A balanced judgment?

The gist of the court's answer appears to be the following: in theory, sovereignty is for Quebec a legitimate goal to pursue and the right to secede cannot democratically be denied; in practice, however, the federal power is entitled to raise obstacles and difficulties that are important and numerous enough so as to negate any attempt to achieve sovereignty and to throw off track any negotiation on the issue. How did the court arrive at this conclusion?

THEORETICAL CORRECTNESS: HALF THE STORY

If it is true that the principles underlying the Canadian constitution — democracy, federalism, the rule of law, and respect for minorities — make it imperative for the federal government and the English-speaking majority in Canada to recognize the legitimacy of a democratically supported movement in favour of the secession of Quebec, then certain federal politicians and self-appointed spokesmen will have to modify their behaviour.

Indeed, if the will to secede is a "right," provided it is pursued by democratic means, the appeal to the Canadian Air Forces by a McGill academic to bomb the Hydro-Quebec installations in case of secession appears to be somewhat exaggerated if not outright illegitimate. In fact, the court's reasoning undermines the federal "plan B" and it is not surprising that the Quebec government should have been pleased with this unexpected pat on the back.

Similarly, the "obligation" to negotiate when and if the people of Quebec choose sovereignty (or some other type of constitutional reform) is in stark contrast to the unilateral attitudes of the federal government in its dealings with Quebec since it decided to put an end to Privy Council appeals in 1949 and to Westminster's control over the constitution in 1981. As a matter of fact, these attitudes largely account for the progress — gradual but steady — of the idea of independence in Quebec. Has the Supreme Court become belatedly aware of this situation?

For their part, the Parti québécois leaders have always known and said that they would negotiate. Indeed, at every referendum they have put forward a number of elements of negotiation, including a common market, free circulation of persons, goods, and capital, and the protection of minority rights. It is only when confronted with a dogmatic affirmation by federal politicians that they would under no circumstances negotiate that Premier Parizeau evoked the possibility of a unilateral declaration at the expiry of a one-year delay.

The court went even further. It warned that, in the absence of negotiations, the possibility of a unilateral decision to secede de facto remained open. Such a move on the part of Quebec would be unconstitutional, but its success would depend on the recognition of the new sovereign state by the international community, which no doubt would take into account any refusal to negotiate. And the court went so far as to recognize that obstruction might create a "right" to secede, although it did not rule on whether such a norm is firmly established in international law.

So far, those who support Quebec's independence have every reason to be pleased with the court's answers. But the nine judges failed to carry their theoretical considerations through to their practical consequences and left enough questions open to allow Ottawa as much leeway as it needs to negate Quebec's right to self-determination.

DENYING QUEBEC'S CLAIM IN PRACTICE

The Supreme Court is wary lest it appear to usurp the role of politicians. Yet, it ventures deeply enough into the political arena to raise insoluble questions concerning the actual working of referendums.

Nobody will contest the idea that a referendum must allow the people to express their will without ambiguity. Unfortunately, the court, instead of pursuing its principles and political considerations to their logical conclusion, is content with the vague language of politicians. What indeed can be considered a "clear" question by a federal politician other than one that will ensure the failure of any attempt to obtain independence?

"Sovereignty" has a clear meaning in international law, but Mr. Chretien insists on "separation" because of its negative connotation. Similarly, any mention in the referendum question of an economic association between Canada and Quebec or any arrangement of the common market type should be banished from Ottawa's viewpoint, as it might appear reasonable to Quebec voters.

The expression "clear majority" used by the court also opens the door to endless bickering. United Nations practice has always observed the norm of 50 percent of votes plus one in such matters, and indeed this has been considered reasonable in the Canadian context until it was very nearly attained in 1995. Now, thanks to the court's lack of "clearness," the only clear majority that will satisfy federal politicians is one that will be out of reach for Quebec.

This would mean minority rule and the court should have known that few situations are more likely to thwart the fine democratic principles on which it has based its decision. Indeed, the margin of interpretation left to the federal government is such as to undermine the whole democratic process in Canada.

SOME LOOSE ENDS

What will happen if, in spite of these obstacles, Quebec decides in favour of Quebec's right to secede?
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What indeed can be considered a "clear" question by a federal politician other than one that will ensure the failure of any attempt to obtain independence?