

*Volume 50, Issue 3 (Spring 2013)*

*Rights Constitutionalism and the Canadian Charter of  
Rights and Freedoms*

Article 4


*Guest Editors: Benjamin L. Berger & Jamie Cameron*

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# Inclusion, Voice, and Process-Based Constitutionalism

Colleen Sheppard

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## Citation Information

Sheppard, Colleen. "Inclusion, Voice, and Process-Based Constitutionalism." *Osgoode Hall Law Journal* 50.3 (2013) : 547-574.  
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# Inclusion, Voice, and Process-Based Constitutionalism

## **Abstract**

This article explores a growing emphasis on process issues in the elaboration of constitutional rights and freedoms, focusing on the Canadian Charter of Rights and Freedoms. In a diverse range of contexts, judges are framing constitutional rights and freedoms in terms of the processes and practices they require, rather than in terms of specific constitutionally mandated substantive outcomes. Thus, constitutional rights have been interpreted to require a duty to negotiate, a duty to consult, a duty to accommodate, and entitlements to participate in democratic governance. The growing emphasis on processes and practices is positive to the extent that it resonates with new understandings of social regulation in modern society, empowers institutional and social actors as change makers, and reduces reliance on the judiciary as interpreters of the substantive content of rights in diverse social and institutional contexts. Values of democratic participation, institutional and social transformation, empowerment, and self-governance also emerge with the shift towards processes and practices. And yet, it is also important to consider whether and to what extent a focus on processes and practices risks undermining constitutional protections.

## **Keywords**

Canada. Canadian Charter of Rights and Freedoms; Civil rights; Procedure (Law); Canada

## Inclusion, Voice, and Process-Based Constitutionalism

COLLEEN SHEPPARD \*

This article explores a growing emphasis on process issues in the elaboration of constitutional rights and freedoms, focusing on the *Canadian Charter of Rights and Freedoms*. In a diverse range of contexts, judges are framing constitutional rights and freedoms in terms of the processes and practices they require, rather than in terms of specific constitutionally-mandated substantive outcomes. Thus, constitutional rights have been interpreted to require a duty to negotiate, a duty to consult, a duty to accommodate, and entitlements to participate in democratic governance. The growing emphasis on processes and practices is positive to the extent that it resonates with new understandings of social regulation in modern society, empowers institutional and social actors as change makers, and reduces reliance on the judiciary as interpreters of the substantive content of rights in diverse social and institutional contexts. Values of democratic participation, institutional and social transformation, empowerment, and self-governance also emerge with the shift towards processes and practices. And yet, it is also important to consider whether and to what extent a focus on processes and practices risks undermining constitutional protections.

Cet article se penche sur l'importance croissante accordée aux questions de procédure lors de l'élaboration des droits et libertés constitutionnels, en se fondant sur la *Charte canadienne des droits et libertés*. Dans divers contextes, les juges considèrent les droits et libertés constitutionnels en termes des procédures et des pratiques nécessaires plutôt que des résultats significatifs qu'exige spécifiquement la constitution. Par conséquent, les droits constitutionnels sont réputés comporter un devoir de négociation, un devoir de consultation et un devoir d'accommodement, ainsi que le droit de participer à la gouvernance démocratique. L'importance croissante accordée aux procédures et aux

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pratiques est positive dans la mesure où elle reflète une manière nouvelle d'interpréter la régulation sociale dans la société moderne, en conférant aux intervenants institutionnels et sociaux le pouvoir d'opérer des changements et en réduisant le recours aux instances judiciaires comme interprètes du contenu de fond des droits dans divers contextes sociaux et institutionnels. La valeur de la participation démocratique, de la transformation institutionnelle et sociale, de la responsabilisation et de l'autorégulation est également soulignée par ce glissement vers les procédures et les pratiques. Pourtant, il importe également de se demander à quel point l'emphase mise sur les procédures et les pratiques ne risque-t-elle pas de saper les protections constitutionnelles.

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I. PROCESS-BASED VALUES AND CONTEMPORARY CONSTITUTIONALISM .....	549
II. EMERGING PROCESS-BASED VALUES IN THE FRAMING OF CONSTITUTIONAL RIGHTS AND FREEDOMS .....	552
III. DEMOCRACY IN INSTITUTIONS, WORKPLACES, AND COMMUNITIES.....	556
IV. CONSULTATION, POWER, AND GOVERNANCE .....	560
V. NEGOTIATION AND GOVERNANCE: RIGHTS AND DUTIES .....	565
VI. ACCOMMODATION DUTIES: SUBSTANTIVE AND PROCEDURAL DIMENSIONS .....	568
VII. THE PROMISE AND RISKS OF THE PROCEDURAL TURN .....	573

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**WE HAVE BEEN TRAVERSING** an enormously rich period in constitutional law, both internationally and in Canada. Around the world, there is a significant body of jurisprudence interpreting a wide array of constitutional rights, freedoms, and obligations. This article explores a growing emphasis on process issues in the elaboration of constitutional rights and freedoms, focusing on the *Canadian Charter of Rights and Freedoms*.<sup>1</sup> In a diverse range of contexts, Canadian judges are framing constitutional rights and freedoms in terms of the processes and practices they require rather than in terms of specific constitutionally-mandated substantive outcomes. Thus, constitutional rights have been interpreted to require a duty to negotiate, a duty to consult, a duty to accommodate, and an entitlement to participate in democratic governance. Beyond the judiciary, debates amongst political theorists and legal scholars about constitutionalism increasingly highlight processes and practices by drawing on concepts like democratic accountability, accommodation of individuals and communities, dialogic democracy, participatory democracy, inclusive citizenship, and critical multiculturalism.<sup>2</sup>

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1. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2. See Part II, below.

The growing emphasis on processes and practices is positive to the extent that it resonates with new understandings of social regulation in modern society, empowers institutional and social actors as change makers, and reduces reliance on the judiciary as interpreters of the substantive content of rights in diverse social and institutional contexts. Values of democratic participation, institutional and social transformation, empowerment, and self-governance have also emerged with the shift towards processes and practices. Yet it is also important to consider whether and to what extent a focus on processes and practices risks undermining constitutional protections. Do procedural rights—such as the right to be consulted or the right to have negotiations with no guarantee of reaching an agreement—deflect the resolution of substantive legal issues from the courts back to inequitable institutional, political, or social contexts? In so doing, do they reinforce privatized power and privilege,<sup>3</sup> or do they defer the effective realization of constitutional rights and freedoms indefinitely? To what extent is assimilation into the institutional status quo a precondition to the exercise of procedural rights? It is important, therefore, to canvass both the promise and the perils of this interpretive shift and to think about how to shape such a shift to ensure that its future development reinforces, rather than undermines, the enhanced and effective protection of constitutional rights and freedoms.

## I. PROCESS-BASED VALUES AND CONTEMPORARY CONSTITUTIONALISM

The shift towards process-based constitutionalism may be viewed as part of a larger shift towards process-based approaches to legal regulation. Gunther Teubner, for example, described the emergence of “reflexive law” back in the early 1980s.<sup>4</sup> He observed a trend towards a “policy of proceduralization” whereby the “legal system concerns itself with providing the structural premises for self-regulation within other social subsystems.”<sup>5</sup> Developing similar themes regarding shifting approaches to state regulation, David Garland argues that the “project of establishing a sovereign state monopoly has begun to give way to a clear

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3. See Brenda Cossman & Judy Fudge, eds, *Privatization, Law and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002). See also Frank I Michelman, “Constitutionalism, Privatization and Globalization: Whither the Constitution?” (2000) 21:4 *Cardozo L Rev* 1063.

4. Gunther Teubner, “Substantive and Reflexive Elements in Modern Law” (1983) 17:2 *Law & Soc’y Rev* 239.

5. *Ibid* at 274.

recognition of the dispersed, pluralistic nature of effective social control. In this new vision, the state's task is to augment and support these multiple actors and informal processes ... ."<sup>6</sup> Such a shift also resonates with the work of scholars of legal pluralism on the informal law embedded in "semi-autonomous social fields."<sup>7</sup> State legal regulation is increasingly understood to coexist with other sources of normativity that constitute the informal law within multiple and overlapping institutional and social contexts.<sup>8</sup> As Susan Sturm explains, "Legal norms play the role of opening spaces for ongoing engagement about current practice in relation to aspirations that have been identified to be of public significance."<sup>9</sup> She explores the role of law in institutionalizing "occasions for analysis, reflection, relationship building, boundary renegotiations, and institution building."<sup>10</sup>

The procedural turn in constitutional law also resonates with the rich literature in philosophy and political theory about "constitutionalism as a dialogic and conversational process."<sup>11</sup> Contemporary theorists of democracy have emphasized the importance of deliberative,<sup>12</sup> dialogic,<sup>13</sup> and communicative democracy,<sup>14</sup> which celebrate inclusion and diversity of representation and voice in political decision making. Increasingly, political theorists concerned with equality and diversity have insisted on the importance of recognition, redistribution, and democratic representation.<sup>15</sup>

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6. See David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001) at 126. Although Garland focuses on criminal justice and crime control, his insights about shifts in state regulatory strategies resonate with themes advanced in this article regarding the changing directions of constitutional law.
  7. See Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" (1973) 7:4 *Law & Soc'y Rev* 719. See also Sally Engle Merry, "Legal Pluralism" (1988) 22:5 *Law & Soc'y Rev* 869.
  8. Martha-Marie Kleinhans & Roderick A Macdonald, "What is a Critical Legal Pluralism?" (1997) 12:2 *CJLS* 25.
  9. "Owen Fiss, Equality Theory, and Judicial Role" (2003) 2:1 *Issues in Legal Scholarship* (Article 18) at 7 (examining the role of judges as catalysts for institutional change).
  10. *Ibid.* See also Susan Sturm, "Second Generation Employment Discrimination: A Structural Approach" (2001) 101 *Colum L Rev* 458.
  11. Jo Shaw, "Process and Constitutional Discourse in the European Union" (2000) 27:1 *JL & Soc'y* 4 at 23.
  12. See e.g. Amy Gutmann & Dennis Thompson, *Why Deliberative Democracy?* (Princeton: Princeton University Press, 2004).
  13. See Anthony Giddens, *Beyond Left and Right: The Future of Radical Politics* (Stanford: Stanford University Press, 1994); Anthony Giddens, *The Third Way: The Renewal of Social Democracy* (Cambridge, UK: Polity Press, 1998). See also Sarah Hale, Will Legget & Luke Martell, eds, *The Third Way and Beyond: Criticisms, Futures and Alternatives* (Manchester: Manchester University Press, 2004).
  14. See e.g. Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000).
  15. See e.g. Nancy Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (New

Canadian scholars have also endorsed the critical connection between participatory democracy and constitutionalism, which Simone Chambers describes as combining “the centrality of rights found in modern constitutionalism with the role of practice in ancient constitutionalism.”<sup>16</sup> James Tully articulates a “philosophy and practice of constitutionalism informed by the spirit of mutual recognition and accommodation of cultural diversity.”<sup>17</sup> This contemporary constitutionalism entails “negotiation and mediation of claims to recognition in a dialogue governed by the conventions of mutual recognition, continuity and consent.”<sup>18</sup> Pursuant to this dialogic vision, the meaning and content of the constitution is dynamic, evolving, and connected to the lived and negotiated understandings of multiple communities, groups, and citizens.<sup>19</sup> In rejecting a conception of constitutionalism based on the fixed substantive meanings of constitutional provisions, these scholars focus not on judicial determinations of constitutional rights but on the lived realities of democratic public engagement.

Similar trends have emerged in other jurisdictions. Jo Shaw has emphasized the importance of focusing on “key procedural, dialogic, and relational elements in a reworked conception of constitutionalism” in the European Union.<sup>20</sup> Similarly, Colin Harvey has highlighted the significance of new republicanism’s focus on participatory and deliberative democracy.<sup>21</sup> Scholars of US constitutional law have theorized constitutionalism as a practice of democratic engagement that transcends judicial interpretation. For example, the meaning of rights has been linked to social relations and legal interpretation in everyday institutional contexts rather than exclusively in the courts.<sup>22</sup> There is also a rich debate about the significance and contours of “popular constitutionalism.”<sup>23</sup>

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York: Columbia University Press, 2009).

16. “New Constitutionalism: Democracy, Habermas, and Canadian Exceptionalism” in Ronald Beiner & Wayne Norman, eds, *Canadian Political Philosophy* (Toronto: Oxford University Press, 2001) 63 at 75. See also Hester Lessard, “Jurisdictional Justice, Democracy and the Story of Insite” (2011) 19:2 Const Forum Const 93.
17. James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, UK: Cambridge University Press, 1995) at 209.
18. *Ibid.*
19. See also Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Kingston and Montreal: McGill-Queen’s University Press, 1994).
20. *Supra* note 11 at 21.
21. “Governing After the Rights Revolution” (2000) 27:1 JL & Soc’y 61.
22. See e.g. Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1990). For a discussion on rights and relationships in Canadian and US constitutionalism, see also Jennifer Nedelsky, “Reconceiving Rights and Constitutionalism” (2008) 7:2 J Hum Rts 139.
23. See e.g. Mark Tushnet, “Popular Constitutionalism as Political Law” (2006) 81:3 Chi-Kent L

## II. EMERGING PROCESS-BASED VALUES IN THE FRAMING OF CONSTITUTIONAL RIGHTS AND FREEDOMS

Turning to the Canadian context, in the early days of *Charter* interpretation judges celebrated the new array of constitutionally entrenched rights and freedoms; they sought to interpret them liberally by giving them generous and substantive content.<sup>24</sup> The affirmation of substantive equality in the Supreme Court's early decisions on equality rights, for example, reflected a significant commitment to judicial activism in articulating the substantive content of rights and freedoms.<sup>25</sup> The Court's interpretation of "principles of fundamental justice" as including both procedural and substantive guarantees in relation to the protection of life, liberty, and security of the person further illustrates the early association of meaningful and robust constitutional rights protection with judicial articulation of the substantive content of *Charter* rights and freedoms.<sup>26</sup> Concerns with the intersection of rights, freedoms, and the processes and practices of constitutionalism were also explicitly considered from the outset of judicial interpretation of the *Charter* as a result of the constitutional mandate that any limits on rights and freedoms be consistent with the values and principles of a free and democratic society.<sup>27</sup> As Chief Justice Dickson explained in *R v Oakes*:<sup>28</sup>

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and *faith in social and political institutions which enhance the participation of individuals and groups in society*.<sup>29</sup>

Certainly, procedural concerns also emerged in early *Charter* decisions about criminal procedure.<sup>30</sup> However, in the early days of the *Charter*, the Supreme

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Rev 991 at 991-1006.

24. See e.g. *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 18 DLR (4th) 321 at paras 116-17, citing *Canada (Combiner Investigation Branch, Director of Investigation and Research) v Southam*, [1984] 2 SCR 145 at 156-157, 160, 11 DLR (4th) 641.

25. See *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1. Recognition of effects-based violations of rights and freedoms further attests to robust substantive judicial interpretations of the *Charter*.

26. See *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at paras 17-19, 24 DLR (4th) 486

27. *Supra* note 1, s 1. Section 1 states: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

28. [1986] 1 SCR 103, 26 DLR (4th) 200.

29. *Ibid* at para 64 [emphasis added].

30. For an overview of procedural protections in the criminal context, see Robert J Sharpe &



Court articulated a clear commitment to charting a new course of constitutional interpretation that went beyond the legal formalism and narrow interpretations of the *Canadian Bill of Rights*<sup>31</sup> era. The predominant expression of this new era of judicial engagement with constitutionally entrenched rights and freedoms was a robust, liberal, generous, and substantive interpretation of *Charter* rights and freedoms.

The procedural turn in the interpretation of rights and freedoms, though implicit in some of the early decisions, appeared to gain greater prominence in the late 1990s and into the new century.<sup>32</sup> This new strand of proceduralism in Canadian constitutional rights jurisprudence goes beyond constitutional requirements for fair process (which has longstanding roots in administrative law). Rather, it engages process-based values that affect governance, community, and institutional decision making—values such as participatory democracy, dialogue, consultation, negotiation, and accommodation.

One critical constitutional case that reflects a growing trend towards the affirmation of process-based values in Canadian constitutionalism is the 1998 non-*Charter* case, *Reference re the Secession of Quebec*.<sup>33</sup> Building on a “living tree” vision of interpretation,<sup>34</sup> the Court articulated four fundamental principles of Canadian constitutionalism: federalism, democracy, the rule of law, and protection of minority rights.<sup>35</sup> These principles constitute the “lifeblood” of the *Constitution Act, 1867*<sup>36</sup> and inform its interpretation, particularly in the face of silence or ambiguity in its written provisions.<sup>37</sup> All of these fundamental constitutional principles implicate important process-related values.<sup>38</sup>

Kent Roach, *The Charter of Rights and Freedoms*, 4th ed (Toronto: Irwin Law, 2009), ch 14.

31. SC 1960, c 44, reprinted in RSC 1985, App III.

32. For a review of the procedural justice dimensions of both early and more recent *Charter* cases, see Lorne Sossin, “The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights” (2010) 23 Can J Admin L & Prac 93 at 96-97 [Sossin, “The Duty to Consult”]. See also Lorne Sossin, “The Promise of Procedural Justice” in Adam Dodek & David A Wright, eds, *In the McLachlin Court’s First Ten Years: Reflections of the Past and Projections of the Future* (Asper Centre for Constitutional Rights Working Paper Series, 2010), online: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1911499](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911499)>.

33. [1998] 2 SCR 217, 161 DLR (4th) 385 [*Secession Reference* cited to SCR].

34. See *Edwards v Canada (AG)*, [1930] AC 124, 1 DLR 98 at 136.

35. *Secession Reference*, *supra* note 33 at para 32.

36. 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*].

37. *Secession Reference*, *supra* note 33 at para 51. For similar arguments regarding US constitutional law, see Lawrence Tribe, *The Invisible Constitution* (Oxford: Oxford University Press, 2008).

38. Even the minority rights principle resonates with a procedural concern with ensuring voice and fair treatment of minorities within a democratic polity.

Recognition of these principles allowed the Court to provide a juridical response to the difficult questions at issue despite the absence of an express provision in the *Constitution Act, 1867* for determining if and how provinces should be allowed to secede. Treading carefully through a minefield of political tensions, the Court linked its conclusions explicitly to process values:

[C]onferring a right to initiate constitutional change on each participant in Confederation ... imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces. This duty is inherent in the democratic principle which is a fundamental predicate of our system of governance.<sup>39</sup>

Thus, the Court held that the Canadian government would have a duty to negotiate with Quebec regarding its continued affiliation or separation from Canada if a referendum revealed a genuine interest in secession on the part of a significant majority in Quebec.<sup>40</sup> Though the Court was careful to limit any potential judicial oversight of the duty to negotiate,<sup>41</sup> the reasoning nonetheless provides an important example of the judicial turn towards a process-based resolution of complex and contentious constitutional questions. Did this focus on process allow the Court to avoid making certain substantive pronouncements, effectively using process to avoid substance? Or was the decision consistent with the Court's growing sensitivity to the need to understand judging in relation to larger social and political dynamics—and the need to identify how concerns with democracy, federalism, minority rights, and the rule of law shape the parameters within which other social and political actors must engage? Judges, pursuant to this latter vision, are not always best suited to provide substantive answers to complex questions and should instead frame certain process-based obligations, such as a duty to negotiate. In so doing, judges act, in effect, as catalysts for others to engage with one another to come up with substantive solutions. Beyond its significance in mediating a deeply contentious political issue regarding Quebec and the right of self-determination, the *Secession Reference* also had a broader influence because of its very clear endorsement of an approach to constitutional interpretation based on broad unwritten principles, values, and process-based duties.

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39. *Secession Reference*, *supra* note 33 at para 69.

40. *Ibid* at para 88.

41. As in other domains of constitutional adjudication, the *Secession Reference* reflects the Court's tendency to impose procedural duties while minimizing its role in reviewing compliance with those duties. See discussion in Parts III to VI, below.

To what extent can we discern process-related shifts in other areas of constitutional law? When one examines various domains of constitutional litigation, a number of important examples emerge in relation to rights-based claims. In these domains, judges appear to be increasingly attentive to the ways in which constitutional rights and freedoms are mediated and given concrete significance within diverse institutional, state, and non-state governance processes. One domain of *Charter* litigation where process-based values emerged relatively early was in cases involving linguistic minorities. The Court concluded that the educational rights of linguistic minorities include entitlements to participate in the “management and control” of minority language education.<sup>42</sup> A second important area where we have witnessed attentiveness to procedural duties concerns Aboriginal rights, entrenched in section 35 of the *Constitution Act, 1982*.<sup>43</sup> The Court has imposed duties upon governments to consult and to accommodate Indigenous communities, even prior to the final adjudication or determination of Aboriginal rights claims.<sup>44</sup>

Freedom of association is a third domain that has been infused by process values. Though initially accorded a narrow and limited definition, the Court has more recently interpreted freedom of association to acknowledge more fully the role of labour unions in advancing democracy in the workplace through processes of collective bargaining.<sup>45</sup> Recognition of the constitutional value of collective bargaining in turn raises questions about legal duties on the part of employers to engage in good faith negotiations.<sup>46</sup> Though not directly constitutional in character, this extension of duties to non-state actors marks a significant blurring of the divide between the private and the public, and it has led the Court to impose positive duties on the state to prevent private actors from interfering with constitutional freedoms.<sup>47</sup>

Building on developments in statutory human rights law, constitutional duties to accommodate have also been recognized in *Charter* cases. One important area

42. See e.g. *Mahe v Alberta*, [1990] 1 SCR 342, 68 DLR (4th) 69 [*Mahe* cited to SCR]; *Arsenault-Cameron v Prince Edward Island*, 2000 SCC 1, 1 SCR 3 [*Arsenault-Cameron* cited to SCR].

43. Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].

44. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, 3 SCR 511 [*Haida Nation* cited to SCR].

45. *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, 2 SCR 391 [*Health Services* cited to SCR]; *Contra Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313, 38 DLR (4th) 161 [*Alberta Reference* cited to SCR]. The Court in *Health Services* concluded that the holding in *Alberta Reference* no longer stands.

46. *Ontario (AG) v Fraser*, 2011 SCC 20, 2 SCR 3 [*Fraser* cited to SCR].

47. See also *Dunmore v Ontario (AG)*, 2001 SCC 94, 3 SCR 1016 [*Dunmore* cited to SCR].

where this duty has emerged is in relation to religious freedom.<sup>48</sup> Duties of accommodation have also arisen in the context of Aboriginal rights and the rights of persons with disabilities.<sup>49</sup> Conceptions of the duty to accommodate include both substantive and procedural dimensions, with the latter resonating with our focus on institutional processes, practices, participation of various state and non-state actors, consultation, and voice issues.<sup>50</sup> In all of these domains of constitutional law, we witness the courts grappling with questions such as democracy, governance, institutional relationships, and duties to consult, to accommodate, and to negotiate. It is important, therefore, to reflect critically upon the significance of framing rights through a process lens and to assess both the positive dimensions and the potential risks of these interpretive developments.

### III. DEMOCRACY IN INSTITUTIONS, WORKPLACES, AND COMMUNITIES

Perhaps the most significant promise of process-based constitutionalism is an express concern with enhancing democratic governance, both in terms of identifying the constitutional value of democratic processes in public and private decision making, and in relation to obligations imposed on the state to listen to and consult with individuals and communities. For example, in the linguistic minority education cases, the Court endorsed a right of management and control of linguistic minority education by the affected community.<sup>51</sup> In these cases, we witness the Court articulating a significant conceptual connection between the protection of minority rights and mechanisms for inclusion, voice, and self-governance.<sup>52</sup> In the first significant ruling in this domain, *Mahe v Alberta*, Chief

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48. *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, 1 SCR 256, [*Multani* cited to SCR]; *Syndicat Northcrest v Amselem*, 2004 SCC 47, 2 SCR 551, [*Amselem*].

49. On Aboriginal rights, see *e.g. Haida Nation*, *supra* note 44. On the duty to accommodate persons with disabilities, see *e.g. Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, 151 DLR (4th) 577.

50. See David M Lepofsky, "The Duty to Accommodate: A Purposive Approach" (1993) 1 Can Lab LJ 1. This article develops the idea of both a procedural and a substantive component to the duty to accommodate. The dual-pronged nature of the duty to accommodate was affirmed in the statutory anti-discrimination law context in *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 at para 66, 176 DLR (4th) 1 [*Meiorin*].

51. See *Mahe*, *supra* note 42; *Arsenault-Cameron*, *supra* note 42.

52. For an extended discussion of the conceptual link between democratic self-governance and equality, see Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queen's University Press, 2010) at 119-35 [Sheppard, *Inclusive Equality*].

Justice Dickson concluded that, where numbers warrant, francophone parents should be accorded “a measure of management and control over the educational facilities in which their children are taught” because “[s]uch management and control is vital to ensure that their language and culture flourish.”<sup>53</sup> He recognized that “minority language groups cannot always rely upon the majority to take account of all of their linguistic and cultural concerns. Such neglect is not necessarily intentional: the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority.”<sup>54</sup> Thus, it is not enough for the governing majority to set up schools and educational programs for the linguistic minority community; rather, the minority community itself should have significant input into key decisions about curriculum, teachers, et cetera.<sup>55</sup> The Court’s subsequent decision in *Arsenault-Cameron v Prince Edward Island* affirmed that “[e]mpowerment is essential to correct past injustices and to guarantee that the specific needs of the minority language community are the first consideration in any given decision affecting language and cultural concerns.”<sup>56</sup>

Although there are constitutional limits to these rights of management and control based on how large the linguistic minority community is (with disparate and very small communities having fewer constitutional entitlements)<sup>57</sup> the Court is nevertheless to be applauded for its attentiveness to the ways in which fundamental constitutional rights are realized and its recognition of processes for minority voices in the everyday decision-making processes governing linguistic minority education. These cases provide a clear example of a process-based framing of rights that mandates more participatory governance structures. In effect, constitutional language rights impose duties on provincial governments to set up governing processes and structures that allow for linguistic minority decision making, management, and control. Judicial decisions in these cases contribute to the establishment or reinforcement of governance structures that are attentive to the needs of minority communities. From an institutional capacity perspective, the linguistic minority cases are an interesting example of judges not assuming greater control over the substantive decisions in school boards necessary to protect constitutional rights; rather, they are extending decision-making power to the minority community whose lives are directly affected by institutional choices.

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53. *Mabe*, *supra* note 42 at para 60.

54. *Ibid* at para 61.

55. *Ibid* at para 60.

56. *Arsenault-Cameron*, *supra* note 42 at para 45.

57. See *Charter*, *supra* note 1, s 23.

The labour cases regarding freedom of association also embrace democratic decision making as a constitutional value. In *Health Services & Support –Facilities Subsector Bargaining Assn v British Columbia*,<sup>58</sup> the Supreme Court overruled its previous decisions to conclude that freedom of association protects a procedural right to engage in collective bargaining. The impugned legislation, which was aimed at health care and social service workers, “invalidated important provisions of collective agreements then in force, and effectively precluded meaningful collective bargaining on a number of specific issues.”<sup>59</sup> Affirming constitutional protection of collective bargaining resonates with process-based constitutional definitions. It goes beyond a formal and constitutive definition of freedom of association (meaning simply the freedom to come together as a group) and endorses instead a more functional and collective definition of freedom of association.<sup>60</sup>

What is particularly significant in relation to the recent affirmation of constitutional protection for collective bargaining is the Court’s express concern for workplace democracy and participatory governance as constitutional values. As noted by Chief Justice McLachlin in *Health Services*, “a constitutional right to collective bargaining is supported by the *Charter* value of enhancing democracy”:<sup>61</sup>

Collective bargaining permits workers to achieve a form of workplace democracy and to ensure the rule of law in the workplace. Workers gain a voice to influence the establishment of rules that control a major aspect of their lives.<sup>62</sup>

This idea resonates with earlier articulations of the importance of collective bargaining to the advancement of democratic values at work.<sup>63</sup>

It is also noteworthy that the value of democracy in the freedom of association cases is affirmed in the sphere of workplace governance—a context outside of the traditional public, political domain of democracy. This extension of democratic values beyond the formal institutions of the state affirms the importance of participatory democracy in the institutions of everyday life, including the workplace. Collective bargaining is about negotiating the rule of law in the workplace. The collective agreement becomes a governance document that goes beyond merely setting the narrow terms and conditions of employment (on a collective rather than individual level); it also represents the “constitution” for the workplace,

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58. *Supra* note 45.

59. *Ibid* at para 11.

60. See *Alberta Reference*, *supra* note 45, at paras 79-81, 97 (Dickson CJ, dissenting).

61. *Health Services*, *supra* note 45 at para 85.

62. *Ibid*.

63. For an important early statement of the democratic role of unions, see *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211, 81 DLR (4th) 545.

regulating the relationship between employees and employers. Theorists of participatory democracy have long argued that active citizenship in the political domain is reinforced and learned through active citizenship in the institutions of everyday life, such as workplaces, schools, and community organizations.<sup>64</sup>

While the constitutional reinforcement of the values of democratic governance in minority linguistic education and unionized workplaces builds upon a discourse of participatory democracy and is to be celebrated, it is important to identify a few of the limits of this interpretive turn. First, the courts can be selective in terms of which types of associations, institutions, and communities are accorded entitlements to democratic self-governance. One important example concerns Aboriginal peoples. While specific democratic participation entitlements (for example, the rights of off-reserve residents to vote in band council elections)<sup>65</sup> have been recognized, the courts have been reticent to recognize broader entitlements to self-governance as a component of Aboriginal rights in section 35 of the *Constitution Act, 1982*, insisting instead that Aboriginal rights be framed in relation to specific traditions and practices.<sup>66</sup> It is interesting to observe the more explicit recognition of participatory democracy and self-governance as a constitutional entitlement in more recently drafted Latin American constitutions, particularly in relation to Indigenous peoples.<sup>67</sup>

A second concern regarding democracy is the risk of power imbalances in the institutions of civil society and/or in communities in which democratic self-governance is constitutionally affirmed. There is a risk that power inequalities

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64. See Carole Pateman, *Participation and Democratic Theory* (Cambridge, UK: Cambridge University Press, 1970). See also Carole Pateman, "Participatory Democracy Revisited" (2012) 10:1 *Perspectives on Politics* 7.

65. See *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 173 DLR (4th) 1.

66. *R v Pamajewon*, [1996] 2 SCR 821, 138 DLR (4th) 204. For a critique of judicial interpretations of section 35, see John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22:1 *Am Indian L Rev* 37. See also John Borrows, "Tracking Trajectories: Aboriginal Governance as an Aboriginal Right" (2005) 38:2 *UBC L Rev* 285; John Borrows, "Aboriginal and Treaty Rights and Violence Against Women" (2013) 50:3 *Osgoode Hall LJ* 699 (on the need for a living tree approach to the interpretation of section 35). Another context in which constitutional values of democracy appears to have been less well recognized is student democracy and the right of students to strike: see Christian Brunelle, Louise-Philippe Lampron & Myriam Roussel "La liberté d'expression en contexte de crise: Le cas de la grève étudiante" (2012) 53:4 *C de D* 831.

67. See e.g. Donna Lee Van Cott, *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America* (Pittsburgh: University of Pittsburgh Press, 2000). See also Almut Schilling-Vacaflo, "Bolivia's New Constitution: Towards Participatory Democracy and Political Pluralism?" (2011) 90 *Eur Rev Latin Am Caribbean Studies* 3.



and/or unequal structures of representation<sup>68</sup> will undermine the possibility of equitable and effective democracy. To the extent that democracy endorses majority rule in many circumstances, it is also necessary to be attentive to shifting majority and minority statuses. While the extension of democratic self-government to peoples, communities, and organizations outside of state regulation can be a mechanism for enhancing equality and inclusion, it is critical to be attentive to ensuring that the voices of the least powerful and of minorities within these self-governing institutions and communities are heard.<sup>69</sup>

One final concern is that constitutional entitlements to democratic governance will provide too little, too late. In the face of historical harms that have had real effects in terms of undermining autonomous self-governance, disempowering individuals and communities, entrenching structural and economic constraints to collective organizing, and enforcing assimilation, there is a considerable risk that, in many contexts, process-based entitlements may be insufficient to reverse the continued effects of past abuses.<sup>70</sup>

#### IV. CONSULTATION, POWER, AND GOVERNANCE

Listening to the concerns and voices of those affected by government decisions is critical to good governance. Governments have increasingly articulated commitments to undertake consultations before making decisions that will have significant impacts on individual lives, communities, and society at large.<sup>71</sup> In most instances, consultation has been done as part of the political process

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68. See Rianne Mahon, "Canadian Public Policy: The Unequal Structure of Representation" in Leo Panitch, ed, *The Canadian State: Political Economy and Political Power* (Toronto: University of Toronto Press, 1977) 165.

69. For a discussion of these concerns in the trade union context, see Adelle Blackett & Colleen Sheppard, "Collective Bargaining and Equality: Making Connections" (2003) 142:4 Int'l Lab Rev 419. See also Young, *supra* note 14 at 141-48 (arguing for special representation rights for marginalized groups).

70. See e.g. Truth and Reconciliation Commission of Canada, *They Came for the Children* (Winnipeg: Truth and Reconciliation Commission of Canada, 2012) at 77-83, online: <[http://www.attendancemarketing.com/~atmk/TRC\\_jd/ResSchoolHistory\\_2012\\_02\\_24\\_Webposting.pdf](http://www.attendancemarketing.com/~atmk/TRC_jd/ResSchoolHistory_2012_02_24_Webposting.pdf)> (documenting the continuing legacy of the harms of Aboriginal residential schools in Canada). See also *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, 3 SCR 3, in which the provincial government continued to undermine minority language educational entitlements at the secondary school level in five school districts in Nova Scotia despite findings of critical levels of assimilation.

71. *Consulting With Canadians*, online: Government of Canada <<http://www.consultingcanadians.gc.ca/hm.aspx?lang=eng>>.



in conjunction with government policy and legislative reform. It has not generally been recognized as a constitutional requirement. Nevertheless, in cases involving Aboriginal rights, courts have held that governments have constitutional duties to consult and to accommodate.

Most significant in this regard is the 2004 decision in *Haida Nation v British Columbia (Minister of Forests)*.<sup>72</sup> Logging had been taking place in the territorial homelands of the Haida since before the First World War. The province of British Columbia began issuing logging licenses in 1961 to private forestry corporations. The Haida Nation increasingly voiced its concerns about the forestry operations and formally objected to the timber operations in 1994. In 2000, the Haida Nation commenced a lawsuit challenging the issuance of forestry licenses to private corporations and claiming Aboriginal title over the lands being logged. As the litigation proceeded, the question arose as to whether the government had a constitutional duty to consult and accommodate the Haida Nation even prior to final legal determination of the Aboriginal title claim. Given the significance of the rights at stake, the Court concluded that the government has a “legal duty to consult” with the Haida people about the forestry licenses, and that such consultation may lead to an “obligation to accommodate.”<sup>73</sup> Both duties were rooted in the constitutional requirement that governments uphold the “honour of the Crown” in all of their dealings with Aboriginal peoples.<sup>74</sup> The honour of the Crown may also require “negotiations leading to a just settlement of Aboriginal claims”<sup>75</sup> in some cases. Again, it is possible to discern a clear endorsement of process-based duties being imposed on the state as a component of its constitutional obligations.

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72. *Supra* note 44. In outlining the facts of the case, the Court noted:

To the west of the mainland of British Columbia lie the Queen Charlotte Islands, the traditional homeland of the Haida people. Haida Gwaii, as the inhabitants call it, consists of two large islands and a number of smaller islands. For more than 100 years, the Haida people have claimed title to all the lands of the Haida Gwaii and the waters surrounding it. That title is still in the claims process and has not yet been legally recognized (at para 1).

73. *Ibid* at para 10. Similar process-based requirements are emerging in international Indigenous rights cases. See Alex Page, “Indigenous Peoples’ Free Prior and Informed Consent in the Inter-American Human Rights System” (2004) 4:2 Sustainable Dev L & Pol’y 16. On the duty to accommodate, see Part VI, below.

74. Interestingly, in a more recent case involving the duty to consult and Aboriginal peoples, Justice Deschamps identified the “honour of the Crown” as an additional unwritten constitutional principle (drawing on the interpretive approach set out in the *Secession Reference*). See *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 97, 3 SCR 103 [*Beckman*]. See also E Ria Tzimas, “To What End the Dialogue?” (2011) 54 Sup Ct L Rev 493.

75. *Haida Nation*, *supra* note 44 at para 20.

On a positive note, *Haida Nation* appears to impose an obligation on governments to listen to the concerns and voices of Aboriginal peoples and, based on what it hears, to accommodate the concerns and needs of Indigenous communities. The Court emphasized that the “consultation must be meaningful,” explaining that “[m]eaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations.”<sup>76</sup> In a more recent case, the Court wrote:

As the post-*Haida Nation* case law confirms, consultation is “[c]oncerned with an ethic of ongoing relationships” and seeks to further an ongoing process of reconciliation by articulating a preference for remedies “that promote ongoing negotiations.”<sup>77</sup>

The Court further described consultation as “a distinct constitutional process requiring powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and aboriginal interests.”<sup>78</sup>

Although the constitutionalization of the duty to consult appears to be a positive juridical development, there are significant limitations to the procedural guarantees regarding consultation with Aboriginal peoples. At a macro level, there is the historical context in which colonial authorities time and again negotiated treaties with Aboriginal peoples in ways that undermined their survival and well-being or revoked promises and commitments made in treaties. For some critical scholars, this history significantly limits the value of any process-based consultations, accommodation, or treaty negotiations by or with non-Indigenous state and private actors.<sup>79</sup> Current treaty negotiations have also been criticized for their underlying neo-colonial effects in which traditional lands are surrendered in exchange for financial compensation. These concerns present a significant counter-narrative to the Court’s insistence on the “honour of the Crown” in its

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76. *Ibid* at para 46. The Federal Government has set guidelines for meaningful consultation. See Minister of the Department of Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (Ottawa: Aboriginal Affairs and Northern Development Canada, 2011), online: Aboriginal Affairs and Northern Development Canada <<http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675>>.

77. *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, 2 SCR 650 at para 38 [*Rio*], citing Dwight G Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing, 2009) at 21.

78. *Rio*, *supra* note 77 at para 74.

79. Taiaiake Alfred & Jeff Cornthassel, “Being Indigenous: Resurgences against Contemporary Colonialism” (2005) 40:4 *Gov’t & Oppos* 597. See also Joyce A Green, “Towards a Detente with History: Confronting Canada’s Colonial Legacy” (1995) 12 *Int’l J of Can Stud* 85.

dealings with Aboriginal peoples and raise considerable doubt about any historic respect for fiduciary obligations to act in the best interests of Aboriginal peoples.

In addition to these macro-historical critiques linked to the continuing realities of contemporary colonialism, a number of specific limitations can also be identified in relation to the duty to consult articulated in the Court's jurisprudence. First, the duty applies exclusively to public actors and does not extend to private corporations.<sup>80</sup> The duty also does not require the state to secure compliance with consultation or accommodation obligations of private actors.<sup>81</sup> Second, the Court was careful to note that the duty to consult does not imply any duty to reach an agreement.<sup>82</sup> It is a constitutionalized procedural entitlement that does not dictate any substantive result. Third, the Court indicated that the obligation to consult prior to the determination of Aboriginal title does not accord a veto power to the Haida over decisions regarding logging.<sup>83</sup> Fourth, the Court was vague about what constitutes meaningful consultation, explaining that the content of the duty varies depending on circumstances and the strength of the claim that is being litigated.<sup>84</sup> Finally, it appears that the Court narrowed the scope of the *Haida Nation* decision by limiting when the duty to accommodate arises, specifically limiting its applicability to new and future adverse effects rather than historical harms.<sup>85</sup> These limitations raise concerns about the risks of the procedural turn. Consultation may be partial or inadequate, and it may not yield consensus or agreement. Moreover, governments may still seek to legitimize certain

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80. Unlike the British Columbia Court of Appeal, the Supreme Court of Canada did not find that the private forestry corporation, Weyerhaeuser, had any process-based duties toward the Haida people; nor could the provincial government delegate its duty to consult and accommodate to a private corporation.

81. See *Haida Nation*, *supra* note 44 at paras 52-54. More recently, the Court of Appeal for British Columbia further limited the scope of the constitutional duty to consult and accommodate, finding that the duty does not apply to municipalities. See *Neskonlith Indian Band v Salmon Arm*, 2012 BCCA 379, 12 WWR 1.

82. *Haida Nation*, *supra* note 44 at para 10.

83. *Ibid* at para 48. The Court distinguished this case from one in which legal rights and entitlements had been adjudicated. See *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw* cited to SCR].

84. *Haida Nation*, *supra* note 44 at para 46. The Court did refer to New Zealand policies on meaningful consultation with the Māori as a model.

85. In cases following *Haida Nation*, however, the Court appears reluctant to find violations of the duty to consult or to accommodate. See *e.g. Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, 3 SCR 550; *Rio*, *supra* note 77; *Beckman*, *supra* note 74; *Quebec (AG) v Moses*, 2010 SCC 17, 1 SCR 557. The Court did find a violation in a recent case. See *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, 3 SCR 388.

policy choices and decisions by highlighting prior consultation with Aboriginal communities.

One final consideration regarding consultation revolves around the questions: With whom does the government consult? Who represents the interests of particular communities? And is there a risk of partial consultation in which certain less powerful members of a community are excluded from the consultation processes? This risk of exclusion emerged as a key concern in an important Canadian constitutional case involving the Native Women's Association of Canada a decade prior to the *Haida Nation* case.<sup>86</sup> During the constitutional reform processes of the early 1990s leading up to the negotiation of the Charlottetown Accord, the federal government initiated a consultation process with four national Aboriginal organizations. The four organizations were provided with ten million dollars to fund their participation in the consultation initiatives. The Native Women's Association of Canada was not funded; the four funded groups did direct a small portion of their funds (one per cent) to women's issues.<sup>87</sup>

Using innovative legal arguments that endeavoured to secure a vision of constitutional freedoms that included positive entitlements, the Native Women's Association of Canada maintained that Aboriginal women were denied equality in the exercise of their freedom of expression by the government's failure to provide sufficient funding to support the organization's full and effective participation in the constitutional consultation. Although the argument was rejected by the Supreme Court of Canada, Justice Mahoney of the Federal Court of Appeal agreed that the "Canadian government [had] accorded advocates of male-dominated aboriginal self-governments a preferred position in the exercise of expressive activity ... which has had the effect of restricting the freedom of expression of [A]boriginal women ... ." <sup>88</sup> Concluding that the funding was so disparate as to be prima facie inadequate, the Federal Court of Appeal ordered the government to take positive measures to achieve gender equity in consultation processes. Although this finding was reversed on appeal to the Supreme Court of Canada,<sup>89</sup> it remains an important illustration of the judicial concern for equity in government consultation processes. It reminds us that it is critical to remain attentive to who is consulted, the extent of the duty to consult, and the ways in which consultation takes place.

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86. *Native Women's Association of Canada v Canada*, [1994] 3 SCR 627, 119 DLR (4th) 224 [NWAC SCC cited to SCR].

87. *Ibid* at 634-35.

88. *Native Women's Association of Canada v Canada*, [1992] 3 FC 192, 95 DLR (4th) 106 at para 28 (CA).

89. NWAC SCC, *supra* note 86.

## V. NEGOTIATION AND GOVERNANCE: RIGHTS AND DUTIES

Imposing a constitutional duty to negotiate on the government is another example of the procedural turn. As in the case of consultation, the endorsement of the negotiation of Aboriginal rights must confront a history and continued reality of rights violations.<sup>90</sup> As we saw in the *Secession Reference*, fundamental constitutional principles may require that parties negotiate the terms of their continued engagement, relationship, and shared issues of governance.<sup>91</sup> The idea of negotiation resonates with the idea of an ongoing relationship in which parties engage in a dialogue towards achieving some common agreement. The value of negotiated agreements also emerges in the Aboriginal context, where the Court has repeatedly emphasized that negotiations are the best vehicle for advancing reconciliation between Aboriginal and non-Aboriginal peoples. As noted in *R v Sparrow*,<sup>92</sup> section 35(1) “provides a solid constitutional base upon which subsequent negotiations can take place.”<sup>93</sup> As in the case of consultation, the endorsement of the negotiation of Aboriginal rights must confront a history and a continued reality of rights violations. Negotiation cannot be reduced to a process whereby Aboriginal peoples give up rights and entitlements.

In some instances, the constitutional value of negotiation may require the state to impose duties to negotiate on private actors.<sup>94</sup> Such is the case in the domain of freedom of association and trade unions. At the outset, it is important to point out that in affirming the constitutional protection of collective bargaining, the Court has been careful to distinguish the process from its outcomes, emphasizing that “it is entirely possible to protect the ‘procedure’ known as collective bargaining without mandating constitutional protection for the fruits of that bargaining process.”<sup>95</sup> It has further explained that the *Charter* “protects associational collective activity in furtherance of workplace goals. The right is not merely a paper right, but a right to a process that permits meaningful pursuit of those goals.”<sup>96</sup> Thus, in

90. While often occurring in conjunction with consultation, negotiation differs to the extent that it requires joint decision making and conflict resolution.

91. *Supra* note 33.

92. [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow* cited to SCR]. This case was cited with approval in *Delgamuukw*, *supra* note 83 at para 186.

93. *Sparrow*, *ibid* at 1105.

94. See *Dunmore*, *supra* note 47 at para 29: “Once the state has chosen to regulate a private relationship such as that between employer and employee, I believe it is unduly formalistic to consign that relationship to a ‘private sphere’ that is impervious to *Charter* review.”

95. *Health Services*, *supra* note 45 at para 29.

96. *Fraser*, *supra* note 46 at para 38 [emphasis added]. For further discussion of the *Fraser* case, see Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada*:

freedom of association cases, the Court has endeavoured to distinguish process from substantive outcomes and to affirm the need to adjudicate the adequacy of processes, while taking pains to remain neutral on substantive outcomes.

In *Fraser v Ontario (Attorney General)*,<sup>97</sup> the Court was faced with the question of whether legislation allowing farm workers to unionize and engage in collective bargaining in Ontario had to include provisions imposing a duty on both sides to engage in good faith bargaining. The Court had already held that the historic exclusion of farm workers from general collective bargaining legislation violated their effective enjoyment of the freedom of association.<sup>98</sup> When the provincial legislature introduced legislation to comply with that ruling, it omitted any explicit duty to negotiate in good faith, a standard clause in most collective bargaining legislation.<sup>99</sup> In a divided ruling in *Fraser*, a majority of the Court concluded that one could read a duty to negotiate in good faith into the new legislation, thereby securing collective bargaining rights for farm workers even though it was not expressly included.<sup>100</sup> The majority, therefore, concluded that the new legislation was in compliance with constitutional norms of freedom of association.

In a persuasive dissenting judgment, Justice Abella rejected the constitutionality of the *Agricultural Employees Protection Act, 2002*.<sup>101</sup> She emphasized that earlier jurisprudence had recognized that the “duty to consult and negotiate in good faith” were integral to collective bargaining.<sup>102</sup> As she explained, according constitutional protection to collective bargaining “does not guarantee that a collective agreement will be achieved, but good faith bargaining does require that the parties meet, engage in a meaningful dialogue, and make reasonable efforts to arrive at a collective agreement.”<sup>103</sup> For Justice Abella, collective bargaining involves “meaningful dialogic consultation.”<sup>104</sup> Accordingly, the legislature’s failure to include a specific duty to negotiate in good faith, with remedial consequences for non-compliance, impugned the legislation’s constitutionality.

*Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012). See also Judy Fudge, “Constitutional Rights, Collective Bargaining and the Supreme Court of Canada: Retreat and Reversal in the Fraser Case” (2012) 41:1 *Indus LJ* 1.

97. *Supra* note 46 at para 38.

98. *Dunmore*, *supra* note 47.

99. For references to Wagner-style collective bargaining legislation, see *Fraser*, *supra* note 46 at para 169.

100. *Ibid* at para 107.

101. SO 2002, c 16; *Labour Relations Act*, 1995, SO 1995, c 1, Schedule A, s 3(b.1).

102. *Fraser*, *supra* note 46 at para 326, citing *Health Services*, *supra* note 45 at para 97. The Court stated the duties were found to be a “fundamental precept” of collective bargaining.

103. *Fraser*, *ibid* at para 326, citing *Health Services*, *supra* note 45 at paras 90, 101.

104. *Fraser*, *ibid* at para 327.

While the labour cases on freedom of association provide another example of the articulation of constitutional norms in procedural terms, one critique of the procedural turn is the impossibility of dissociating procedure from substance. The background framework of process-based rights and duties vis-à-vis collective bargaining have a direct impact on bargaining power and thus on the substantive outcomes. Thus, it is critical to take into account the substantive and redistributive dimensions of process-based constitutional norms and values.

Beyond collective bargaining and constitutional protections for freedom of association, duties to negotiate and procedural approaches to rights have emerged in other workplace contexts. Legislation on employment, pay equity, and occupational health and safety generally mandate the participation of employees and unions in developing programs and workplace initiatives.<sup>105</sup> The process-based provisions in these domains are embedded in various statutory, rather than constitutional, provisions; yet they resonate with constitutional concerns because they affect basic rights to equality, physical and psychological security of the person, and non-discrimination. They must also be consistent with fundamental constitutional rights and freedoms. Reflecting new forms of social governance, they delegate responsibility to private actors to achieve identified public objectives.<sup>106</sup> While these developments are positive and create opportunities for legal interpretation and implementation in the institutional relationships of everyday life, they also risk transferring rights issues to private actors and institutions characterized by continued inequities of power and privilege.

In the domain of pay equity, for example, it is difficult to implement effective pay equity policies if employees do not have effective access to information or lack sufficient power to participate effectively in processes of institutional change.<sup>107</sup> There is also a very real risk that process rights will replace rather than reinforce substantive human rights. A troubling example of such a trend is the federal *Public Sector Equitable Compensation Act*,<sup>108</sup> which took pay equity for federal public servants out of the *Canadian Human Rights Act*<sup>109</sup> (where it was subject to substantive

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105. See Sheppard, *Inclusive Equality*, *supra* note 52 at 119-35.

106. For a parallel argument in the criminal law context, see Garland, *supra* note 6.

107. For a review of best practices in implementing pay equity, see Marie-Thérèse Chicha, "A comparative analysis of promoting pay equity: models and impacts" (International Labour Organization Working Paper No. 49, September 2006) at 53-59, online: <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_decl\\_wp\\_27\\_en.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_wp_27_en.pdf)>.

108. SC 2009, c 2 [*PSECA*].

109. RSC 1985, c H-6.



adjudication and remedies) and mandated that it be negotiated instead.<sup>110</sup> By imposing a joint responsibility on unions and employers to negotiate pay equity<sup>111</sup> this law effectively reduced the right to sex equality in compensation to a right to negotiate such equality.<sup>112</sup> While negotiation may advance the effective enjoyment of rights and be pragmatic and attentive to specific institutional realities, it is important to identify circumstances where negotiating about fundamental human rights is inconsistent with basic principles of substantive human rights protection.

## VI. ACCOMMODATION DUTIES: SUBSTANTIVE AND PROCEDURAL DIMENSIONS

Human rights legislation increasingly includes duties to accommodate, which have been interpreted to include both substantive and procedural dimensions.<sup>113</sup> Another area in which a procedural discourse has emerged is in the context of religious freedom. In the face of an expansive and largely subjective interpretation of freedom of religion, constitutional debate has focused on defining reasonable limits to the exercise of religious freedoms.<sup>114</sup> In defining these limits, the Court has imposed a duty to accommodate on governments vis-à-vis religious minorities. One leading decision that illustrates the importance of the duty to accommodate from a constitutional perspective is *Multani v Marguerite-Bourgeoys (Commission scolaire)*,<sup>115</sup> a case involving the question of whether a young Sikh student could wear a *kirpan*, or ceremonial dagger, to school.

110. *PSECA*, *supra* note 108, s 239.

111. See *ibid*, ss 12-24.

112. For critiques of the pay equity reforms, see Parliament of Canada, *An Analysis of the Effects of the Public Sector Equitable Compensation Act: Report of the Standing Committee on the Status of Women*, online: Coalition for Pay Equity <[http://www.equite-equity.com/userfiles/file/FEWO\\_Report\\_June19-e%5B1%5D.pdf](http://www.equite-equity.com/userfiles/file/FEWO_Report_June19-e%5B1%5D.pdf)>; and Letter from various concerned persons to Prime Minister Stephen Harper (23 February 2009), online: Equality Rights Central <[http://www.equalityrightscentral.com/papers\\_docs/20100628105956/payequityletterfinal2009.pdf](http://www.equalityrightscentral.com/papers_docs/20100628105956/payequityletterfinal2009.pdf)>.

113. See *Meiorin*, *supra* note 50 at para 66: “Notwithstanding the overlap between the two inquiries, it may often be useful as a practical matter to consider separately, first, the *procedure*, if any, which was adopted to assess the issue of accommodation and, second, the *substantive content* of either a more accommodating standard which was offered or alternatively the employer’s reasons for not offering any such standard ...” [emphasis in original]. See generally Lepofsky, *supra* note 50. There is considerable debate about the notion of accommodation and whether it fails to challenge dominant norms and the institutional status quo. See also Shelagh Day & Gwen Brodsky, “The Duty to Accommodate: Who Will Benefit?” (1996) 75 Can Bar Rev 433 at 462.

114. *Amselem*, *supra* note 48.

115. *Supra* note 48.



After concluding that Gurbaj Singh Multani's religious freedom was violated by the school's general requirement that no weapons be brought to school, the Court found that he should be accommodated, provided such accommodation does not cause undue hardship to the school or other students.<sup>116</sup> The duty to accommodate was accordingly read into the minimal impairment prong of the *Oakes* test under section 1 of the *Charter*. Writing for the majority, Justice Charron explained:

In relation to discrimination, the courts have held that there is a duty to make reasonable accommodation for individuals who are adversely affected by a policy or rule that is neutral on its face, and that this duty extends only to the point at which it causes undue hardship to the party who must perform it. Although it is not necessary to review all the cases on the subject, the analogy with the duty of reasonable accommodation seems to me to be helpful to explain the burden resulting from the minimal impairment test with respect to a particular individual, as in the case at bar.<sup>117</sup>

Applying the duty of reasonable accommodation, the Court concluded that the school commission should have accommodated the student and allowed him to wear the *kirpan*, provided he took a series of precautions to ensure the safety of others.<sup>118</sup> Indeed, it is noteworthy that the school had initially proposed a compromise and that informal institutional channels had produced an agreement between the parties:

On December 21, 2001, the school board, the Commission scolaire Marguerite Bourgeoys ("CSMB"), through its legal counsel, sent Gurbaj Singh's parents a letter in which, as a [TRANSLATION] "reasonable accommodation", it authorized their son to wear his kirpan to school provided that he complied with certain conditions to ensure that it was sealed inside his clothing. Gurbaj Singh and his parents agreed to this arrangement.<sup>119</sup>

As is the case in classrooms and schools across the country, accommodation had been arranged through everyday processes of discussion and compromise.<sup>120</sup> This decision to accommodate, however, was overturned by the Council of the Commission, prompting the subsequent litigation.<sup>121</sup>

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116. *Ibid* at para 53.

117. *Ibid* at para 53, citing José Woehrling, "L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse" (1998) 43 McGill LJ 325 at 360.

118. *Multani, ibid* at para 99.

119. *Ibid* at para 3.

120. For a review of accommodation practices in Quebec schools, see Marie McAndrew, "Immigration and Diversity in Quebec's Schools: An Assessment" in Stephan Gervais, Christopher Kirkey & Jarrett Rudy, eds, *Quebec Questions: Quebec Studies for the 21<sup>st</sup> Century* (Oxford: Oxford University Press, 2010) 287 at 287-304.

121. *Multani, supra* note 48 at paras 4-12 (outlining the procedural history of the case).

In an interesting concurring opinion, Justices Deschamps and Abella maintained that in cases involving the duty to accommodate and the exercise of discretion by public officials, courts should rely upon an administrative law approach rather than a constitutional law approach.<sup>122</sup> They emphasized that “administrative law analysis is microcosmic, whereas a constitutional law analysis is generally macrocosmic”:<sup>123</sup>

The process required by the duty of reasonable accommodation takes into account the specific details of the circumstances of the parties and allows for dialogue between them. This dialogue enables them to reconcile their positions and find common ground tailored to their own needs.<sup>124</sup>

The duty to accommodate pursuant to this approach is best understood as part of the exercise of administrative discretion infused with constitutional values of dialogue, reconciliation, and accommodation.<sup>125</sup> For Justices Abella and Deschamps, accommodation within an institutional context differs significantly from what should be required under a minimal impairment analysis of a general law or policy in section 1. The latter entails a more general inquiry regarding legislative provisions in which the “justification of the infringement is based on societal interests, not on the needs of the individual parties.”<sup>126</sup>

A more recent freedom of religion case again raised questions about constitutional duties of accommodation.<sup>127</sup> The case concerned the question of whether members of the Hutterian Brethren could be exempted from the requirement of being photographed for identification purposes for provincial drivers’ licenses. The Hutterian Brethren objected to being photographed on religious grounds. The case focused on section 1 of the *Charter*, since both sides agreed that there had been a violation of religious freedom. In her majority judgment, Chief Justice

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For a description of the Council of the Commission, see *Commission Scolaire Marguerite-Bourgeois*, online: Conseil des commissaires de la CSMB <<http://www.csmb.qc.ca/fr-CA/commissaires/commissaires-csmb.aspx>>.

122. *Multani*, *ibid* at para 85.

123. *Ibid* at para 132.

124. *Ibid* at para 131.

125. For examples where constitutional and human rights values have infused judicial oversight of the exercise of government discretion, see *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, 3 SCR 134; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, 1 SCR 3; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193.

126. *Multani*, *supra* note 48 at para 132.

127. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, 2 SCR 567 [*Hutterian Brethren* cited to SCR].

McLachlin rejected the applicability of the duty to accommodate in section 1, writing that

where the validity of a law of general application is at stake, reasonable accommodation is not an appropriate substitute for a proper s. 1 analysis based on the methodology of *Oakes*. ... The government is entitled to justify the law, not by showing that it has accommodated the claimant, but by establishing that the measure is rationally connected to a pressing and substantial goal, minimally impairing of the right and proportionate in its effects.<sup>128</sup>

In contrast to Justice Charron's approach in *Multani*, which treated the minimal impairment analysis as functionally equivalent to a reasonable accommodation assessment, Chief Justice McLachlin distinguished the two analyses, drawing on the concurring opinions of Justices Abella and Deschamps in *Multani*. Chief Justice McLachlin concluded that despite the violation of religious freedom, a universal photo-ID requirement was justified under section 1 to advance the government's objective of reducing identity theft.<sup>129</sup>

The majority's endorsement of the observations of Justices Deschamps and Abella in *Multani* about the limits of integrating a duty to accommodate into a section 1 minimal impairment analysis was ironic because Justice Abella herself dissented in *Hutterian Brethren*, applying the minimal impairment analysis robustly in ways that resonate with the idea that we should endeavour to accommodate religious minorities. She concluded that the universal photograph requirement did not minimally impair religious freedom, and that the proposed alternative of a license without a photograph would not significantly interfere with the government's objective of reducing identity theft. Although Justice Abella relied on the language of minimal impairment, the effect of her judgment is to ensure that the Hutterian Brethren are accommodated in their request for an exemption from the photo-ID requirement. Justice Abella would have suspended the declaration of invalidity "for one year to give Alberta an opportunity to fashion a responsive amendment."<sup>130</sup> In short, the religious freedom cases appear to endorse duties to accommodate in institutional contexts (*e.g.*, schools and court proceedings<sup>131</sup>); however, we may be witnessing an emerging reticence to impose duties of accommodation on legislators, particularly when constitutional challenges are directed at facially

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128. *Ibid* at para 71. Chief Justice McLachlin's judgment is reminiscent of the majority decision in *Bhinder v CN*, [1985] 2 SCR 561, 7 CHRR D/3093, where the Court had difficulty conceptualizing a duty to accommodate where a general bona fide occupational requirement defense was available.

129. *Hutterian Brethren*, *supra* note 127 at para 104.

130. *Ibid* at para 177.

131. *R v S(N)*, 2010 ONCA 670, 102 OR (3rd) 161.

neutral laws and regulations that can be linked to a valid secular purpose.<sup>132</sup>

As noted above in Part V, another context in which the duty to accommodate has emerged concerns Aboriginal rights. In the *Haida Nation* case, the Court noted that “the effect of good faith consultation may be to reveal a duty to accommodate.”<sup>133</sup> The idea of accommodation is closely connected to processes of reconciliation:

The terms “accommodate” and “accommodation” have been defined as to “adapt, harmonize, reconcile” ... “an adjustment or adaptation to suit a special or different purpose ... a convenient arrangement; a settlement or compromise”: *Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 9. The accommodation that may result from pre-proof consultation is just this—seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other’s concerns and move to address them.<sup>134</sup>

While concepts such as reconciliation and harmonization have positive dimensions, there remains a very significant concern that accommodation may be asymmetrical, favouring historically dominant groups and interests. Indeed, in a very different context, feminist scholars have critiqued the very notion of accommodation as being inherently assimilationist:

Accommodation does not go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed. Accommodation seems to mean that we do not change procedures or services, we simply “accommodate” those who do not quite fit. We make some concessions to those who are “different”, rather than abandoning the idea of “normal” and working for genuine inclusiveness.<sup>135</sup>

Therefore, though intended to advance reconciliation between Aboriginal and non-Aboriginal Canadians, concepts like accommodation and compromise risk not being sufficiently transformative.

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132. This reticence corresponds to the Court’s increasing unwillingness to find adverse effect discrimination in relation to section 15 claims. See *Hutterian Brethren*, *supra* note 127 at paras 106-08. It may also be linked to a continued individualistic rather than collective interpretation of religious freedom.

133. *Haida Nation*, *supra* note 44 at para 47. The Court notes: “When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation.” See also (*ibid*) at para 48. The Court states: “This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim.”

134. *Ibid* at para 49.

135. Day & Brodsky, *supra* note 113 at 462.

## VII. THE PROMISE AND RISKS OF THE PROCEDURAL TURN

Reflection on these examples brings to light both positive and negative dimensions of the procedural turn in constitutional interpretation. On the one hand, this turn holds significant promise for those without power or privilege in our society, according them rights to participate in social and institutional decision-making processes. It reinforces and builds upon the values of democratic participation in critical institutions of everyday life (such as workplaces and schools), consultation, institutional and social transformation, and self-governance using constitutional norms to reinforce more equitable and inclusive processes for hearing historically excluded voices. It allows for continued change and self-correction, particularly when problems are relational, structural, intergenerational, and systemic. It goes beyond the traditional instrumental, top-down model for the enforcement of laws and integrates legal norms into governance structures and processes. The procedural turn in constitutional interpretation highlights democratic values and recognizes key structural, systemic, relational, and institutional dimensions of constitutional rights and freedoms. In these ways, process-based constitutionalism reinforces a conception of contemporary constitutionalism that values dialogue, negotiation, voice, democracy, inclusion, accommodation, and consultation.

On the other hand, the Canadian cases also illustrate the risks associated with this interpretive turn. If legal interpretation secures process rather than substance, it may undermine the legal recognition of certain substantive rights and undermine the possibility of obtaining concrete substantive remedies using constitutional litigation. Process rights become a substitute for substantive rights, which may never be realized. Processes for participation, consultation, and dialogue are mapped onto institutional and political contexts of inequitable power and privilege. These constitutionally mandated processes of consultation and political participation are then relied upon to legitimize government inaction, the continued denial of substantive rights, or inequitable substantive outcomes. While potentially helpful, process-based entitlements may not be sufficient to challenge an inequitable institutional or political status quo. When no agreement is reached, the politically powerless often lose. Moreover, there are significant risks in shifting governance responsibilities to private actors, where unequal power and privilege are not subject to any democratic, public accountability.

To summarize, the risks of a procedural turn include making process rights a substitute for, rather than a supplement to, substantive rights or ignoring the

integral connection between process and substance;<sup>136</sup> delegating responsibilities for rights and freedoms to inequitable institutional or social contexts; reinforcing privatized power and privilege; deferring the effective realization of the promise of constitutional rights and freedoms indefinitely, despite the rhetoric of social transformation; and legitimizing constitutional law as progressive despite its failure to attain significant substantive results.

Despite these risks, we should not reject the procedural turn in constitutional law. We cannot expect judges to have the knowledge, political will, or institutional capacity to elaborate the substantive outcomes necessary for greater effective freedom and equality. It is critical to seek equitable and inclusive processes of contemporary constitutionalism that reinforce participatory democracy in our social, economic, and political institutions, and empower those historically excluded from power and privilege as decision makers and change makers. Thus, while it is useful to recognize and celebrate procedural turn, we need to be vigilant in ensuring that its promise outweighs its perils.

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136. See Sossin, "The Duty to Consult," *supra* note 32 at 110. Sossin writes: "The future of procedural justice thus rests with whether a more just process is able to facilitate more just outcomes."