BANQUO'S GHOST AND OTHER CONSTITUTIONAL INCUBUSES: SOME LESSONS FROM THE CHARLOTTETOWN PROCESS

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The sleep of every person who participated, as I did, in the charlottetown negotiations is haunted by nightmarish images of the errors that were committed during that process. In an effort to exorcise some of these demons — Québec as both banquo's ghost and count dracula, the two-headed monster of the federal delegation, the pandora's box of issue linkage — I have attempted to bring the cold light of day to bear on them. On the principle that those who do not learn from the past are condemned to repeat it, what follows is a short catalogue of suggestions as to the lessons which might be drawn from the charlottetown process.

There are six points which a post-mortem focussing on process *must* consider. In making these observations, I am purposely leaving aside several questions — for example regarding electoral behaviour, the referendum campaign, interpretation of the vote and media involvement — in order to focus on the ways in which the failure of the Charlottetown Accord may require us to recast our thinking about constitutional reform and how it can and should be carried out. In the short space available I intend merely to touch on these points, indicating some directions for further reflection and research. They are presented in no particular order and are not intended to be exhaustive of the matters which might be considered from a "process" point of view.

1. The first point is a kind of disclaimer with respect to what a consideration of process questions can achieve. Nothing that we can do in playing with the constitutional process can change the fact that the relation of trust between politicians and the general public is in a state of disrepair. This disrepair reaches far beyond the unpopularity of individual politicians, even though all of us involved in the negotiations were painfully aware that one of the biggest obstacles to ultimate success was the fact that the prime minister would be associated with any eventual deal.

We can speculate on the causes of this breach but that is not what is important here. What is important is that without a fund of trust and goodwill, without an established tradition of politicians winning grudging respect for tough stances, a large part of the population will always obstruct proposals for far-reaching reform because they do not trust those who will be charged with carrying them out.

2. In part because of the ill-advised and opportunistic populism of a number of politicians, we may well now be stuck with a referendum rule for constitutional change. At least two provinces are now required by law to hold referenda on any proposed change before legislative approval can be given. While it may be the case that this can be amended for truly minor constitutional changes, it seems unlikely in the extreme that this power of public review, once granted, can ever be withdrawn without consequences any politician would be loath to face. And once changes must be submitted to popular approval in one part of the country, it becomes difficult to deny the same opportunity to the rest.

If this is the case, and this practice is combined with the low level of respect for politicians already alluded to, the consequences for the constitutional reform process are truly far-reaching. I would go so far as to suggest that the only way to reintroduce into any (highly hypothetical) future constitutional discussions that element of elite accommodation necessary for reform to succeed may be to take the constituent assembly route. No one is more aware than I of all the drawbacks that this represents, and I suggest it reluctantly and with great trepidation. On the other hand, politicians have made such a disastrous showing and so discredited themselves in the public mind that they may well need to relinquish a good degree of control over the process. They could do so secure in the knowledge that the Constitution guarantees them the final word and a right of veto, via the legislative process, as a protection against unacceptable reforms.

Such an assembly would have to be fully open and conducted under the watchful eye of television cameras. My sense is that it would be a salutary experience for Canadians to see a group of non-politicians struggle with these questions and return with solutions that will probably bear a striking resemblance to those previously arrived at by politicians.

If, however, in a triumph of hope over experience, the politicians decide to persevere in their role as chief architects of constitutional reform, serious thought should be given to opening even those negotiations up to the cameras. Of course there is a risk of distortion, of playing to the gallery and of trivialization, but there is also a greater chance of better public comprehension and sympathy. No one can dispute that television changed the House of Commons, but the Commons had to change, to modernize itself, and the political process is gradually adjusting to counter some of the abuses caused by the camera's unblinking gaze.

Here again we cannot escape the consequences of the referendum rule for constitutional amendment. If the people must approve the fruit of the politicians' labour, it is well to bear in mind that they now seem disposed to reject almost out of hand anything that smacks of one-way communication. This calls for a slower, more stately process, with ample time for public reaction and feedback to reach the politicians and manifest itself in the negotiations.

3. My third point is that from the view of sensible and, dare I say it, rational constitutional arrangements, linkage of wildly disparate issues in the negotiations has proven simply disastrous. This is so for three reasons.

The first reason, and this is a judgement with which many will no doubt disagree, is that when we allow such linkage, hardly any of the resulting reforms taken individually can really be defended on their merits. The Senate reform, not to put too fine a point on it, was a complete dog's breakfast, as was the Aboriginal self-government package, the Canada Clause and so forth and this arose in large part because of the "trade-offs" which were made against other issues which had little or no intrinsic relation to the matters under discussion. No doubt *some* linkage is unavoidable, but if we are seeking to write a constitution with which we can live in the long run, and not just to solve some passing problem of the moment, linkage on the scale we practise it is counter-productive. We would be well-advised here to take a leaf from the book of international trade negotiations, where diplomats strive mightily to avoid linkages, knowing that they produce either stalemates or trade-offs which tend to be in no one's long term interests. Far better to resolve each question on its merits.

The second reason for avoiding linkage is that in so doing one lessens the power of individual interest groups and, of course, governments. The fact that many of the governments and groups that gained the most from linkage in the Charlottetown negotiations such as Alberta (on Senate reform) or various national Aboriginal organizations (on the self-government package) are deeply hostile to "de-linkage" is in itself suggestive of the power that they understand flows from linkage as a negotiating tactic.

Finally, linkage must be avoided in a country where referenda are part of the approval process. People (rightly) felt manipulated by being asked a hundred questions on October 26th yet being given only one yes or no with which to answer the lot. The complexities and inter-relationships, the "seamless webs" linkage introduces between the elements of a constitutional package cannot survive the sceptical public "deconstruction" involved. Referendum research, again, shows clearly that simple questions on relatively clear-cut issues (for example, capital punishment) lend themselves best to decision by referendum. I repeat, linkage *on the scale of Charlottetown* brings *any* constitutional deal into the world with at least two and a half strikes against it.

It may be objected that dealing with the questions individually rather than as part of a larger package simply invites their rejection *seriatim* rather than at a go. In response, I would merely remark that the literature on constitutional referenda in other countries suggests strongly that few enough such votes succeed in any case. If we wish to improve the chances of success from "almost hopeless" to (a much better) "poor", the lesson seems to be that once a constitution is in place, the population looks much more kindly on small incremental improvements taken one at a time than on wholesale reforms. Nor does the Meech Lake experience invalidate the point: while we never had a referendum on Meech, even the most cursory examination of the polling data reveals that there was a strong national majority in support of the deal for almost two years after the Langevin Block meeting. This support only dwindled after Québec's Bill 178.

4. Process questions may well be linked to the question of the point at which the Charlottetown Accord went adrift from public sentiment. It seems right to say that the public followed the negotiations in a detached but supportive way until some point quite far along. Where the divergence arose is thus important to identify.

Let me suggest that the divergence arose between the Pearson Building meetings of June and July and the Charlottetown Accord of August. This was the point at which we moved on from the "Clark Process" which, in the public mind, was credible and shaped the fundamental reform, but did not yet include Québec. This constitutional chrysalis was quickly wrapped in a cocoon of Mulroneyish hue; the public perception was that the process moved behind the scenes, to bargaining in smoke-filled rooms, most obviously to convince Québec to buy into the Accord. The crucial question then became how much was conceded to Québec in order to entice them to join a deal that the rest of the country had already accepted? This suggestion is given some credence by the concentration in a great deal of the public debate on what Québec "got" between those two stages of the process.

5. This brings me to the next point: the way the process was irreparably damaged by the absence of Québec from the table, hovering, as one minister aptly put it, like Banquo's ghost over the whole negotiations. The damage this caused took two principal forms.

First, there was damage from the point of view of Québec itself. Notwithstanding all the telephone calls and briefings by various federal, provincial and Aboriginal delegations, Québec was by no means at the heart of the negotiations. They were always behind, always only partly aware of developments, and different delegations had fundamentally opposed readings of what Québec wanted. Oddly enough, almost every delegation came away from meetings with Québec firmly convinced that Québec wanted, or at least did not oppose, what that delegation itself sought in the negotiations. We all knew something was dreadfully awry when both Ontario and Alberta could claim that Québec supported their position in the Senate reform talks.

As a result, Québec was unable to shape many of the fundamental elements of the Accord, even once they had returned formally to the table, for by then it was all but a done deal. At best they could tinker on the margins which, at the end of the day, was insufficient to make the Accord saleable to a dubious Québec electorate and gave credence to the charges made against Bourassa in the Wilhelmy-Tremblay tapes.

The second way that Québec's absence damaged that process was that it unavoidably cast Québec, in the eyes of many outside the province, in the role of "backroom negotiator". The appropriate analogy, I suppose, was that Québec was seen as the Dracula of the constitutional talks, fleeing the sunlight, skulking in dark rooms, coming out only at night to suck "extra concessions" out of the country. Those "extra concessions" were granted, damagingly,

under Mr. Mulroney's auspices. The net result was a number of arrangements with Québec (for example, the 25% guarantee in the Commons) which were deeply and bitterly resented elsewhere in the country, however reasonable and defensible they may have been to anyone familiar with the unfolding of either the negotiations themselves or Canadian history.

6. Finally, a word regarding the federal role within the talks themselves. Much as I share the respect and admiration that many of us feel for Mr. Clark's chairmanship of the negotiations, it is worth reflecting for a moment on the basis for that respect. We all thought that he chaired difficult and often fractious negotiations with great calm, good humour and mastery of the issues. In this role, he was an ideal choice. Unfortunately, Mr. Clark played a double role: he was also the chief spokesman for the federal government at the table. These roles are not obviously compatible, and I think a good case could be made that Mr. Clark placed the role of conciliating chairman above that of forceful spokesman for national interests.

Clearly the federal government felt that their political survival hinged on a successful deal, so that splitting the roles between two different personalities *might* not have helped. On the other hand, many provincial delegations were under the strong impression that Mr. Clark's desire to strike a deal resulted in the abandonment of any serious federal effort to shape the final package in many of its aspects. Federal positions on the Triple E Senate, many aspects of Aboriginal self-government and on the economic union were only the most obvious casualties.

The practise at the officials' level of always having federal and provincial co-chairpersons (and an Aboriginal co-chairperson on Aboriginal issues) seems the better route here. It might even be wise to reach beyond practising politicians for such co-chairpersons for constitutional conferences as a whole, recruiting from retirement prestigious and impartial figures such as former Supreme Court judges, governors general, federal ministers and provincial premiers. Then, at least, the federal government would have to accept full responsibility for its policy successes or failures at the table, rather than having the easy out of saying that the federal representative had to make concessions in order to maintain the chairperson's credibility. There is a serious conflict of interest between these two roles that must be fully examined and thought out.

As these few reflections suggest, *how* we undertake constitutional reform not only shapes the content of such reform, but also deeply influences its chances for ultimate success. I will not make the claim that if we had had a different process, the substance of Charlottetown would have passed; that is too hypothetical. On the other hand, it is perhaps time to reflect seriously on the fact that the only one of our interminable attempts at constitutional reform to succeed in the last thirty years is the one that broke radically with the established rules. It is a whole new political world out there; constitution-makers, like any other endangered species, must adapt or give way.

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AUTHOR'S NOTE:

This text is an expanded version of a talk given at the annual meeting of the Institute for Intergovernmental Relations of Queen's University, Kingston, Ontario on 30th November, 1992.