Secession and Constitutional Law in the Former Yugoslavia

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In the post-Cold War era that has aptly been referred to as 'the age of secession',[1] the issue of whether a unit of a sovereign federal state has a right of unilateral secession in international law has been the subject of considerable analysis. The most prominent case in which this issue has been debated is that of the former Yugoslavia. What Yugoslavia has apparently demonstrated is that the unilateral secession of such a federal unit would be welcomed into the international community of states by means of international recognition if such a federal unit obtained the popular support of its population for secession at a referendum, and accepted as binding upon it basic international law provisions as to respect for the rule of law, democracy, and human and minority rights.[2]

Whilst the question of the legality of unilateral secession has attracted significant debate from international lawyers, an analysis of the same question from the perspective of a state's constitutional law has not attracted the same degree of attention. This article is an attempt to address that imbalance by analysing judicial consideration of the legality of unilateral secession in constitutional law, especially in the case of the former Yugoslavia.

One of the earliest cases of a state's highest judicial tribunal considering the right of unilateral secession occurred in the United States of America ('USA'). Prior to the collapse of the attempt at secession by the Confederate States of America in 1865, debate over the right of an individual state of the USA to secede unilaterally was the subject of

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1 Allen Buchanan, 'Self-Determination, Secession, and the Rule of Law' in Robert McKim and Jeff McMahon (eds), *The Morality of Nationalism* (1997) 301.

2 For a detailed analysis of the break-up of Yugoslavia from the perspective of international law see Peter Radan, *The Break-up of Yugoslavia and International Law* (2002).

opposing legal and constitutional opinion.[3] In 1869, in the wake of the defeat of the Confederacy, the Supreme Court of the USA, in *Texas v White*,[4] noted briefly that the USA was 'an indestructible Union, composed of indestructible States'.[5] However, the Court acknowledged that secession could come about 'through consent of the States'.[6] Notwithstanding the Court's decision, the debate over the right of a state to secede has continued to this day.[7]

A more comprehensive and contemporary judicial analysis of the constitutional law right of secession was given by the Supreme Court of Canada in 1998 in its landmark decision of *Reference re: Secession of Quebec* (*Secession Reference*).[8] Against the background of two failed referenda on secession in Quebec in 1980 and 1995, the Court ruled, inter alia, that 'there is no right, under the [Canadian] Constitution ... to unilateral secession'[9] by one of its Provinces. The Court further ruled that a constitutionally legal secession of a Province could only be achieved by an amendment to Canada's *Constitution*.[10] The Court

3 For a comprehensive account of the pre-Civil War debate over the American constitution see Elizabeth Kelley Bauer, *Commentaries on the Constitution 1790-1860* (1965). Writers rejecting a right of secession included Joseph Story, *Commentaries on the Constitution of the United States* (1833); Sidney George Fisher, *The Trial of the Constitution* (1862). Writers favouring a right of secession included St George Tucker, *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; And of the Commonwealth of Virginia* (1803); William Rawle, *A View of the Constitution of the United States of America* (2nd ed, 1829).

4 *Texas v White*, 74 US 700 (1869).

5 Ibid 725. For an analysis of this case see William Whatley Pierson Jr, *Texas versus White, A Study in Legal History* (1916); David P Currie, 'The Constitution in the Supreme Court: Civil War and Reconstruction, 1865-1873' (1984) 51 *University of Chicago Law Review* 163; Harold M Hyman, *The Reconstruction of Justice Salmon P Chase* (1997) 72-112, 140-50.

6 *Texas v White*, ibid 726.

7 Writers supportive of the tenor of *Texas v White* include Francis Wharton, *Commentaries on Law* (1884); Edward Payson Powell, *Nullification and Secession in the United States* (1897). Cass Sunstein has recently written that 'no serious scholar or politician now argues that a right to secede exists under United States constitutional law': Cass R Sunstein, *Designing Democracy, What Constitutions Do* (2001) 95. Such a view is dismissive of writers critical of the tenor of *Texas v White*, such as Jefferson Davis, *The Rise and Fall of the Confederate Government* (1881); Albert Taylor Bledsoe, *Is Davis a Traitor? Secession as a Constitutional Right Prior to the War of 1861* (1907); Mark E Brandon, *Free in the World, American Slavery and Constitutional Failure* (1998); Charles Adams, *When in the Course of Human Events, Arguing the Case for Southern Secession* (2000).

8 (1998) 2 SCR 217.

9 Ibid 296.

10 Ibid 263-4.

recognised that a provincial referendum in favour of secession would trigger the process of constitutional amendment by obliging other Provinces and the federal government to enter into negotiations on such a constitutional amendment.[11]

However, the Court recognised the significantly political nature of secession by its decision to leave open to the political process key aspects of the procedure for obtaining a constitutionally valid secession. These included such issues as the wording of any referendum question and the size of the majority vote in any referendum that would trigger the process of constitutional negotiations, as well as the matter of the items that would be placed on the agenda of such negotiations.[12] An important legal issue left open by the Court was which of Canada's constitutional amending formulae applies to a secession amendment.[13]

The essence of the two North American cases on secession is a clear rejection of the right of a federal unit of a state to secede unilaterally. It is implicit in the USA case, and explicit in the Canadian case, that legal secession can only be achieved by a constitutional amendment.

In the decade prior to the decision of the Canadian Supreme Court, the Constitutional Court of the former Yugoslavia handed down a number of decisions dealing with the constitutional validity of the secession of a federal unit from a sovereign federal state. What is particularly interesting about the former Yugoslavia is that, in its introductory provisions, the Yugoslav *Constitution* explicitly mentioned secession as a manifestation of the right to self-determination. Thus, the Constitutional Court of the former Yugoslavia, unlike its counterparts in the USA and Canada, was directly confronted with explicit constitutional references to the right of secession.

Constitutional provisions pertaining to the right of Yugoslavia's constituent peoples to self-determination and secession first appeared within the Yugoslav federal state framework that emerged in the wake of World War II. From this time, and up to its fragmentation in the

[11] Ibid 265-6.

[12] Ibid 271-2.

[13] Ibid 274. For analysis of and comment on the Supreme Court of Canada's decision see Warren J Newman, *The Quebec Secession Reference, The Rule of Law and the Position of the Attorney General of Canada* (1999); Alexander Reilly, 'Constitutional Principles in Canada and Australia: Lessons from the Quebec Secession Decision' (1999) 10 *Public Law Review* 209; Jean-Francois Gaudreault-DesBiens, 'The Quebec Secession Reference and the Judicial Arbitration of Conflicting Narratives About Law, Democracy, and Identity' (1999) 23 *Vermont Law Review* 793.

1990s, Yugoslavia proclaimed new *Constitutions* in 1946, 1963 and 1974, although it should be noted that the Constitutional Law of 1953, in extensively amending the 1946 *Constitution*, in effect amounted to a new constitution. It was only during the decade after 1953 that references to self-determination and secession were absent from Yugoslavia's *Constitutions*.

This article's examination of the former Yugoslavia's constitutional law provisions on secession will be done by an analysis of the background to Yugoslav constitutional law, relevant provisions of Yugoslavia's constitutional texts, decisions of the Yugoslav Constitutional Court on the matter, and the proposal for constitutional reform on the issue that surfaced at a time when secession had become the focal domestic political issue in Yugoslavia at the beginning of the 1990s.

In undertaking this analysis it must be kept in mind that the evolution of Yugoslav constitutional law did not operate in a vacuum. In the decades following World War II, Yugoslavia's constitutional law was engaged in the task of finding a theoretical framework that would provide for a viable federal political system that would maintain the unity of the multi-national state that was Yugoslavia. In the late 1980s, when the forces of nationalism were given a window of opportunity following the end of the Cold War, new theoretical frameworks in the form of a loose confederation of states or even independence informed the development of Yugoslav constitutional law.[14] In this sense, the development of Yugoslav constitutional law reflected an ongoing political process in which Yugoslavia's national groups defined and redefined the essential basis of their political relationships.

Background to Yugoslav Constitutional Law

The genesis of the former Yugoslavia's constitutional law lies in the victorious Partisan resistance movement during World War II, led by the Communist Party of Yugoslavia ('CPY'). The Partisan movement was one of a number of political forces engaged in a complex and multifaceted war within Yugoslavia following the latter's dismem-

[14] On the political background of post-World War II Yugoslavia, see Aleksandar Pavković, *The Fragmentation of Yugoslavia: Nationalism and War in the Balkans* (2nd ed, 2000) 61-135; Lenard J Cohen, *Broken Bonds: Yugoslavia's Disintegration and Balkan Politics in Transition* (2nd ed, 1995) 26-225. On Yugolsav federalism of this period see Peter Radan, 'Constitutional Law and the Multinational State: The Failure of Yugoslav Federalism' (1998) 21 *University of New South Wales Law Journal* 185.

berment at the behest of the Axis forces in 1941. Much of the fighting in Yugoslavia during World War II was motivated by the legacy of nationalist antagonisms that had thwarted Yugoslavia's political development from the time of its creation in 1918. The political goal of the Partisans was to liberate and reunite Yugoslavia under the leadership of the CPY. To achieve this goal the Partisans had to adopt a flexible and politically calculated approach to the problems associated with the multi-national composition of Yugoslavia's population, commonly referred to as 'the national question'.

The foundations of Partisan policy lay in the interwar experiences of the CPY. In this period the CPY was bitterly divided over the national question. Official policy varied greatly from time to time. In 1920 the Party supported a centralist state and recognised only Yugoslav nationality.[15] By 1924 a shift had occurred and the CPY began to recognise national groups, and in fact cooperated with Macedonian separatists in the 1920s and with Croat and Albanian separatists in the early 1930s.[16] At this time the CPY sought the dismemberment of Yugoslavia and claimed that national groups had the right of secession. With the rise of Nazi Germany official policy was again altered. The CPY began to support the integrity of Yugoslavia and adopted a 'Yugoslavism' policy that stressed the unity of the Yugoslav peoples.[17] The bitter and acrimonious divisions of the interwar period were valuable lessons for the CPY and enabled it to formulate successful policies during the war. By 1941 the Party appreciated the existence of national differences among the Yugoslav peoples, but at the same time maintained a resolve to find a Yugoslav solution to the national question.[18]

The essence of Partisan policy was equal treatment of all national groups in the face of Nazi occupation. The Partisans' emphasis on the theme of 'brotherhood and unity' was a key factor in its successful campaign to garner widespread support from all of Yugoslavia's major national groups. Nevertheless, nationalism within Partisan ranks was a major problem. Thus, in Kosovo the Albanian population was hostile to the Partisans, and local communists sought to be attached to

15 Ivan Avakumovic, *History of the Communist Party of Yugoslavia* (1964) vol I, 46; Aleksa Djilas, *The Contested Country, Yugoslav Unity and Communist Revolution 1919-1953* (1991) 58-9.

16 Avakumovic, ibid 107-8; Djilas, ibid 83-9; Paul Shoup, *Communism and the Yugoslav National Question* (1968) 32-9.

17 Shoup, *Communism and the Yugoslav National Question*, ibid 40-8; Djilas, ibid 93-102.

18 Shoup, *Communism and the Yugoslav National Question*, ibid 55.

the Albanian Communist Party. The CPY refused to consider any concessions to Albanian nationalism and an Albanian revolt in 1944-1945 was ruthlessly suppressed.[19] In Macedonia local communists were divided as to whether to attach themselves to the CPY or the Bulgarian Communist Party ('BCP'). In 1943 Macedonian communists declared their independence outside Yugoslavia, and became affiliated with the BCP. To entice the Macedonians away from Bulgaria, the CPY was forced to concede a considerable degree of initiative to the Macedonian communists in party matters and over liberated territories in Macedonia. It was only in August 1944 that the Macedonian communists opted for membership in a Yugoslav federation.[20] In Croatia, expressions of nationalism within the Party were widespread, and it was only the authority of the Partisan leader, Josip Broz Tito, that prevented the Croat communists from adopting separatist policies.[21]

To overcome the problems of nationalism within the Partisan movement the CPY was forced to concede some degree of local autonomy to Partisan units and encourage regional loyalties. This was, to some extent, achieved by the creation of organisationally separate subparties for Slovenia, Croatia and Macedonia. The CPY's acquisition of a sensitivity to the points of view of individual Yugoslav peoples during the interwar period enabled it to make each region feel that the Partisan movement was fighting primarily for the freedom and liberation of that region. The Partisan leadership realised that it would only succeed in attracting support by appealing to the separate national identities of Yugoslavia's peoples. The Leninist concept of national self-determination, by which national and patriotic freedoms were closely identified, became a key part of the successful Partisan political platform.[22] It was thus entirely appropriate that the word 'national' appeared in the name of all Partisan military detachments, for it reflected the nationalist basis of the Partisan mobilisation strat-

19 Miranda Vickers, *Between Serb and Albanian, A History of Kosovo* (1998) 141-3.

20 Stephen E Palmer Jr and Robert R King, *Yugoslav Communism and the Macedonian Question* (1971) 61-116.

21 Milovan Djilas, *Wartime* (1977) 315; Jill A Irvine, *The Croat Question, Partisan Politics in the Formation of the Yugoslav Socialist State* (1993) 141-203. Tito himself was of mixed Croat and Slovene parentage, but never identified himself as either a Croat or Slovene nationalist.

22 Walker Connor, *The National Question in Marxist-Leninist Theory and Strategy* (1984) 155-6; Paul Shoup, 'The Yugoslav Revolution: The First of a New Type' (1971) XI(4) *Studies on the Soviet Union (New Series)* 233.

egy. Furthermore, it reflected the reality that such detachments were, by and large, organised on nationalist lines.[23]

On 27 November 1942, the first Congress of the Antifascist Council of the People's Liberation of Yugoslavia ('AVNOJ'),[24] an ostensibly multi-party 'Partisan parliament' organised by the CPY, declared itself the legitimate representative of the Yugoslav peoples.[25] At its second Congress held on 29-30 November 1943, AVNOJ proclaimed itself the supreme legislative and executive body of Yugoslavia. Furthermore, Yugoslavia was to 'be established on a democratic federative principle as a state of equal peoples'.[26] The new state was to consist of six Republics, five of which were to be homelands for Yugoslavia's five constituent peoples, the Serbs, Croats, Slovenes, Macedonians and Montenegrins, with the sixth Republic of Bosnia-Hercegovina the home of Serbs, Croats and Slavic Muslims.[27] These provisions were justified on the principle of national self-determination and the equality of all of Yugoslavia's peoples.[28]

At its third Congress held on 7-9 August 1945, AVNOJ was renamed the Provisional National Assembly.[29] On 21 August 1945, this Assembly passed a law for the purpose of electing a Constituent Assembly to prepare a new constitution for Yugoslavia. On 29 November 1945 the Constituent Assembly declared Yugoslavia to be a federal republic, 'a community of equal peoples who have freely expressed

23 Connor, ibid 151.

24 The acronym AVNOJ derives from the Serbo-Croat 'Antifašitičko veće narodnog oslobođenja Jugoslavije'.

25 'Rezolucija o organizaciji AVNOJ', 27 November 1942, in Branko Petranović and Momčilo Zečević (eds), *Jugoslovenski federalizam, Ideje i stvarnost, Tematska zbirka dokumenata Prvi tom, 1914-1943* (1987) 727, 732-3.

26 'Deklaracija Drugog zasedanja Antifašističkog Vijeća narodnog oslobođenja Jugoslavije', 29 November 1943, in Petranović and Zečević, *Jugoslovenski federalizam, 1914-1943*, ibid 795-6.

27 Bosnia-Hercegovina's Slavic Muslim population gained the status as the sixth constituent people of Yugoslavia by the 1970s: Francine Friedman, *The Bosnian Muslims, Denial of a Nation* (1996) 159-60, 164-8.

28 'Odluka Drugog zasedanja Antifašističkog Vijeća narodnog oslobođenja Jugoslavije o izgradnji Jugoslavije na federativnom principu', 29 November 1943, in Petranović and Zečević, *Jugoslovenski federalizam, 1914-1943*, above n 25, 800-1.

29 'Predlog rezolucije AVNOJa', 10 August 1945, in Branko Petranović and Momčilo Zečević (eds), *Jugoslovenski federalizam, Ideje i stvarnost, Tematska zbirka dokumenata Drugi tom, 1943-1986* (1987) 193.

their will to remain united within Yugoslavia',[30] and on 31 January 1946 proclaimed a new *Constitution* for Yugoslavia.

Yugoslavia's *Constitution* of 1946

In accordance with the resolutions adopted at the second Congress of AVNOJ, article 2 of the 1946 *Constitution* declared Yugoslavia to be a federal state of six Republics. However, article 2 went further and established two sub-federal units within the Republic of Serbia, namely the Autonomous Province of Vojvodina and the Autonomous Region of Kosovo-Metohija.[31]

Although modelled on the 1936 Soviet *Constitution*, Yugoslavia's 1946 *Constitution* did not contain any equivalent to article 17 of the Soviet *Constitution*, which stipulated that 'every union republic shall retain the right of free secession from the USSR'.

Article 1 of the 1946 *Constitution* stipulated:

> The Federative People's Republic of Yugoslavia is a federal peoples' state, republican in form, a community of peoples equal in rights who, on the basis of their right to self-determination, including the right of secession, have expressed their will to live together in a federative state.

The overwhelming majority of legal opinion in Yugoslavia took the view that article 1 did not grant the right of unilateral secession. The reasons for such a view can be summarised as follows. First, although modelled on the 1936 Soviet *Constitution* and proclaimed at a time when Soviet and Yugoslav constitutional theories were essentially the same, the absence from Yugoslavia's 1946 *Constitution* of an equivalent to article 17 of the 1936 Soviet *Constitution*, indicated a clear inference that the Yugoslav Constituent Assembly was concerned to preclude any constitutional right of unilateral secession. A similar inference was drawn from article 21, which stated that 'any preaching of national, racial, or religious hatred and disunity' was unconstitutional.

[30] 'Deklaracija o proglašenju Federativne narodne republike Jugoslavije', 29 November 1945, in Petranović and Zečević, *Jugoslovenski federalizam, 1943-1986*, ibid 228-30. For detailed accounts of AVNOJ from its first Congress through to the proclamation of the Yugoslav republic in 1945, see Ferdo Čulinović, *Stvaranje nove Jugoslavenske države* (1959), 185-278; Vojislav Simović, *AVNOJ, Pravno politička studija* (2nd ed, 1976).

[31] By the 1963 *Constitution*, the Autonomous Region of Kosovo-Metohija was elevated to the same status as Vojvodina and renamed the Autonomous Province of Kosovo.

Second, the very form of words used in article 1, in particular the expression 'have expressed their will to live together', was interpreted by Yugoslav constitutional lawyers as being a final and irrevocable exercise of the right to self-determination, and a rejection of the right of unilateral secession as an exercise of the right to self-determination. The post-World War II Yugoslav state was, in the words of its Deputy Premier Edvard Kardelj, a 'voluntary community of equal peoples in which the nationalities question has been completely solved on the basis of the free self-determination of our peoples'.[32] In Yugoslav legal theory, the equality of the Yugoslav peoples was only capable of being protected in a unified federal Yugoslav state. Thus, the establishment of such a state was viewed as having exhausted the rights to self-determination and secession.[33]

Third, inclusion of the references to self-determination and secession in article 1 was justified on political grounds related to the need to continue with such references as had first been made in the declarations of the second Congress of AVNOJ. The Partisan struggle during World War II had used self-determination as a mobilising slogan and it was argued that its absence from the *Constitution* would provide 'reactionary elements' in Yugoslavia with a propaganda weapon to attack the new communist government. It was not intended that article 1 confer any right to secession in the future.[34] In theoretical terms, the inclusion of self-determination was seen as a confirmation of the continued equality of the peoples of Yugoslavia and the continued confirmation of their will to unite in a federal Yugoslav state. Rather than meaning that unilateral secession was possible in the future, the constitutional entrenchment of self-determination meant quite the opposite.[35]

The indissoluble unity of Yugoslavia was implicit in the political rhetoric of Yugoslavia's leaders in the period leading up to the 1946

[32] Quoted in Michael Boro Petrovich, 'The Central Government of Yugoslavia' (1947) 62 *Political Science Quarterly* 519.

[33] Leon Geršković, 'Ustavni temelji pravnog poretka nove Jugoslavije' *Arhiv za pravne i društvene nauke* (1947) Godina XXXIV, Broj 2, April-June, Knjiga III, 205-6; Walker Connor, 'The Ethnopolitical Challenge and Governmental Response' in Peter F Sugar (ed), *Ethnic Diversity and Conflict in Eastern Europe* (1980) 150-1.

[34] Djilas, above n 15, 167.

[35] 'Predlog za dopunu nacrt ustava' in Petranović and Zečević, *Jugoslovenski federalizam, 1943-1986*, above n 29, 230-3. According to Đorđević, the right of secession in socialist theory meant '(a) the ultimate guarantee of self-determination; (b) the confirmation of voluntariness; (c) a constitutive element of self-determination as a process': Jovan Đorđević, *Ustavno Pravo* (3rd ed, 1978) 614.

Constitution. This can be seen in a speech by Tito in May 1945, in which he spoke of the new federative Yugoslavia in the following terms:

> Because of our federative Yugoslavia we have a number of nations: Croats, Serbs, Slovenes, Macedonians and Montenegrins, we have Bosnia and Hercegovina where Croats, Serbs and Muslims live. But ... if each [nation] within its boundaries formed a strong federal unit, Croatia, Serbia etc, at the expense of others, that would be a mistake. We are forming one state - Yugoslavia, in which each nation has its rights, and complete equality. In that is the essence: out of them, out of a number of federal units, we form one strong Yugoslav national state. ... [Yugoslavia's communists] must be the element that will unite all into one whole. Amongst communists a deep sense of internationalism must be developed. To love one nation, Croatia or Serbia, does not deny our wide country - Yugoslavia. On the contrary, to love one's federal unit - means to love a monolithic Yugoslavia.[36]

The most prominent and authoritative exponent of this view in Yugoslavia was Moše Pijade, a key figure in the preparation of the 1946 *Constitution*,[37] who, in 1950, wrote:

> [O]ur federation ... has been established because our peoples, making use of the right of self-determination, 'to separate and unite with other peoples', did decide to live together in a common federal State and they have not used the right to secession, but the right to unite with others. Inasfar as the Constitution has mentioned the right to secession, it is only in connection with the origin of the [Federal People's Republic of Yugoslavia] and not in order to ensure that our republics still have today the right of separation. The formula in the Constitution has the grave shortcoming of not mentioning in the same breath with the right to secession, the right to unite with other peoples. This shortcoming has been ironed out in the republican constitutions enacted later.[38] All republican con-

[36] 'Iz govora Generalnog Sekretara KPJ JB Tita na osnivačkim kongresu KP Srbije', 8 May 1945, in Petranović and Zečević, *Jugoslovenski federalizam, 1943-1986*, above n 29, 158. Tito's speech has its parallels with the following words of George-Etienne Cartier, which were cited with approval by the Supreme Court of Canada:

> In our own federation we should have Catholic and Protestant, English, French, Irish, and Scotch, and each by his efforts and his success would increase the prosperity and glory of the new confederacy. [I view] the diversity of races in British North America in this way: we were of different races, not for the purpose of warring against each other, but in order to compete and emulate for the general welfare.

In Janet Ajzenstat et al (eds), *Canada's Founding Debates* (1999) 230-1.

[37] Djilas, above n 15, 167.

[38] Article 2 of the Serbian Republic *Constitution* of 17 January 1947 referred to 'the right of all peoples to self-determination, including the rights of secession and

> stitutions have formulated it scientifically and fully. ... Meanwhile, although our Constitution has not granted the right to secession, this does not mean that it is ruled out altogether. It is theoretically possible that some people or people's republic would bring up the matter of its secession. But that would be a thing to be solved in concreto, either as a revolutionary or as a counter-revolutionary case, according to the situation, the social causes and so forth. In the development of the [Federal People's Republic of Yugoslavia] there is, so far, no reason to surmise that this would happen.[39]

A minority of legal opinion in Yugoslavia was of the view that article 1 granted a right of unilateral secession to the Republics. Thus, Jovan Stefanović was of the view that Yugoslav Republics were sovereign political entities. That sovereignty was confirmed, first, by the fact that the Yugoslav state was a freely entered federation of sovereign Republics, and second, by the fact that those Republics were granted the right to secede under article 1. Stefanović conceded that article 1 did not contain an explicit right of secession as was the case with article 17 of the Soviet *Constitution*. However, he maintained that the implicit effect of article 1 was the right of a Republic to secede unilaterally from the federation.[40]

Apart from article 1, other provisions in the 1946 *Constitution* also raised the question of whether Republics had the right to unilaterally secede. Article 9 clearly stipulated that sovereignty was vested in the Republics. On the other hand, article 10 referred to the sovereignty of the people. This presented a difficult theoretical problem for Yugoslavia's constitutional lawyers.[41] Article 9 declared:

> The sovereignty of the peoples' republics composing the Federative Peoples Republic of Yugoslavia is limited only by the rights which by this Constitution are given to the Federative Peoples Republic of Yugoslavia.

The Federative Peoples Republic of Yugoslavia defends the sovereign rights of the peoples' Republics.

union with other peoples': 'Ustav Narodne republike Srbije' in Petranović and Zečević, *Jugoslovenski federalizam, 1943-1986*, above n 29, 244. For similar provisions see the constitutions of Croatia of 18 January 1947 (article 2) and Bosnia-Hercegovina of 31 December 1946 (article 2): Petranović and Zečević, *Jugoslovenski federalizam, 1943-1986*, at 248.

39 Quoted in Frits W Hondius, *The Yugoslav Community of Nations* (1968) 142-3.

40 Jovan Stefanović, 'Razmatranja o federativnom uređenju države' [1948] *Zbornik pravnog fakulteta u Zagrebu* 135-7.

41 Hondius, above n 39, 146-7.

It was argued by some constitutional lawyers that, if the sovereignty of Republics was to be anything more than an empty phrase, Republics had the right of unilateral secession.[42] Others took the view that, even though Republics had sovereignty, it was one shared with the people. It was possible to have a division of sovereignty, provided the Republics voluntarily entered the federation and were equal within it. These pre-conditions were met by articles 1 and 10 of the 1946 *Constitution*. Nothing in the concept of divided sovereignty, it was argued, permitted unilateral secession from the federation.[43] On the other hand, others opined that, in a federation, constituent federal units could not have sovereignty, and thus that Yugoslavia's Republics had no right of unilateral secession.[44]

However, the significance of article 9 must be assessed in conjunction with article 44(2) and the political environment of the late 1940s in the Balkans. Article 44(2) provided for the admission of new Republics to the Yugoslav federation. In the late 1940s Yugoslavia sponsored an attempt to create a Balkan Federation by the addition of other Balkan states to Yugoslavia, notably Albania and Bulgaria. Article 44(2) was designed to provide a constitutional mechanism to facilitate such an attempt. Article 9 was also designed with such a Balkan Federation in mind.[45] In this the CPY was adopting the Leninist model used in the 1920s to add further units to the Soviet Union. The recognition of republican sovereignty was seen as making the expansion of the Soviet Union more palatable to Republics such as Ukraine and Georgia. It was anticipated that article 9 would achieve the same result.[46] However, Yugoslavia's expulsion from the Soviet bloc in 1948 put an end to Yugoslavia's Balkan Federation aspirations. It was thus not surprising that following the 1953 amendments to the 1946 *Constitution* there was no corresponding provision to article 44(2). Nor was such a provision included in the 1963 and 1974 *Constitutions*. From 1953 onwards, sovereignty no longer vested in the Republics, but rather it was consistently stipulated as residing in the people.[47]

42 Ibid 147; Stefanović, above n 40, 137; Connor, above n 22, 224.

43 Ferdo Čulinović, *Razvitak jugoslavenskog federalizma* (1952) 150-1.

44 Miodrag Jovičić, *Državnost federalnih jedinica* (1992) 25-7.

45 William H Riker, *Federalism, Origin, Operation, Significance* (1964) 40-1.

46 Connor, above n 22, 218-9, 223.

47 Ibid 224; Hondius, above n 39, 196, 253.

Yugoslavia's *Constitution* of 1963

The 1953 Constitutional Law removed references to self-determination and secession from Yugoslavia's 1946 *Constitution*. However, the 1963 *Constitution* marked a return of such references, not in its substantive provisions, but in the Introductory Part, which was described by Hondius as 'a rambling collection of whatever principles did or should apply in the Yugoslav universum'.[48] Although not substantive in nature, the principles of the Introductory Part did serve as a basis for the interpretation of the substantive provisions of the 1963 *Constitution*. Section I of the Introductory Part stated:

> The peoples of Yugoslavia, on the basis of the right of every people to self-determination, including the right to secession, on the basis of their common struggle and their will freely declared in the People's Liberation War and Socialist Revolution, and in accordance with their historical aspirations, aware that the further consolidation of their brotherhood and unity is to their common interest, have united in a federal republic of free and equal peoples and nationalities and have founded a socialist federal community of working people, the Socialist Federative Republic of Yugoslavia.

The comments made above on article 1 of the 1946 *Constitution* equally apply to section I. In addition, the explicit reference in section I to the 'will freely declared in the People's War of Liberation and Socialist Revolution' strengthens the argument that the rights to self-determination and unilateral secession were exhausted with the Partisan victory during World War II. This reference to the People's War of Liberation and Socialist Revolution as a basis upon which the post-World War II Yugoslav federation was built, impliedly incorporated the resolutions of AVNOJ into the body of Yugoslavia's constitutional law.

At the second Congress of AVNOJ in November 1943, it was resolved:

> On the basis of the right of all nations to self-determination including the union with or secession from other nations, and in accordance with the true will of all the peoples of Yugoslavia, tested during three years of common national struggle for liberation which has cemented the *indissoluble fraternity* of all the people of Yugoslavia, [AVNOJ] passes the following decisions:
>
> 1. The peoples of Yugoslavia *never recognised and do not recognise the dismemberment of Yugoslavia* by the fascist imperialists and they have es-

[48] Hondius, ibid 245.

> tablished in the joint armed struggle their firm will *to remain in the future united* in Yugoslavia.[49]

These AVNOJ resolutions clearly refer to an indissoluble Yugoslavia and implicitly deny the right of unilateral secession once the Yugoslav state was reconstituted after World War II.[50]

However, there were prominent constitutional lawyers in Yugoslavia who argued that the rights of self-determination and secession in the 1963 *Constitution*, unlike its 1946 predecessor, indicated a continued right of unilateral secession.[51] The basis of such a claim stemmed from the 'open community' provision in section VII of the Introductory Part, which laid down principles of self-determination and national independence in general. On the role of Yugoslavia in this connection, section VII said:

> In pledging itself to comprehensive political, economic and cultural cooperation with other peoples and states, Yugoslavia, as a socialist community of nations, holds that this cooperation should contribute to the creation of new democratic forms of association between States, nations and peoples, which will correspond to the interest of the nations and social progress, and in this respect it is an open community.

Section VII was interpreted by some Yugoslav theorists to mean that, irrespective of what Yugoslavs may have had in mind as to Yugoslavia's future, that future could not be isolated from the international mainstream which included principles relating to national independence and self-determination.[52]

Unlike the 1946 *Constitution*, the 1963 *Constitution* did not contain a provision governing the admission of new constituent units to the federation. The absence of such a provision, when read in the light of the 'open community' provisions in section VII, was seen by some Yugoslav theorists as not having ruled out the possibility of enlargement of, or unilateral secession from, Yugoslavia.[53] On the other hand, other Yugoslav theorists suggested that the absence of a provi-

[49] 'Odluka Drugog zasedanja Antifaćističkog veća narodnog oslobođenja Jugoslavije o izgradnji Jugoslavije na federativnom principu', 20 November 1943, in Petranović and Zečević, *Jugoslovenski federalizam, 1914-1943*, above n 25, 801 (emphasis added).

[50] Connor, above n 22, 161-2. At the third congress of AVNOJ on 8 August 1945, Tito referred to 'the creation of *indestructible* brotherhood and unity among the various nationalities of Yugoslavia' as one of the major achievements of the Partisan war effort: Connor at 171 (emphasis added).

[51] Hondius, above n 39, 251.

[52] Ibid 252.

[53] Ibid 251-2.

sion governing the admission of new constituent units in the 1963 *Constitution*, could equally be interpreted as having precluded any tampering with Yugoslavia's structure of six Republics and two Autonomous Provinces as set out in article 2.[54]

Yugoslavia's *Constitution* of 1974

The provisions of section I of the 1963 *Constitution* were retained in almost identical form in section I of the Basic Principles of the 1974 *Constitution*,[55] which stipulated:

> The peoples of Yugoslavia, proceeding from the right of every people to self-determination, including the right of secession, on the basis of their will freely expressed in the common struggle of all nations and nationalities in the National Liberation War and Socialist Revolution, and in conformity with their historic aspirations, aware that further consolidation of their brotherhood and unity is in the common interest, together with the nationalities with whom they live, have united in a federal republic of free and equal nations and nationalities and created a socialist federative community of working people.

The comments made above on article 1 of the 1946 *Constitution* and section I of the 1963 *Constitution*, to the effect that they did not indicate a continuing right to self-determination and unilateral secession, applied equally to section I of the 1974 *Constitution*.

As with Section VII of the 1963 *Constitution*, Section VII of the Basic Principles of the 1974 *Constitution* contained an 'open community' provision in almost identical terms to that of its 1963 counterpart. The prominent Yugoslav constitutional lawyer, Jovan Đorđević, in his commentary on the 1974 *Constitution*, noted that the 'open community' provision did not rule out *a priori* the possibility of 'annexation and unification'[56] of new Republics to the existing federation. This comment made no reference to the 'open community' provision enabling Republics to secede unilaterally from the federation. On the other hand, in the context of the rights to self-determination and secession in section I, Đorđević observed that the 1974 *Constitution* did not prevent *a priori* a Republic from leaving Yugoslavia. However, he also noted that section I did not give a Republic, as did all the *Consti-*

[54] Ibid 251.

[55] It should be noted that the 1974 *Constitution* included significant constitutional changes that had been passed in 1971 as amendments to the 1963 *Constitution*.

[56] Đorđević, above n 35, 614. Earlier, at 186, Đorđević referred to the 'open community' provision as 'encapsulating ... the possibility of annexation and association'.

tutions of the Soviet Union, an absolute right of withdrawal. Đorđević did not elaborate on the circumstances that would have invoked this qualified right of Republic secession, presumably because of his view that the forces for unity and association within the framework of Yugoslavia were so strong, and continuing to become stronger, that unilateral secession was an almost impossible option.[57]

Whatever one may make of the possible right of unilateral secession pursuant to the 'open community' provision, there were a variety of other provisions in the 1974 *Constitution* that indicated that the *Constitution* precluded such a right. The principal provisions were those dealing with the territorial integrity of the Yugoslav federation. Various provisions referred to the preservation of the integrity of Yugoslavia's territory, which itself was referred to in article 5, as 'a single unified whole'. The protection of Yugoslavia's territorial integrity, referred to in section VI of the Basic Principles, was, by article 237, the 'right and duty' of, not only individuals, but also of 'the peoples and nationalities of Yugoslavia'. By article 244, individuals, as well as 'peoples' and 'nationalities' had to 'ensure' Yugoslavia's territorial integrity. By article 281, the Federation, through its organs, was also obliged to 'ensure the independence and territorial integrity' of Yugoslavia. In particular, that obligation was, by article 240, cast upon Yugoslavia's armed forces, principally the Yugoslav People's Army, which itself was defined as 'the *common armed forces of all the peoples and nationalities* and of all working people and citizens' (emphasis added). The territorial integrity provisions were clearly inconsistent with permitting any right of unilateral secession. Furthermore, the prohibition of unilateral secession was implied by article 203, which precluded constitutionally granted rights being used in ways that threatened the existence of the state.[58]

Furthermore, article 5 stipulated that Yugoslavia's international borders were unalterable except with the consent of all its constituent units. Article 283 stipulated that such alterations also required the approval of the Federal Assembly. A unilateral act of secession of any unit would have altered Yugoslavia's international borders in breach

[57] Ibid 613.

[58] Richard F Iglar, 'The Constitutional Crisis in Yugoslavia and the International Law of Self-Determination: Slovenia's and Croatia's Right to Secede' (1992) 15 *Boston College International and Comparative Law Review* 219.

of these provisions and would, therefore, have been unconstitutional.[59]

Yugoslavia's Constitutional Court and Secession

In January 1990, Yugoslavia's Constitutional Court considered the first of a number of cases in which the central issue was the claim of a Republic to the right of self-determination, including the right of secession. These cases all ruled against a right of unilateral secession from the Yugoslav federation.

The first of these cases was brought before the Constitutional Court in the wake of the 1989 amendments to Slovenia's Republic *Constitution* – the *Slovenian Constitutional Amendments Case*.[60] One of these amendments asserted that Slovenia had the right of unilateral secession pursuant to the right of self-determination. This assertion was rejected by the Constitutional Court, which ruled that secession from the federation was permitted only if there were unanimous agreement of Yugoslavia's Republics and Autonomous Provinces. In coming to this conclusion, the Court ruled that the right of self-determination, including the right of secession, flowed from the references to these matters in section I of the Basic Principles of the 1974 *Constitution*, together with the provisions of the *Constitution* that determined the nature and composition of Yugoslavia and the rights and obligations of the federation. According to the Court, the rights of self-determination and secession belonged to 'the peoples of Yugoslavia and their socialist republics'.[61]

The reason that the unanimous consent of the Republics and Autonomous Provinces was required before secession of a Republic could be seen as constitutionally valid was because an act of secession by one people and its Republic was relevant, not only to that people and Republic, but to all the peoples and Republics that were parts of the common state of Yugoslavia. It was relevant to all six of Yugoslavia's peoples and Republics, because secession of one people and Republic affected the composition of the federation, its international borders, internal relations within Yugoslavia, and Yugoslavia's posi-

59 Pavle Nikolić, *Od raspada do beznađa i nade, Svedočanstvo o jednom vremenu* (1997) 18.

60 *Mišljenje Ustavnog suda Jugoslavije o suprotnosti amandmana IX-XC na ustav SR Slovenije a ustavom SFRJ*, 18 January 1990, Službeni List SFRY, God XLVI, Broj 10, 23 February 1990, 593.

61 Ibid.

tion as a member of the international community and signatory to many international agreements.

The decision of the Constitutional Court was significant in that it determined that unilateral secession of a Republic was unconstitutional. However, in ruling that secession was possible if there was the unanimous agreement of Yugoslavia's Republics and Autonomous Provinces, the Court's decision was controversial. It also left many questions unanswered.

The Court's ruling that the rights of self-determination and secession existed in 'the peoples of Yugoslavia and their socialist republics',[62] can be questioned as to its correctness. Nothing in the 1974 *Constitution* explicitly tied the rights of self-determination and secession to the Republics. Section I of the Basic Principles, which explicitly mentioned the right of self-determination and secession, referred only to the 'peoples' of Yugoslavia. The Court appeared to justify its ruling on article 1 of the 1974 *Constitution*, which did not mention the rights of self-determination and secession, but which referred to Yugoslavia as a 'state community of voluntarily united peoples and their socialist republics'. However, the implication that article 1 conferred the rights of self-determination and secession upon both the peoples and Republics of Yugoslavia cannot be justified. Section I of the Basic Principles, after mentioning the rights of self-determination and secession, stated that the peoples of Yugoslavia united 'into a federal republic of free and equal peoples and nationalities and formed a socialist federative community of working people - the Socialist Federative Republic of Yugoslavia'. Section I made no mention of uniting Yugoslavia's peoples and Republics. Article 1, in its reference to Yugoslavia's 'peoples and their socialist republics' can be interpreted only as meaning that the Republics were the *result* of the peoples' exercise of the right to self-determination referred to in Section I of the Basic Principles. As such the Republics could not have the rights of self-determination or secession, that right being vested exclusively in Yugoslavia's peoples.[63]

62 Ibid.

63 In a 1991 decision rejecting the constitutionality of a declaration by the Autonomous Province of Kosovo to the effect that the Albanian population of Yugoslavia were a constituent people, the Constitutional Court stated that 'only peoples of Yugoslavia' possessed the right to self-determination: *Odluka o ocenjivanju ustavnosti ustavne deklaracije o Kosovu kao samostalnoj i ravnopravnoj jedinici u okviru federacije (konfederacije) Jugoslavije kao ravnopravnog subjekta sa ostalim jedinicama u federaciji (konfederaciji)*, 19 February 1991, Službeni List SFRJ, God. XLVII, Broj 37, 20 May 1991, 618.

However, if one accepted the Court's ruling that the rights of self-determination and secession existed in both the peoples and Republics of Yugoslavia, this gave rise to the problem of how a Republic would invoke the right of secession. If both peoples and Republics had the right of self-determination and secession, then presumably both would have needed to agree to the exercise of these rights. Thus, for a Republic to secede it would have needed to gain the approval of the Republic through its Assembly and the constituent peoples of that Republic. The latter would have presumably required plebiscites of each such people to approve of that Republic's secession. For example, in the case of Bosnia-Hercegovina, it would have been necessary to conduct three plebiscites to gain the approval of the Muslim, Serb and Croat peoples.

On the question of implementing the secession of a Republic from Yugoslavia, in the *Croatian Independence Declaration Case*,[64] the Constitutional Court ruled that the fact that the procedure for the realisation of the right to self-determination was not dealt with in Yugoslavia's federal *Constitution* did not mean that the right could be realised by the unilateral acts of one Republic. In the *Slovenian Amendments Case*, the Court was clear that this was a matter for the federal *Constitution* of Yugoslavia and not the *Constitution* of any single Republic. The Constitutional Court did not elaborate much further on this matter, except to indicate that the approval of all of Yugoslavia's Republics and Autonomous Provinces was necessary. In the later *Slovenian Referendum on Independence Case*,[65] the Court was more explicit in ruling that secession of a Republic required a constitutional amendment. A preliminary to such an amendment was agreement on a settled procedure, pursuant to which negotiations on the future relationships between the Republics would have taken place. It is clear from all the cases considered by the Constitutional Court that the unanimous consent of all the Republics and Autonomous Provinces was necessary for such a constitutional amendment. In the highly charged political atmosphere that prevailed during the last years of the former Yugoslavia, it was clear to all that such unanimity was never going to be reached.

[64] Odluka o ocenjivanju ustavnosti deklaracije o proglašenju suverene i samostalne Republike Hrvatske, 13 November 1991, in Milovan Buzadžić, *Secesija bivših Jugoslovenskih republika u svetlosti odluka Ustavnog Suda Jugoslavije* (1994) 159.

[65] Odluka o ocenjivanju ustavnosti deklaracije o suverenosti države Republike Slovenije, 10 January 1991, Službeni List SFRJ, God XLVII, Broj 23, 5 April 1991, 452.

Proposals for Constitutional Reform, 1990-1991

In the year preceding the outbreak of war in Yugoslavia in mid-1991, federal authorities attempted to initiate a process of constitutional reform in a desperate effort to preserve the federation. On 17 October 1990, the Yugoslav Presidency submitted to the Federal Assembly a document entitled 'Concept for the Constitutional Structure of Yugoslavia on a Federal Basis'.[66] This document was a draft set of principles for further constitutional reform. Principle 11 of the draft stipulated that, on the basis of a successful referendum, each Republic was entitled to leave the federation in accordance with procedures to be set out in the federal *Constitution*. The document did not stipulate any details of these procedures. The Presidency recognised that, although a constitutional right of secession was unusual in federal constitutional structures, it was impossible not to include such a right in light of the extent to which such a right had become a political demand within Yugoslavia.

Details of the Presidency's thinking on the actual implementation of a right of secession are found in documents considered, but not adopted, by the Presidency in early March 1991. These documents noted that the right of secession flowed from the right of peoples to self-determination. The proposed constitutional entrenchment of the right of secession was deemed necessary because such a right was not granted pursuant to the 1974 *Constitution*. The implementation of a Republic's secession was to be initiated by means of a referendum of a Republic's citizens. If the referendum failed, the issue was not to be raised again for five years. A successful referendum required a simple majority of votes cast in favour of secession. An important qualification on the referendum procedure related to Republics with more than one constituent people. In such Republics, the majority of each people had to vote for secession. If any people did not vote for secession, then areas in which that people formed the majority population would remain in Yugoslavia, provided such areas bordered on the remaining part of Yugoslavia. In effect, this provided for the possible partition of Republics following a secession referendum. Where such partition was to occur, the Federal Assembly was to determine the

[66] 'Predsedništvo SFRJ dostavilo Skupštini koncept federativnog uređenja Jugoslavije', reprinted in *Borba*, 18 October 1990, 2.

appropriate territorial division as a precondition to formal legislation validating the secession and partition.[67]

The proposals failed to proceed to implementation. However, they were significant because they illustrated that no Republic was irrevocably opposed to secession. Rather, the dispute was over whether Republics could secede within the confines of existing Republic borders, or whether these borders would need to be abandoned and replaced with borders that more closely resembled territorial divisions along national lines.[68]

Conclusion

What is clear from the decisions of the Yugoslav Constitutional Court is that, notwithstanding references to self-determination and secession in the introductory provisions of the former Yugoslavia's *Constitution*, the unilateral secession of one of its Republics was illegal. Secession could only occur with the consent of all Yugoslav federal units to appropriate amendments to the Yugoslav *Constitution*. To this extent, the Yugoslav Constitutional Court decisions mirrored the decision of the USA Supreme Court in *Texas v White* and anticipated the later decision of the Canadian Supreme Court in the *Secession Reference*. The Yugoslav Constitutional Court effectively left the procedural basis for achieving a constitutional amendment to Yugoslavia's political process. In this respect it again anticipated the approach taken by the Canadian Supreme Court.

In leaving the procedures for achieving the necessary constitutional amendment for secession to the political process, it is fair to say that the Yugoslav Constitutional Court and the Canadian Supreme Court acted properly. Indeed, the respective Courts were left with no other choice given the silence of the *Constitutions* of these two states as to such matters. However, this aspect of the Courts' rulings points to significant practical issues relating to a constitutionally sanctioned secession. If, as is clear from the decisions of the courts in the USA, the former Yugoslavia and Canada, secession is constitutionally possible, the question arises as to whether it would be more appropriate that a state's constitution contained, from the outset, explicit provisions dealing with the procedures to be followed in the event of a future se-

[67] 'Predlog ustavno-pravnog postupka za izdvajanje iz Jugoslavije', reprinted in *Nedlejna Borba*, 2-3 March 1991, 13. See also Miodrag Mitić, *Međunarodno pravo u Jugoslovenskoj krizi* (1996) 25-6.

[68] For an account of the various secessionist claims in Yugoslavia: see Radan, above n 2, 167-203.

cession.[69] Arguably, the examples of Yugoslavia and Canada support such an approach.

In Yugoslavia, the demands for secession by a number of its Republics had advanced to such a degree and the political atmosphere had been so heated by the time the Constitutional Court made its rulings that agreement on procedures was virtually impossible. The decisions of the Constitutional Court were blithely ignored by the secessionist Republics as were the Yugoslav Presidency's proposals for constitutional reform that they inspired. If procedures for secession had been in place in Yugoslavia's *Constitution* before demands for secession surfaced, Yugoslavia's brutal wars of the 1990s may have been avoided or, at least, their extent may have been minimised.

Whether, in this respect, the case of Yugoslavia again anticipates that of Canada is an open question. In the wake of the *Secession Reference* a fierce political debate about the procedures for secession has been conducted over the past few years. In March 2000, the Canadian Federal Parliament adopted the so-called *Clarity Act*,[70] which stipulates that, in any provincial referendum on secession that could, if successful, act as a trigger for constitutional negotiations to achieve that Province's secession, the federal government would not participate in any constitutional negotiations unless the House of Commons was satisfied that the referendum question was clear,[71] and that it was approved by a clear majority of the population of Quebec.[72] The Act also stipulates a number of matters that would need to be included on the agenda of negotiations that followed a successful referendum, including the sensitive issue of possible border changes to the Province seeking to secede.[73]

[69] The issue of explicit constitutional references to secession has recently emerged as a topic of debate within philosophical circles. See Daniel Weinstock, 'Constitutionalizing the Right to Secede' (2001) 9 *The Journal of Political Philosophy* 182-203; Cass R Sunstein, 'Should Constitutions Protect the Right to Secede? A Reply to Weinstock' (2001) 9 *The Journal of Political Philosophy* 350-5; Sunstein, above n 7, 95-114.

[70] *An Act to Give Effect to the Requirement for Clarity as Set Out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference*, SC 2000, c 21 (Assented to 29 June 2000).

[71] *An Act to Give Effect to the Requirement for Clarity as Set Out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference*, SC 2000, c 21, s 1.

[72] *An Act to Give Effect to the Requirement for Clarity as Set Out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference*, SC 2000, c 21, s 2.

[73] *An Act to Give Effect to the Requirement for Clarity as Set Out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference*, SC 2000, c 21, s3.

In December 2000, in response to the *Clarity Act*, the Quebec National Assembly passed *Bill 99*,[74] which stipulates that the matter of the referendum question is solely within its jurisdiction,[75] and that a simple majority in favour of independence is all that is required for such a referendum to be successful.[76] *Bill 99* also stipulates the inviolability of Quebec's present provincial borders.[77] In August 2001, a case was initiated before Quebec's Superior Court challenging the constitutional validity of *Bill 99*.[78] In this atmosphere of unresolved political controversy, a move by Quebec towards independence could easily lead to violence. The threat of violence in the case of Quebec is rarely openly canvassed, but has at times been conceded, especially by spokespersons for Quebec's aboriginal peoples. In opposing Quebec's move towards secession, they have consistently asserted that if such a move is made they will seek to secede from Quebec and remain in Canada.[79] Arguably, the likelihood of violence would be reduced if Canada's *Constitution* had explicit provisions governing the process for secession of one of its Provinces.

Finally, although the constitutional jurisprudence of the USA, the former Yugoslavia and Canada indicates a consensus view that the unilateral secession of a federal unit from a sovereign state is constitutionally illegal, and further, that secession can only be achieved by constitutional amendment, the reality is that the success of such a unilateral secession will ultimately depend upon whether it is sanctioned by the international community of states by means of international recognition. This is implicitly conceded by the USA Supreme Court in its admission that the dissolution of the USA could come

74 *An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Quebec People and the Quebec State*, SQ 2000, c 46 (Assented to 13 December 2000).

75 *An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Quebec People and the Quebec State*, SQ 2000, c 46, ch I(3).

76 *An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Quebec People and the Quebec State*, SQ 2000, c 46, ch I(4).

77 *An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Quebec People and the Quebec State*, SQ 2000, c 46, ch III.

78 *Henderson and Equality Party v Attorney General of Quebec*, No 500-05-065031-013. See also Kevin Dougherty, 'Quebec Moves to Quash Equality's Bill 99 Challenge' *The Montreal Gazette*, 28 August 2001 <http://www.canada.com/montreal/montrealgazette/>.

79 Douglas Sanders, 'If Quebec Secedes From Canada Can the Cree Secede From Quebec?' (1995) 29 *University of British Columbia Law Review* 143; Matthew Coon Come, 'Dishonourable Conduct: The Crown in Right of Canada and Quebec, and the James Bay Cree' (1996) 7(2-3) *Constitutional Forum* 79; Brenda Miller, 'Quebec's Accession to Sovereignty and its Impact on First Nations' (1994) 43 *University of New Brunswick Law Journal* 261.

about 'through revolution'.[80] It is explicitly conceded by the Canadian Supreme Court.[81] Although Yugoslavia's Constitutional Court made no reference to this reality, the international response to the secessionist demands of some of Yugoslavia's Republics is abundant evidence of its undeniable truth.

80 *Texas v White*, 74 US 700, 725 (1869).

81 *Reference re: Secession of Quebec* [1998] 2 SCR 217, 274-5, 289-90.