

Introduction

How can we explain our decision to offer readers a book on federalism that deals mainly with secession? In fact, there is no shortage of reasons. For example, many of the contributors to this book make the observation that the question of secession has been largely ignored in the specialized literature on federalism. This silence alone is enough to attract interest from researchers, who would be just as surprised to see a legal expert study the complex topic of marriage, or a lawmaker legislate on the same matter, only to drop everything when faced with the question of divorce. Could we imagine, today, a study of marriage or a civil code – in a liberal democracy – failing to cover the subject of divorce? This, however, is the situation in the field of federalism (our equivalent of the “political union”) and secession (the “political divorce”). All of which leads to a simple question: “Why?”

Federalism has often been presented as the best mechanism for accommodating diversity in unity in a complex society. It appears to be a system that, by opting for a vertical (territorial) separation of power, is able to keep territories and cultures endowed with enough autonomy (self-rule)¹ to make their own political choices united under a joint government (shared rule). However, federalism is by no means immune from the problems it is expected to solve. This is because, first, the theoretical virtues of the federal idea, an ideal balance between a centre and a periphery, are sometimes difficult to put into practice, for example when the values of federalism have to give way to a centralizing vision. Carl Schmitt referred to this centripetal dynamic within a federation in a particularly apt way: “a federal state without a federal foundation”.² Secondly, federalism is a little like the worm in the apple: it carries the germ (the freedom without which peoples would not even

¹ Elazar, D. J., *Exploring Federalism*, Tuscaloosa, University of Alabama Press, 1987.

² Schmitt, C., *Théorie de la Constitution*, transl. by F. Deroche, Paris, Presses universitaires de France, 1993, p. 537.

consider uniting) of disaggregation.³ From this point of view we can only agree with the position of Will Kymlicka, that the greater the territorial autonomy and ethnocultural or national diversity present in a federative system, the more the system will tend to be challenged by its constituent units. European federalists will probably agree with this as they face the fallout from Brexit. When the centrifugal effect of the federative relationship dominates, the values of federalism and the reasons that encourage states or peoples to unite will fade, and unity will be, and will remain, precarious.

The authors whose work is presented here recognize the potential of federalism as a way to organize relations between several different states, peoples, nations or territories under the same government, in a relatively balanced and harmonious way.⁴ However, they are not naïve or idealist about the ability of the federal idea to succeed in the complex situations in which it is applied. In some cases success seems assured (the United States, Switzerland, Germany, etc.), and the merits of federalism can be showcased. But there are also failures (the former Yugoslavia, or more recently Brexit) and semi-failures (sometimes only perceived as such) that have generated turbulence in recent years in devolutive systems (Scotland in the United Kingdom, Catalonia in Spain) or federative systems (Québec in Canada).

The question here is not to decide whether federalism can be an efficacious remedy against secessionism. This has already been subjected to extensive analysis, the results of which mainly indicate a positive

³ Kymlicka, W., "Is federalism a viable alternative to secession?", in Lehning, P. B. (ed.), *Theories of Secession*, London, Routledge, 1998, p. 111–150.

⁴ The question of secession does not arise in a system in which everything is running smoothly for both the federated parties and the federation. Secession is always connected to another problem, a symptom for a serious dysfunction within the federation. Rainer Baubock describes the situation as follows: "None of the current Anglo-American theories of secession gives proper consideration to the most common grievance voiced by national minorities in multinational states: that the terms of federation are either unfair or have been violated by the majority. If this charge is indeed a plausible and necessary justification for threatening with secession, then it would also follow that a national minority is morally bound to maintain the unity of the existing state as long as fair terms of federation are respected." ("Why Stay Together? A Pluralist Approach to Secession and Federation", in Kymlicka, W., Norman, W. (eds.), *Citizenship in Diverse Societies*, Oxford, Oxford University Press, 2000, p. 367).

answer, with some qualifications. These qualifications are necessary because there are, in fact, two different cases: one in which federalism is applied to a people or nation that sees itself as the only people or nation in the future federation; and the case in which federalism is applied to several different peoples or nations that see themselves as distinct, and generally wish to remain so. The problem of secession concerns mainly the second case.

Territorial federalism and multinational federalism

Secession poses an existential problem, as Carl Schmitt has pointed out.⁵ For this reason, federation-nations (territorial federalism) and multinational federations (pluralist federalism) are not affected in the same way. In a federation in which the constituent entities see themselves as forming part of a single nation (like the United States or Germany), the risk of secession is low.⁶ The same cannot be said of federations based to a greater or lesser degree on national or ethnocultural pluralism, like Belgium, Canada, the United Kingdom or Spain (two decentralized states), or the European Union.

In these contexts, national or ethnocultural groups in a specific territory that is part of the federation or state are more likely to raise the question of secession. In Canada, Québec, rather than the other provinces or territories (majoritarily English-speaking), was the province that launched a referendum process in order to secede. In the United Kingdom, it was Scotland (and, in earlier times, Ireland); it is hard to imagine that England would follow this route to separate from Wales, Northern Ireland and Scotland. In Spain, which has faced secessionist challenges from Catalonia and the Basque Country, the same claims would be unlikely to come from other regions such as Andalusia, Galicia

⁵ Schmitt, C., *op. cit.*, p. 518 ff.

⁶ It is worth noting that the Civil War (a war of secession) in the United States occurred at a point in its history when the system was undergoing nationalization and the states (at least those in the South) saw themselves as sovereign and in charge of the constitution (*compact federalism*). The nationalization of the system (and of the population), successfully concluded and consolidated since the 19th century, makes it highly unlikely that today, in Texas or California, a large part of the population would support secession.

or Valencia. Likewise in Belgium, where secession appears attractive only to the Flemish nation, rather than the national and linguistic group that was formerly dominant, the French-speaking Walloons.

In short, secession is an issue – and a concern – for multinational federalism, rather than for territorial or national federalism. When the nation-building process has had the expected effect in a federation that has also consolidated its functional democracy, the risk of seeing a strong secessionist movement emerge is so low that it is easy to understand why, in these federations, the hypothesis of secession is greeted with a mixture of distaste and incomprehension.

Multinational federations, which are more directly concerned by the problem of secession, must also deal with the greater legitimacy granted to secessionist demands within their borders. The same logic applies: just as it is difficult to imagine that a French *région* (except in a colonial context), a German *Land* or a US *State* would ever ask its nation-state for permission to separate and form an independent state (by reason of the degree to which the populations concerned see themselves as forming an integral part of the nation and the state), so it is easy to understand and to accept, in the state- and nation-based logic of our modern political world, that a territorialized human group, aware of being a distinct nation or people, should want to control its own state. In other words, a demand from the second group is generally seen as having more legitimacy than a demand from the first group. The question of legitimacy is of capital importance here. If, like the United Kingdom (under article 50 of the EU treaties), Québec, or Scotland, the political entity claiming a right to withdraw is recognized as a people or nation, secession seems to follow an easier path and to find a place in the legal order; on the other hand, if the political entity claiming a right of secession is not perceived by the central state or organization to be a separate people (as in the case of Catalonia, for example), then the legal order will remain inflexible.

Structure of the book

It is difficult to separate legality from legitimacy in such a sensitive and complex area. This is probably one of the key lessons we can take from the court decision that has attracted the most attention: the advisory opinion given in 1998 by the Supreme Court of Canada concerning Québec's

unilateral secession.⁷ This is the leading case⁸ systematically referred to today in the all discussions of secessions in liberal democracies. The authors presented here are no exception to this rule, and the advisory opinion of 1998 is discussed extensively in this book.

In the first chapter, Christophe Parent reviews the juridical nature of secession. Going beyond the question of secession as a fact (when it succeeds despite violating the legal order to which the secessionist territory formerly belonged), he examines the normative dimension: “in a federal framework, does there exist, or can there exist, a right of secession?” Parent offers a vast and rich array of experiences drawn from doctrine and positive law to help readers understand the contrast between federal theory and practice over the course of history, and the hostility of federal positive law towards secession. Parent presents the thesis, in a sense following the path traced by the Supreme Court of Canada that the juridical value of secession in constitutional law depends on a mechanism for constitutional amendment to accredit the legal avenue for the outcome targeted.

Next, extending his theory of federation, Olivier Beaud defends the idea that secession from a federation should be treated as an autonomous concept. In his *Théorie de la Fédération*,⁹ Beaud presents the federation as an intermediate stage between the two dominant federative models, the federal state and the confederation. Since a federation is not a federal state (in the author’s view), and since the relation between federalism and secession has generally been examined in the fields of constitutional and international law in connection with the federal state (because confederations are associations governed by international public law), Beaud appears justified in asking if there is a difference between secession *from a unitary state* and secession *from a federation*. He details his approach and outlines the possible consequences.

Chapter 3, by Jorge Cagiao y Conde, tests the dominant thesis in studies of federal systems, which posits that there is a logical

⁷ *Reference re Secession of Québec*, [1998] 2 S.C.R. 217.

⁸ Delledonne, G., Martinico, G. (eds.), *The Canadian Contribution to a Comparative Law of Secession: Legacies of the Quebec Secession Reference*, London, Palgrave Macmillan, 2019.

⁹ Beaud, O., *Théorie de la Fédération*, Paris, Presses universitaires de France, 2007.

incompatibility between federalism and secession, to the point that the positive law enacted by federations has no choice but to exclude the right of withdrawal. The small number of cases in which federations have constitutionalized a right of secession should, under this thesis, be classified in the “confederation” category (like the EU, if it can be so defined), or as “non-federal” exceptions to the general rule (because they are contrary to the principle of federalism). Cagiao y Conde discusses the thesis in relation to known federal experiences drawn from both doctrine and practice, on the basis of what he calls the “legal logic” that applies when the question of federalism and secession is raised. He arrives at a conclusion that introduces considerable nuances to the dominant doctrinal thesis.

In Chapter 4, Dave Guénette and Alain-G. Gagnon review Québec’s secessionist experiences in Canada. With a constitution that remains silent on both the unity of the Canadian federation and the organization of a referendum concerning a province’s independence, Canada offers an example that clearly illustrates the ability of a federative legal system – and a federal political culture – to mobilize its constitutional resources in order to channel a secessionist conflict using peaceful legal means. It comes as no surprise that the Canadian experience has become, since the famous reference of 1998, the leading case from which politicians and researchers around the world draw both arguments and inspiration, despite a small number of unanswered questions and uncertainties (a clear majority, the constitutional amendment procedure) that remain in the Canada-Québec debate, as Guénette and Gagnon point out.

The last chapter presents what could be considered the perfect counterexample to the lessons drawn from the Canadian experience. Lucía Payero analyses the conflict in recent years between Spain and the independence movement in Catalonia, supported by a political majority. Unlike Canada, Spain is not a federation, and unlike Canada, it has not chosen to explore some of the federative resources that certain authors have glimpsed in its constitutional order. Payero’s thesis is as follows: given the (historical) hostility in Spain with respect to the federative arrangement demanded by the Catalan nationalists and also by left-leaning federalist parties in Spain, which form a tiny minority, based on a revision of the constitution, and given also the failure of infra-constitutional or informal attempts to reform the system (revision of the Statute of Autonomy of Catalonia in 2006, fiscal pact, etc.), support for

the Catalan independence movement, which was marginal at the start of the century, has actually increased. In the case of Spain, the demands for Catalan secession can be seen as a direct consequence of Spanish hostility to federal solutions.

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