights to nation-building, different from the immigrant which is the result of a voluntary choice. However, he could not solve the problem that the Québec language law may deviate from principle of liberal norm. Therefore, he cannot answer adequately the problem that the Québec society is still considered as a collectivist society by other Canadians.

Therefore, in my opinion, Taylor and Kymlicka cannot adequately answer criticisms from English Canadians that multinational federalism is a system in favor of the Québécois society which has tendency to be collective.

Our argument in this master thesis would differ from Taylor's and Kymlicka's arguments for the legitimacy of asymmetrical federalism.[135] For, in the Québécois society, the language rights are not understood to mean only collective rights, but individual and collective rights, that is, rights that an individual and groups made up of individuals claim for the purpose of their self-realization. In other words, in Québec society, the collective rights are demanded for the purpose of developing individual rights. By considering the Québec society as we have stated above, we can find more adequate justification for asymmetrical federalism.

The perspective that we have tried in this master thesis is one of finding justification for asymmetrical federalism through exploring the way of understanding human rights within a given society. Therefore, as the next subject of research, we would like to develop this perspective by examining the language conflict in Belgium, namely, how Flanders in the northern part of Belgium have had asserted their language rights and what kind of influence their arguments for rights have had on the shaping of a multinational federation in Belgium.

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[135] Kymlicka criticized the Taylor's argument as follows.
"Taylor defended Québec's sign law on the grounds that it involved only a minor deviation from liberal norms in order to enable Quebecers to pursue their distinctly communitarian vision of the common good. In reality, Quebecers are no more communitarian than other Canadians, and do not share a conception of the common good". Will Kymlicka, *Politics in the Vernacular* (Oxford: Oxford University Press), 287-288.

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