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Question: "What have been the experience and results in the use of 'last resort' mechanisms (e.g. courts, second chambers, etc.) in resolving significant conflicts in federations?"

Case Study: Canada's Debate over the Rules of Secession

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Overview

After two controversial referendums (1980 and 1995) conducted by the Quebec government on sovereignty for the province, the federal government asked the Supreme Court to rule on the right of secession within Canadian constitutional law and international law. The judgment established a new framework regarding the process for secession: it found no right to secession in Canadian or international law, but did find that there would be a constitutional duty on political actors to negotiate in good faith should there be a clear majority voting in favour of secession based on a clear question in a referendum. The Supreme Court's decision was reflected in a new federal law, the so-called "Clarity Act" of 2000. The Court's judgment was a carefully crafted and balanced document, reflecting both legal and more political considerations. It has been helpful in setting out some of the principles that should be associated with any process of secession and it may have reduced the likelihood of secession happening in a state of confusion.

Analysis

(1) Quebec separatist movement and referendums of 1980 and 1995

Quebec was one of the four founding provinces of the Canadian confederation in 1867. It was distinct from Ontario, Nova Scotia and New Brunswick (the other founding provinces) and from the subsequent provinces in that it was both heavily Catholic and French-speaking. The new federal arrangement (misleadingly labelled a confederation) resulted in part from the unsatisfactory unification of Ontario and Quebec in the United Province of Canada from 1840 until 1867. Federation gave each province a substantial measure of self-government, notably on issues such as education and civil property, which were culturally sensitive.

Quebec functioned within these federal arrangements during Canada's first century, but was always a champion of provincial rights and on occasion was opposed to the national majority on an important issue, such as conscription in the two world wars. However, there was no serious secessionist movement, partly because of the province's ties with significant French Canadian minorities in other provinces. In Quebec, the Catholic church played a central role in education and health and social services, as well as in social and political life. French-speaking Quebeckers had lower levels of education and income than the English-speaking, who dominated Montreal's business community. By the 1950s the province was undergoing rapid social change and it elected reformist governments in the late 1950s and 1960s, which promoted secularization, economic modernization and French-language rights. The mood of Quebec's "Quiet Revolution" was very nationalist, both amongst federalists and the newly emergent separatist forces. The latter coalesced under the leadership of René Lévesque into the Parti Québecois.

The PQ won the provincial election of 1976 and was committed to holding a referendum on its constitutional option of "sovereignty-association". In 1980 it put the following before the electorate:

> "The Government of Quebec has made public its proposal to negotiate a new agreement with the rest of Canada, based on the equality of nations; this agreement would enable Quebec to acquire the exclusive power to make its laws, levy its taxes and establish relations abroad—in other words, sovereignty—and at the same time to maintain with Canada an economic

> association including a common currency; any change in political status resulting from these negotiations will only be implemented with popular approval through another referendum; on these terms, do you give the Government of Quebec the mandate to negotiate the proposed agreement between Quebec and Canada?"

Federal Prime Minister Trudeau criticized this as confusing and based on a dubious assumption that the rest of Canada would negotiate an economic association with a sovereign Quebec, so that a yes would lead to an impasse. In the event, the "No" vote was 59.56%.

Mr. Trudeau used this federalist victory to lead a process that severed Canada's constitutional ties with Britain, and introduced a charter of rights and amending formula into the constitution. The PQ government in Quebec, re-elected after its referendum defeat, opposed these changes and twice challenged the procedure of constitutional change in the Supreme Court. The Conservative party led by Brian Mulroney won the federal election of 1984 and in due course re-opened constitutional negotiations. Two rounds of negotiations failed, discrediting the idea of reform of the federation in the eyes of many Quebeckers. A new PQ government was elected in Quebec in 1995 under the strongly nationalist Jacques Parizeau, who was committed to an early referendum. The question this time was:

> "Do you agree that Quebec should become sovereign after having made a formal offer to Canada for a new economic and political partnership within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995."

Federalists were again highly critical of the wording of the question, notably its references to a draft bill in the provincial legislature and to an agreement between three sovereignist party leaders. However, this question was more direct than that of 1980 and made no reference to negotiations or a second referendum. The "No" won very narrowly, getting 50.58%.

(2) Supreme Court Reference

The close result forced a major stocktaking by the federal government led by Prime Minister Jean Chrétien. Its view was that a majority in favour of such a question

would not have been a fair test of Quebec opinion. Opinion polls had regularly showed only 25-35 per cent of Quebeckers favoured outright Quebec independence. As in 1980, the question had been crafted to broaden support. More fundamentally, the federal government rejected the Quebec government's claimed right to make a unilateral declaration of independence (UDI) based on a majority in a referendum. The federal government had raised these issues in the past, but had focused on trying to defeat the referendum proposals.

Even before the referendum, a Quebec lawyer had challenged the legality of the Quebec government's actions in court. After the vote, the federal government intervened in this case and then in September 1996 took a "reference" directly to the Supreme Court of Canada. This asked the court whether the Quebec government or the National Assembly of the province had the right under Canadian constitutional law or international law to "effect the secession of Quebec from Canada unilaterally".

In July 1997, while the case was before the court, Lucien Bouchard, who became Premier succeeding Mr. Parizeau after the referendum defeat, asserted that a UDI would be valid on the basis of 50 per cent plus one in referendum; he also claimed that international law would protect the territorial integrity of Quebec in the event of secession. Stéphane Dion, the new federal minister of intergovernmental affairs, wrote two carefully crafted open letters contesting these assertions, with extensive reference to international experience of secessions and attempted secessions.

In court, the federal government case argued its case on relatively narrow legal grounds. First that under the Canadian constitution any secession would need to be done through a constitutional amendment and this could not be done unilaterally. Secondly, that international law provides for unilateral acts of independence only in cases of extreme abuse of human rights—which clearly did not apply in Quebec, which has full democratic rights. The Quebec government refused to appear, so an amicus curiae made the sovereignist case. He argued that the issue was essentially political and beyond the authority of the court, that there was a right to self-determination for the "people of Quebec" under the UN Charter and that the absence of an international law barring separation implied a right to separate. Finally, a number of aboriginal intervenors from within Quebec argued their right to stay in Canada based on aboriginal treaties and rights.

The court gave its unanimous ruling on August 20, 1998. The decision was unusual in form in that the court did not give a simple "yes" or "no" reply to the questions. Showing great political sensitivity, its response combined law, political theory and some practical considerations. While on the narrow legal issues, its judgment supported the federal government's view, the court put these legal questions in a larger context that avoided a simple winner-take-all judgment. Thus it broke away from narrow black-letter law, to reflect on the four fundamental principles of democracy, constitutionalism, the rule of law and federalism, which it saw as interacting to define the Canadian constitutional framework. Drawing on these principles, it found that Quebec does not have the right to secede unilaterally under Canadian law; however, should the population of Quebec express itself in a clear referendum result in favour of independence, there would be a "constitutional duty" on political actors to "negotiate terms in good faith". Such negotiations would have to respect the fundamental principles of the constitution and their outcome could not be pre-determined, including on the issue of the borders, which would be subject to negotiation.

The court also found the Quebec government or legislature did not enjoy a right of secession in international law, because its population participates equally and without discrimination in Canada's political institutions and Quebec is not under under foreign occupation or subject to extreme abuse. However, in a careful political aside, it did indicate that the possibility of a UDI could not be ruled out and that its ultimate success in winning recognition internationally would depend on the legality and legitimacy of the act, the conduct of Quebec and Canada. In any case, international recognition would not provide retroactive legal justification for a UDI.

The careful balance of the judgment was reflected in both the federal and Quebec governments quickly declaring their satisfaction with it, as did the large majority of commentators both inside and outside Quebec. However, when Premier Bouchard commented favourably on the ruling that the federal government could have a duty to negotiate, the federal minister Stéphane Dion wrote another open letter, this time arguing that the Premier could not accept some parts of the judgment and reject others, such as the need for a clear majority on a clear question and the illegality of a UDI.

Reading the judgment, it appears that the court listened not just to the legal arguments put to it by counsel, but also to the political debate taking place outside the court, notably in the exchanges between Mr. Dion and Quebec ministers. For example, the court's invocation of such concepts as clear questions and clear majorities were no part of the legal arguments made before it but were central in Mr. Dion's letters and speeches. The federal government had never said that Quebec could not separate, but had focussed on the necessary process for separation. The court, whose standing in Quebec had been damaged by some previous constitutional judgments, picked these points up but also invented the concept of a duty to negotiate so that its judgment was politically shrewd in having something for everyone.

(3) The Clarity Act

There was enough uncertainty and ambiguity in the court's decision that the federal government felt the need to drive home its own interpretation of it. The Quebec Minister of Intergovernmental Affairs, Joseph Facal had rejected various "myths" around a UDI and Quebec's rights, which led to an exchange with his federal counterpart Mr. Dion and confirmed the federal view on the need for legislation.

In December 1999, fifteen months after the court judgment, the federal government introduced the Clarity Act, which was designed to give legal effect to the court's decision. The act required the House of Commons to pronounce prior to a vote on whether a proposed referendum question on secession was clear. The law required that any question that did not clearly state that the province would cease to be part of Canada and become an independent state was to be deemed unclear. Should there be a majority voting in favour of such a clear question, the House of Commons was to determine if the majority in favour was clear enough to trigger the duty to negotiate. The act stipulated that First Nations and all provinces were to be part of any negotiations and that secession would require a constitutional amendment.

While the act was passed, it was denounced by all parties in the Quebec National Assembly and a number of federalists. The Quebec National Assembly proceeded to adopt "An Act respecting the exercise of the fundamental rights and

prerogatives of the Quebec people and the Quebec state", which claimed the right of self-determination according to international law and that 50 per cent plus one of the votes in a referendum would constitute a clear expression by Quebeckers of the right to determine their own future.

(4) The results of the "Clarity debate" and the recourse to the courts

The court case brought a new focus, both in Quebec and in the rest of Canada, to the complex issue of due process for secession. The need for a clear question seems to have gained wide acceptance, including in the Parti Québecois. There is even some recognition in sovereignist circles that proceeding on the basis of a narrow majority would be difficult (the 55 per cent rule in the Macedonian independence referendum of 2005 received wide attention in Quebec) and that it would be difficult to proceed to a UDI (though the court's allusion to the international community's assessing the good faith of negotiations provided some comfort). Thus, while the court case was never popular amongst nationalists in Quebec, it does appear to have influenced opinion, notably on clarity and a hasty UDI. The court's judgment also left some significant loose ends, notably regarding the appropriate amending formula, the issue of borders, who the negotiating parties would be, and how to judge the clarity of a question or majority.

The Clarity Act is more controversial. It was greeted with hostility in much of Quebec. It is an unusual piece of legislation in that it places obligations on the House of Commons, whose compliance at the time will presumably be coloured by politicians' judgments of the best strategy and tactics. But it sets a standard that a federal government will need to come to terms with should there be a future referendum and it ensures a different dynamic than has existed in the past.

As much as anything, the Canadian experience shows how difficult an orderly approach to secession can be in a federal democracy. Breaking the deep bonds of a long-established political community would inevitably be fraught. There are also limits to what the law can achieve. Despite the court's judgment, much Quebec opinion still holds that the province has a "right" to secede on its own terms. The legal arguments relating to the constitution or international practice would bump up against this political fact. Thus it must be hoped that, should there ever be

another referendum on secession, the result is clear because a confusing result would carry great risks.

What lessons does Canada's experience have for others regarding the role of "last resort mechanisms" in resolving conflict? Certainly the federal government's decision to turn to the Supreme Court marked an important stage in the Canadian debate. The decision and the subsequent Clarity Act have changed the context in which any future referendum would be considered or held, *especially should there be confusion about what the majority of Quebeckers want.* The Court has a standing that permitted it to bring an important new dimension to the debate, but at the same time, the issue of secession is not simply legal but also intensely political. Thus the "last resort" will be in the court of public opinion and in the reactions of political leaders, where legal considerations are important but are not solely determinative.