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Federalism(s) and secession: from constitutional theory to practice

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Introduction

The word "secession" (from the Latin *secedere*, "to withdraw") dates back hundreds, and even thousands, of years. The first traces can be found in the masterful history of Rome written by Titus Livius, known as Livy, in the 1st century BC.[1] He describes an episode familiar to all historians of Antiquity, referred to by Livy as the "Secession of the Plebs" (*per secessionem plebis*), which led to the creation of the well-known Tribune of the Plebs in the 5th century BC. From the same revolt we gained the expression "to withdraw to the Aventine", an allusion to the fact that the Plebs deserted Rome in their conflict with the aristocratic patrician class and withdrew to the Sacred (Aventine) Mountain until they obtained political equality.[2] The original scope of the term "secession" therefore extended well beyond federalism. As used by Livy, a close associate of the Emperor Augustus, it referred to the separation of a social class rather than a separation between two political entities both aspiring to sovereignty. At the outset, then, secession was connected to a historical and semantic reality, and cannot be reduced simply to the

[1] Tite-Live, *Ab Urbe condita libri*, Liv. II, par. XXXIII.

[2] This time during the second Secession of the Plebs in 449 BC, to denounce political imbalance between the plebeian and patrician classes. It led to the adoption of the Twelve Tables, the first written corpus of Roman law, which had been transmitted orally up to that time.

separatist dynamic within a federal system. In fact, it is interesting to note that the notion of *secession* is practically absent from the constitutional semantics of the main federal states. None of the constitutions of the United States, Germany, Switzerland, Canada, Australia, Austria and Brazil contains the word "secession", either to authorize it or prohibit it. This gives rise to a paradox: secession is a notion that is largely ignored in the constitutional law of federations, even though it initially emerged in domestic law.[3] We will come back later to the theoretical reasons for this situation.

However, a more in-depth historical examination reveals that the possibility of secession within a [con]federal structure was known to Greek historians and legislators as early as the 5th century BC, thanks to the (numerous) defections from the Delian League. Readers can immerse themselves in the story in the *History of the Peloponnesian War*, in which Thucydides uses the idea of *defection* several times to describe cities that wanted to break their ties with Athens.[4] Since history can be used to illuminate the future, it is interesting to note that already, during this period, democratic Athens attempted to oppose the secession of various cities using military force.

Naturally no lesson can be drawn from this example, however illustrious. The conflict arose more from an imperialist shift in Athenian thinking than from the normal operation of a defensive league of cities that, today, would be considered more as an alliance or confederation.[5] However, law (as a discipline) remains uncomfortable with the idea of secession, as though legal science suffered from the paradox of Buridan's ass: it faces an impossible choice between the right of a

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3 On the other hand, secession has received a lot of attention in international public law, in connection with the right to self-determination. One example is the advisory opinion on Kosovo's unilateral declaration of independence issued by the of the International Court of Justice which was asked to, but avoided, giving its opinion on recognition in international law of the theory of secession as a remedy: *ICJ*, *Advisory Opinion on the Declaration of Independence of Kosovo*, July 22nd, 2010.

4 Jean Voilquin, in his French translation of the *History of the Peloponnesian War*, used the term "secession" four times; see T. 1, Paris, Librairie Garnier Frères, see Book I, XCIX; Book III, XIII, Book IV, CXXIII & CXXX. However, other translations tend to use the term "defection".

5 In a contrary example, the United States could have legitimately declared war on France in 1966 when De Gaulle decided to withdraw from the joint NATO command!

people to self-determination on the one hand, and respect for a state's territorial integrity on the other. To understand the reserves felt by international law (except in the specific case of colonization), matched by the almost deafening silence of constitutional law, we need to go back to the fundamentals. An ancient theory that can be traced back to the 19th century and Georg Jellinek, but which is still current in legal circles, underlies the anxiety felt by legal experts. Secession, and more generally the birth of a state, is considered to be a matter of "pure fact", one that by its very nature lies outside the purview of legal science.[6] Kelsen states, for example, that the birth and death of a state are metajuridical facts.[7] Lying outside the control of the law, secession depends on its own failure or success. This explains the more arcane aspects of the positions taken in international law, often apparently contradictory, on the question of secession,[8] dependent on a power relationship that is itself contingent. The state exists in law only because it exists in fact – this is stated in black and white in international law handbooks.[9] A new state will only be recognized if a government has effective control over a given territory. International law, as an obedient pupil of the Heidelberg master, has enacted a principle of effectivity that consists of endorsing the *fait accompli*,[10] meaning that the secessionist combat is legalized *a posteriori* by its success. It appears that, here, law is written by the victor!

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6 Jellinek, G., *L'État moderne et son droit*, t. 1, "Théorie générale de l'État", Paris, 1900 (2004), p. 269.

7 Kelsen, H., "Théorie générale du droit international public", *RCADI*, 1932, t. 42, p. 261; see also Jellinek, G., *op. cit.*, p. 269.

8 The Badinter Commission on Yugoslavia considered in 1991 that "the existence or disappearance of the state is a question of fact", *Advisory Opinion* n°1, November 29th, 1991, *RGDIP*, 1992, p. 264.

9 Combacau, J., Sur, S., *Droit International Public*, 5th ed., Paris, Montchrestien, 2001, p. 279.

10 It is possible to find some exceptions to this principle, including Bosnia-Herzegovina. The former federated republic of Yugoslavia controlled, between 1992 and 1995, only 20 % of the territory, and yet Bosnia-Herzegovina was presented as a state as early as March 1992. Here, recognition created effective statehood, rather than the reverse. On the other hand, some secessionist movements have been able to establish their authority over a territory without obtaining recognition from the international community: the Bosnian Serves of the Srpska republic; Chechnya between 1991 and 1994, and especially between 1996 and 1999 (following a defeat of the Russian army); and Transnistria, Abkhazia, South Ossetia and the Turkish Republic of Northern Cyprus.

Can a jurist really be happy with an approach that reduces secession to a question of *Realpolitik*? Positivism refutes the idea that a normative statement can be inferred from a fact,[11] and the role of a judge is not to take the side of the stronger party which is able to impose its point of view. The role of the law is to state *a priori*, rather than simply *a posteriori* – as influenced by *Realpolitik* – which party is in the right. This question is one of the key issues dealt with in this paper: to go beyond the false pretences raised by pure and practical concepts in order to rehabilitate an objective approach to secession. In the Kelsenian sense, this refers to the urgent need to develop a legal argument without subjecting secession to a value judgement. Legal science cannot become an advocate or defender of a cause,[12] whether to defend the right to secession or the right of an existing state to territorial integrity. This confrontation based on values would, on the contrary, lead to a "war of the Gods", to borrow an expression from Weber, escaping the control of scientific rationality and feeding an endless debate.[13] The question must therefore be examined with this requirement in mind, avoiding any syncretism between law, morals and justice, between *sein* (the "is") and *sollen* (the "ought"). Secession, for a jurist, can be neither good nor bad, fair nor unfair. It must be free from all ethical dimensions: it is either legal or not legal, from the standpoint of a higher norm.

Now that these guidelines have been laid down, we can return to the question of federalism, since secession – in our contemporary world – is indissociably linked in the public discourse to the federal model. Naturally, the US Civil War is a key focus, but in fact unitary states must face the question of secession too, as reflected in the exponential growth in the number of UN member nations, which has been multiplied by four over a period of seventy years. From fifty members in 1945, the UN grew to almost 150 member states in 1984, a trend that can be explained by decolonization. But since 1990 the UN has expanded to include another thirty-eight states to reach a total of 193 member states, mainly

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[11] Kelsen, H., *Théorie pure du droit*, 2nd ed., transl. by C. Eisenmann, Paris, Dalloz, 1962. Ideally, *Sein* and *Sollen* would be the same; but, as Kelsen points out, there is no causal link between them, meaning that just because a secession passes the factual test, in cannot necessarily be included in a *Sollen*.

[12] Troper, M., "Hans Kelsen", in Huisman, D., *Dictionnaire des philosophes*, Paris, Presses universitaires de France, 2009, p. 1413.

[13] The expression, used many times since, is borrowed from Max Weber and conforms to his principle of "axiological neutrality".

as the result of secessions, and not only from federal states. Nevertheless, few constitutional texts include specific provisions on secession. Only a few states mention a clear right to separate. To explain the inaction of the federal drafters, who remain practically mute on this essential subject, it is important to note that federalism is, in its essence, a model that respects and promotes diversity. A naïve – or optimistic – stance is to suppose that the federated entities will have no reason to leave a federal union and its countless economic, political and military advantages,[14] but it is clear that federal unions are not immune from separatist temptation.[15] On this topic, Will Kymlicka has expressed reservations about the ability of federalism to avoid secession, and others have even suggested that federalism may even accentuate the secessionist tendencies of ethnic groups.[16] One immediate example is the dissolution of the federal states of Czechoslovakia, Yugoslavia and the Soviet Union. Both the Yugoslav and Soviet constitutions – in countries where separation sometimes led to violence – expressly recognized the right to secession. Today, liberal thinkers do not necessarily consider secession, within a "perfectly just state" that upholds the principles of justice, to be justified or even desirable.[17] Here, constitutional democracy plays the role of a template

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[14] This is one possible interpretation of the goals of the new and controversial President of the Philippines, Rodriguo Duterte, who announced in June 2016 that he wanted to revise the constitution to federalize the country. One of his stated objectives was to end any separatist temptation for the Muslim minority.

[15] And sometimes more quickly than one might think. The goal of the ephemeral Transcaucasian Democratic Federative Republic – one of the shortest-live examples of a multi-national federation – was to unite Georgians, Azerbaijanis and Armenians. The federation was unable to reconcile the divergent national interests and, under an Ottoman threat, was dissolved after only three months in existence (February-May 1918) after the successive secessions of the Georgians, Azerbaijanis and Armenians.

[16] Kymlicka, W., "Is Federalism a Viable alternative to Secession?", in Lehning, P. (ed.), *Theories of Secession*, London, Routledge, p. 111–150; Nguyen, E., *Les nationalismes en Europe. Quête d'identité ou tentation de repli?*, *Le Monde*, 1998, p. 193; Snyder, J., "La gestión de la etnopolítica en Europa Oriental: una valoración de los enfoques institucionales", in Ferrero, R. (ed.), *Nacionalismo y minorías en Europa Central y Oriental*, Barcelona, Institut de Ciències Polítiques i Socials, 2004, p. 56–57.

[17] Apart from any hypothetical human rights violations or discrimination against part of the population, the principle of a constitutional democracy's territorial integrity takes precedence over the principle of self-determination, because integrity is a fundamental factor in its ability to act as a state that guarantees justice, see Buchanan, A., "Theories of Secession", *Philosophy and Public Affairs*, vol. 26, n°1,

to limit the moral legitimacy of this possibility. It is true that a right to secession could lead to strategic, and even egotistical, behaviour on the part of political sub-units[18] such as rich regions that could attempt, by threatening to withdraw, to avoid funding a social system based on their ability to pay, preventing the federal state from achieving its mission of fair redistribution. However, we can only reiterate that the legality of the right to secession is not the same thing as its legitimacy, whether moral or political. This once again emphasizes the relevance of our question, which *in fine* lies at the normative level: in a federal framework, does there exist, or can there exist, a right of secession? Federalism can take one of three distinct institutional shapes, all of which revolve directly or indirectly around the state, whether in the form of a union of states (a confederation) or of a single state (a federal state) or, on the contrary, in a form defined in opposition to the state and its constituting principles. We are referring here to the federation, a model that remains purely theoretical, but which probably offers the purest form of federalism. Theoretically, and this word is important, the institutional federal model chosen will have a considerable influence on whether or not a right to secede exists.

1. Confederation: a "free union" that hides its true nature?

Praesumptio sumitur de eo quod plerumque fit ("A presumption arises from that which usually occurs"). This old legal maxim, although based on common sense, is no help when looking at secession as part of a theoretical approach to federalism. The history of confederations reveals only total indifference with respect to the legal principles set out in textbooks concerning the right to withdraw. Concepts, positive law and empiricism largely contradict each other, calling into question the categories and

1997, p. 31–61. This position offers a clear contrast with a number of libertarian philosophers, for whom the right of secession is open-ended, see von Mises, L., *Liberalism in the Classical Tradition*, transl. by R. Raico, 3rd ed., Irvington-on-Hudson, Cobden Press, 1985, p. 109–110.

[18] Other liberal thinkers, although they partially agree with Sunstein about the potentially negative impact of a right of secession on democratic debate and political stability, support recognition for a constitutional right of secession. See Weinstock, D., "Vers une théorie normative du fédéralisme", *Revue internationale des sciences sociales*, n°167, 2001, p. 79–87.

standpoints set out in the academic literature. If, like Elizabeth Zoller, we consider that "a theory must be useful in understanding the world; it must help explain what occurs and anticipate what is likely to occur",[19] then we are forced to recognize that confederative theory fails to explain the right to separation.

1.1 From a union of sovereign states …

Fortunately, the pure theory of law remains unaffected by factual reality.[20] This is fortunate because, as we shall see, history has no regard for theoretical constructions.

1.1.1 Confederation as viewed in Kantian political philosophy

If one looks at theoretical constructions, and this is particularly true in the work of Emmanuel Kant to edify a cosmopolitical constitution, confederation is never considered otherwise than as a free union. Kant, who dreamed of a confederal union between states to ensure the peaceful coexistence of peoples and eradicate war,[21] compared his model to a "*permanent* congress of states".

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[19] Zoller, E., "Aspects internationaux du droit constitutionnel. Contribution à la théorie de la fédération d'États", *RCADI*, vol. 294, 2002, p. 41–166.

[20] In this connection, Kelsen disagrees with the sociological schools of thought that assign knowledge of the facts of human behaviour to legal science for the purpose of defining standards.

[21] As Kant says in *Perpetual Peace*, "States do not plead their cause before a tribunal; war alone is their way of bringing suit." Kant continues, "[…] reason, from its throne of supreme moral legislating authority, absolutely condemns war as a legal recourse and makes a state of peace a direct duty, even though peace cannot be established or secured except by a compact among nations. For these reasons there must be a league of a particular kind, which can be called a league of peace (*foedus pacificum*), and which would be distinguished from a treaty of peace (*pactum pacis)* by the fact that the latter terminates only one war, while the former seeks to make an end of all wars forever. This league does not tend to any dominion over the power of the state but only to the maintenance and security of the freedom of the state itself and of other states in league with it, without there being any need for them to submit to civil laws and their compulsion, as men in a state of nature must submit. The practicability (objective reality) of this idea of federation, which should gradually spread to all states and thus lead to perpetual peace, can be proved." (Kant, E., *Perpetual Peace, A Philosophical Sketch*, 1795).

The formula is not without ambiguity, but – properly understood – confirms the idea that a confederal pact offers each member the right to withdraw freely. Kant defined his congress as "a species of voluntary union of the several States, which should be at all times revocable and not, like that of the States of America, a union founded on a public constitution and consequently indissoluble. It is in this way only that the idea can be realized of a public law of nations, which may terminate the differences between peoples by a civil process, like the judicial proceedings among individuals, and not according to the barbarous manner of savages, that is to say, by war".[22] This, as we can all agree, was an insight of great import for the future. Clearly, the states in a Kantian confederation were given a right of withdrawal. In his *Perpetual Peace: A Philosophical Sketch* of 1795, Kant described a "federation of free states" (*Foederalismus Freier Staaten*) bound in an alliance of peace by a joint, revocable pact in which each member state retained its sovereignty, since he was resolutely opposed to the creation of a super-state. This philosophy matches, point for point, the legal framework of a confederation as illustrated today in public law textbooks.

1.1.2 The concept of confederation in public law

Confederation is a well-known model among legal experts,[23] given that it is the oldest form of federalism. Some people even trace it back to the Greek amphictyonic leagues. However, to provide a contemporary definition, we can say that a confederation is an association of independent, sovereign states that entrust, by way of an international treaty, the management of certain matters (diplomacy, defence) to a joint organization.

Legal experts find it difficult, today, to find any actual examples of a confederation, or at least any that are unanimously recognized as such. However, legal theory[24] generally considers that a confederation has five characteristics that distinguish it from other forms of association or political organization.

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[22] Kant, E., *Métaphysique des mœurs*, 1st part, "Doctrine du droit, Du droit public, Droit des gens", Paris, Vrin, 2011, par. LIII.

[23] Le Fur, L., *État fédéral et confédération d'États*, Paris, Panthéon-Assas, 2000.

[24] Aubert, J.-F., "Essai sur le fédéralisme", *Revue du droit public*, n°3, 1963, p. 404–405.

a. A confederation is first and foremost an association of states, and is not a state itself. It is therefore based on an international treaty and not on a constitution, which distinguishes it from a federal state.
b. A confederation has a restrictively listed set of *attributed powers*, generally limited to economic, monetary, customs-related or military matters.
c. A confederation recognizes each member's *right of veto* on any change to the founding treaty, and even – for less developed confederations – the need for unanimous agreement for all decisions.
d. A confederation has *no sovereignty*. As a result, there is no "confederal citizenship" and the citizens of each member state have no vote for electing the confederation's political authorities. Only a member state can have direct relations with its citizens (confederal mediacy *versus* confederal immediacy).
e. Last, and this is the key point for my purposes, a confederation of sovereign states recognizes each member's *right to withdraw* from the association. This is one of the criteria traditionally used to distinguish a confederation from a federal state, which prohibits any form of secession. This binary opposition can be compared to the nature of the founding act: a treaty/pact for the confederation, and a constitution/statute for the federal state.

From this point of view the right to withdraw from the European Union highlighted by Brexit, arising from article 50 of the Treaty on European Union, matches the template (although the right was only formalized in 2009). Because the EU is not a federal state but a confederation, even *sui generis*, it offers its members a right to withdraw.[25]

1.2 … to a "perpetual confederation"

However, looking behind the scenes, we can trace a completely different history of confederation which, as we will see, is a long way from the principles set out in textbooks with respect to member states' right to withdraw.

[25] Parent, C., "Le droit de retrait de l'Union européenne", *Revue du droit public*, n°3, 2016, p. 935–956.

1.2.1 Confederal laws against secession

In fact, the permanency of the confederal union has always been a central objective.

- The Delian League, or Athens' imperialist temptation

From the time of the Delian League, secession was prohibited *de facto*, and even *de jure*. We learn this from the Decree of 446–445 BC voted by the Ecclesia of Athens with respect to Chalkis. Athens required its Chalkidian allies to swear an oath, on which they could not go back, to have the same friends and the same foes, which, within a military alliance, was equivalent to being unable to leave.[26] The Decree was adopted after the Peace of Callias had been signed, in other words after the original goal of the alliance, to defend the cities from the Persian threat during the Greco-Persian Wars, had been attained. The alliance had become perpetual, despite the disappearance of its original objective. In reality, the cities that rebelled were forced back into line, or simply razed.[27]

Other military alliances, including some in the 20th century such as the Warsaw Pact, followed the same trajectory. It is hard to forget the tanks entering Budapest in 1956 when Hungary was considering leaving the pact signed a few months earlier; or the invasion of Czechoslovakia in 1968, which put an end to any reforming zeal in the country.

- *The Iroquois Confederacy*

Thomas Jefferson could rely on three sources of inspiration for drafting the Declaration of Independence. The first was theoretical, the work of John Locke. The second was historical, the secession of the United Provinces of the Netherlands. The last was Indigenous, in the form of the Iroquois League.[28] This confederacy, the most powerful in

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[26] Cloche, P., "Périclès et la politique extérieure d'Athènes entre la paix de 446–445 et les préludes de la guerre du Péloponnèse", *L'Antiquité classique*, vol. 14, n°1, 1945, p. 94.

[27] For example, when Naxos wanted to withdraw in 472, the city was besieged and forced back into the league by Cimon, son of Miltiades. Athens acted in a similar way a few years later with Thasos, and then with Mytilene in 428.

[28] It would be a mistake to underestimate the influence of the union of the Iroquois nations on Thomas Jefferson. For instance, the future 3rd president of the United States declared in 1787: "I am convinced that those societies (as the Indians)

North America for almost two centuries before the arrival of Christopher Columbus, was based on a "constitution" that was transmitted orally and then set down in writing in 1720. It was known as *Gayanashagowa*, which can be translated as "Great Law of Peace". However, the council of the five Iroquois nations condemned secession, which was dealt with in the same article as treason.[29]

- *The American Confederation of 1777*

The "Articles of Confederation" signed by the thirteen original states in 1777 follow the same path. Although they specify in article 2 that each state retains its sovereignty, they also exclude any right of secession. The thirteenth and last article clearly states that "the union shall be perpetual". A state had no right to unilateral withdrawal, and this prohibition of secession can be seen as a constant feature of the tradition in the New World.

- *The Swiss Confederation and Sonderbund War*

After the fall of the First French Empire in 1815, a federal pact was concluded between the Swiss cantons, replacing the Act of Mediation imposed by First Consul Bonaparte in 1803. However, after recovering their sovereignty, the cantons quickly experienced tension between the rural, conservative and Catholic cantons, on the one hand, and the more industrialized, liberal and Protestant cantons, on the other. Anti-Catholic measures were adopted by the liberal cantons, leading seven conservative cantons to form a defensive alliance in 1845, quickly referred to as a *Sonderbund* (separatist alliance) by its detractors. In 1847, after a tight

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which live without government enjoy in their general mass an infinitely greater degree of happiness than those who live under European governments." (Letter to Edward Carrington, Jan. 16, 1787, *The Papers of Thomas Jefferson*, vol. 11, 1 January–6 August, ed. Julian P. Boyd, Princeton, Princeton University Press, 1955, p. 48–50). It is curious to note that Jefferson substituted the pursuit of happiness, in the Declaration of Independence, for Locke's right of property.

[29] *Treason or Secession of a Nation*, Article 92: "If a nation, part of a nation, or more than one nation within the Five Nations should in any way endeavor to destroy the Great Peace by neglect or violating its laws and resolve to dissolve the Confederacy, such a nation or such nations shall be deemed guilty of treason and called enemies of the Confederacy and the Great Peace." "It shall then be the duty of the Lords of the Confederacy who remain faithful to resolve to warn the offending people. They shall be warned once and if a second warning is necessary they shall be driven from the territory of the Confederacy by the War Chiefs and his men."

majority vote, Parliament ordered the dissolution of the *Sonderbund*. It is important to note that the pact of 1815 prohibited the cantons from "forming between them any link detrimental to the federal pact" (article 6). After the separatists refused to disarm, a short war was fought and quickly won by the Confederation. There is nothing surprising about this war, since even the pact of 1291, between the three communities of Uri, Schwyz and Unterwald, considered to be the founding pact of Swiss federalism, was intended to be perpetual. And fifteen years before the Sonderbund War, the Confederation had opposed the withdrawal of Neuchâtel.

In practice and in historical fact, then, the distinction between a confederation and a federal state, based on the licit or illicit nature of secession respectively, cannot be demonstrated.

1.2.2 The philosophical turning-point in the 16th century: the Dutch influence

The 16th witnessed a fundamental turning-point in the way in which secession was addressed. At the start of the Eighty Years' War began, for the first time ever, a written document supported the legitimacy of secession. The Dutch, in revolt against Spain, claimed their independence and religious freedom, and rejected the centralism of the Hapsburg Empire. The "Act of Secession", adopted on July 22, 1581,[30] was followed four days later by the Act of Abjuration signed in The Hague, proclaiming *de facto* the independence of the United Provinces.[31] Both the time and the place are linked, obviously, to the publication about twenty years later of *Politica* by Althusius, the father of modern federalism. As a municipal syndic defending the freedom of his city, Emden, from the Count of Frisia, he logically drew inspiration from the Dutch experience to design a plural political order implicitly based on the idea of revocable consent.

1.2.3 Universalization of the right of secession: the US Declaration of Independence

We know that events in Holland were a source of inspiration for Thomas Jefferson when he drafted the Declaration of Independence.

30 Mentioned by Martinenko, A., "The Right of Secession as a Human Right", *Annual Survey of International & Comparative Law*, vol. 3, n°1, 1996.

31 Recognized by the Peace of Münster included in the Westphalia treaties of 1648.

However, the result was more than just one more chapter added to the history of secession, because the Americans universalized the right to independence. In 1581, it had been seen simply as the right of the Dutch to free themselves of the Hapsburgs, but the American Revolution made the right of secession a right held by all peoples in the world to recover their freedom. The Declaration of Independence opens by pleading for what we could, today, call "secession as a remedy". The thirteen colonies considered it important to justify breaking away by listing the innumerable harms caused by the Crown's exactions.[32] The right of secession was not presented as an unconditional right, but as a response to injustices listed point by point, in order to convince the "opinions of mankind" in the words of Thomas Jefferson.

2. The federal state: an "indissoluble union"?

The history of the 19th and 20th centuries includes several examples of peaceful secession: the secession of Hungary from Austria in 1867,[33] of Norway from Sweden in 1905,[34] and of Iceland from Denmark in 1944.[35] However, if we look in more detail at each secession, its consensual character appears to depend far more on the time chosen, and on the political opportunity created by the weakening of the central state, than on a truly consensual arrangement. Another example is the secession of Singapore from Malaysia in 1965. Is it reasonable, though, in this case to posit a peaceful succession, given that Singapore was in reality

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[32] "When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, […] a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation."

[33] It is only fair to note that the weakness of Austro-Hungarian Empire following the defeat at Sadowa in 1866 forced Emperor Franz-Joseph to agree to negotiate Hungary's independence. The compromise was ratified by the Austrian parliament in 1867, after which the Austrian Diet amended the constitution to match the new political arrangement.

[34] The decision of the Norwegian parliament was followed by a referendum in which 99 % of voters supported secession. Sweden decided to negotiate rather than be isolated from the international community in the event of war, and the Act of Union was repealed by both parliaments.

[35] Taking advantage of the fact that Denmark was still under Nazi occupation,

thrown out of the federation less than two years after joining it because of economic and racial conflict?[36]

In fact, it is hard to identify examples of secessions in recent history that have not led to war or strong regional tension – one immediately thinks of the federation of Eritrea and Ethiopia, organized by the UN in 1952, which degenerated into a thirty-year war. Other examples of this type include Kosovo, the Tamil situation in Sri Lanka, Bangladesh, and Chechnya, among many others.[37] States that expressly recognize a right of secession are extremely rare. However, the sometimes ephemeral nature of some federations, if not simple prudence, calls for a legal way to settle the question.[38]

2.1 Federal positive law

2.1.1 Federal constitutions expressly allowing a right of secession

Only two purely federal states have recognized a right of secession, which is less than the number of unitary states that have done so (for example, Denmark, Liechtenstein and Uzbekistan).[39]

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[36] Its departure was imposed by Malaysia, which had its parliament pass a constitutional amendment to remove any mention of its name in the union.

[37] One case that should be mentioned is that of the United Arab Republic, founded by Nasser in 1958 as a political union of Syria and Egypt. It came to an end in 1961 following a coup in Syria for the purpose of secession.

[38] We can cite the ephemeral Transcaucasian Democratic Federative Republic – one of the shortest-lived examples of a multi-national federation – whose goal was to unite Georgians, Azerbaijanis and Armenians. The federation was unable to reconcile the divergent national interests and, under an Ottoman threat, was dissolved after only three months in existence (February–May 1918) after the successive secessions of the Georgians, Azerbaijanis and Armenians. Other examples are Indonesia (1949–1950), Libya (1951–1963), Mali (1960), Cameroon (1961–1972), the West Indies Federation (1958–1962), and Serbia and Montenegro (2003–2006).

[39] The Act on Greenland Self-Government of 21 June 2009 gave Greenland a right of self-determination that could lead to independence. Chap. VIII, art. 21, par. 1, reads as follows: "Decision regarding Greenland's independence shall be taken by the people of Greenland." The micro-state of Liechtenstein, consisting of eleven communities, recently gave them the "right to secede from the state" (Art. 4, par. 2). The Uzbek Republic has given a right of secession to the Republic of Karakalpakstan (Art. 74 C.).

a) Constitutions that recognized a right of secession in the past

- *Soviet Union*

The Soviet Union was the first federal state to include a right of secession, in black and white, in its constitution.[40] The right was present from the outset, since the Constitution of 1924 provided that "each federated republic is guaranteed a right to withdraw freely from the Union" (article 4). A similar provision was found in the Constitutions of 1936 (article 17) and 1977 (article 72), which state that "each republic is free to secede from the USSR".[41] However, we know how this fine-sounding principle was applied, since for many years Moscow repressed any movement considered to reflect "exaggerated nationalism".[42]

Lenin believed in the right of nations to self-determination, but in reality the defence of the proletarian revolution was more important than the rights of the federated nations.[43] His support for self-determination was really only a step in the process leading up to and/or necessary for constituting Marxist unity.[44] Lenin did not introduce the right to self-determination to prepare for the dismemberment of the Soviet Union, but simply wanted to appease national fears while shoring up proletarian unity. This allowed Lenin to say that "recognition of the right to secession reduces the danger of the 'disintegration of the state' ".[45]

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[40] Article 4 of the Soviet constitution of 1924 specifies that "Each one of the member Republics retains the right to freely withdraw from the Union", while article 6 required consent of all the member republics before and modification of the territory or limitation of modification of article 4. The constitution of the federal state was amended under Stalin in 1936, and then in 1977, without affecting the right of secession.

[41] Article 70 of the constitution defined the USSR as the result of the self-determination of its nations and the "voluntary association of the soviet socialist republics".

[42] At least until the democratization of the regime launched by Gorbachev and the 1989 election of nationalists (such as the Lithuanians) to the Supreme Soviet.

[43] "The aim of socialism is not only to end the division of mankind into tiny states and the isolation of nations in any form, it is not only to bring the nations closer together but to integrate them", Lenin, *Œuvres complètes*, Éditions sociales, t. 22, 1960, p. 159.

[44] "In the same way as mankind can arrive at the abolition of classes only through a transition period of the dictatorship of the oppressed class, it can arrive at the inevitable integration of nations only through a transition period of the complete emancipation of all oppressed nations, i.e., their freedom to secede" (*ibid.*).

[45] Lenin, *Œuvres complètes*, t. 20, p. 437 et 445.

- *The Burman constitution of 1947*

The constitution of the Union of Burma in 1947 included, in Chapter 10, express recognition of the fact that "each state is entitled to separate from the Union"[46]. However, Myanmar went on to experience a long succession of military coups that made the principles of the federation inoperable. The right disappeared in 1974 when the Constitution of the Republic of the Union of Myanmar was adopted, authorizing nothing more than local autonomy until the constitution of 2008.

- *Former Yugoslavia*

The constitution of Yugoslavia, amended in 1974, gave the republics a right of secession,[47] but in the end Yugoslavia followed the tradition of socialist states that made the right of secession an example of *petitio principii*. When Croatia and Slovenia unilaterally declared their independence on June 25, 1991 the army of the Socialist Federal Republic of Yugoslavia (mainly composed of Serbs and Montenegrins) invaded Croatia and Slovenia to prevent them from seceding.

- *State Union of Serbia and Montenegro, 2003*

Following the collapse of Yugoslavia, the State Union was formed in 2003 under the high patronage of the European Union, which persuaded Montenegro not to opt for independent statehood but, instead, to form a new, looser federation with Serbia. Cooperation was limited to a few powers. The founding document, signed in 2002, stated in its preamble that "after a period of three years, Serbia and Montenegro will have the right to initiate a procedure to re-examine their national status, in

[46] However, the constitution prudently included a strict formal framework. The constitution was frozen for ten years after its adoption, and a vote by two-thirds of the members of the state council was required along with a referendum of the population of the secessionist state.

[47] "The peoples of Yugoslavia, proceeding from the right of every people to self-determination, including the right to secession, on the basis of their will freely expressed in the common struggle of all nations and nationalities in the National Liberation War and Socialist Revolution, and in conformity with their historic aspirations, aware that further consolidation of their brotherhood and unity is in the common interest, together with the nationalities with whom they live, have united in a federal republic of free and equal nations and nationalities and created a socialist federative community of working people" (Preamble).

other words to leave the state union".[48] To nobody's surprise (given the scepticism on both sides) a referendum on independence was held in Montenegro as soon as the probationary period ended. The independence side won with just over 55 % of the votes cast, leading to the dissolution of the federation, this time with no violence.

- *Transitional constitution in Sudan, 2005*

The most-recently created member of the international community, South Sudan, results from a constitutional right of secession. The 2005 peace agreement led to the adoption of a transitional constitution which, in articles 118 and 222, enshrined the right to self-determination and the holding of a referendum to authorize the secession of the south of the country.[49] The referendum was held in January 2011, following the transitional period provided for in the constitution, leading to a clear victory for independence.

However, it was the prevailing violence (the second Sudanese Civil War lasted from 1983 to 2002) that justified the United Nations Mission to South Sudan and forced the government in Khartoum to consent to the agreement.

b) Constitutions currently recognizing a right of secession

The federal or quasi-federal states that currently recognize a right of secession can be counted on the fingers of one hand:

- Ethiopia

First, Ethiopia, which – on paper at least – offers a broad right of secession, not only to the nine federated states but also to any nation,

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[48] This three-year period began with the adoption of the new constitution, which occurred in 2003.

[49] Article 222 stated that, in the six months preceding the end of the six-year transitional period, a referendum would be held in South Sudan (paragraph 1) offering two options: confirmation of Sudan's unity, or secession (paragraph 2). Article 118, paragraph 1, stated that if the result of the referendum on self-determination confirmed unity, the national legislator had to fulfil its duties in accordance with the provisions of the Constitution; and that in the event of a vote in favour of secession by the South Sudanese people, the seats of the members and representatives of South Sudan in the National Legislative Assembly would be deemed vacant (paragraph 2).

nationality or people in Ethiopia.[50] The constitution also sets out the precise procedure and the conditions that must be met – first, a two-thirds majority vote of the country's legislative council, followed by a referendum of the local population organized by the federal government. If the referendum favours secession, discussions are then held to define it in more detail. However, the actual importance of this right to self-determination needs is questionable. Sports fans probably remember an Ethiopian marathon runner who won the silver medal at the Rio Olympics and who crossed the finish line with his raised arms crossed, to draw attention to the arrest and repression of members of the Oromos, one of the country's ethnic groups. The Oromos were attempting to exercise their right of self-determination, in particular via the OLF (Oromo Liberation Front), which was considered to be a terrorist organization by the government.

- Saint Kitts and Nevis

Next, the two Caribbean islands of Saint Kitts and Nevis, which gained their independence from Great Britain in 1983. Nevis was authorized to separate from the island of Saint Christopher (Kitts) and this right was almost implemented in 1997 after the election victory of a secessionist party. The federation only survived because of the rigid procedure that required a double majority before Nevis could gain its independence: a two-thirds majority vote of the legislative assembly of Nevis plus a two-thirds majority vote in a referendum of the inhabitations of Nevis. Although the assembly voted unanimously in October 1997 in favour of secession, the population was less enthusiastic, since "only" 61.7 % voted for secession in August 1998,[51] making it a close-run race.

This case highlights the question of the majority required to enable secession. We know that this question has not been settled in Canada, whether by the Supreme Court or in the *Clarity Act*. Is a simple majority sufficient? Should a larger majority be required, at the risk of undermining

[50] Article 39 of the constitution of Ethiopia, 8 December 1994: "Every nation, nationality or people in Ethiopia shall have the unrestricted right to self-determination up to secession."

[51] Article 113 (1) of the constitution of the Federation of St Kitts and Nevis, 1983: "The Nevis Island Legislature may provide that the island of Nevis shall cease to be federated with the island of Saint Christopher and accordingly that this Constitution shall no longer have effect in the island of Nevis."

the political potential for secession? Should a two-thirds majority be required, as in Saint Kitts and Nevis? Montenegro has already been mentioned here; in this case the European Union imposed a threshold of 55 % of votes in favour of separation from Serbia.[52]

- France

As a provocation, France can be added to this list. Its inclusion is provocative in the sense that France is – as we all know – a paragon of the unitary state. However, one section of the constitution is headed "Transitional provisions concerning New Caledonia" and deserves our attention here. The legal relationship it defines contrasts strongly with the ties that generally bind a community, even decentralized, with the central state. This results from the Nouméa Accord, which led to the inclusion of the section on New Caledonia and which included the establishment of "shared sovereignty" between France and New Caledonia, an approach applied by neither Spain nor Italy.[53] The federal nature of the relationship, which reflects a form of federalism by disassociation, is clear.[54] In fact, article 77 of the French constitution [which states that "the interested populations of New Caledonia will be asked to decide on accession to full sovereignty"] indicated that a referendum on self-determination would be held by 2018. The referendum has taken place, and French loyalists won it with over 56 % of the votes cast.

However, in France the right of secession is not limited to New Caledonia, and the question must be examined against the background of the right to independence of former colonies. The constitution of 1958 gave them – temporarily – a right of secession. Article 76 (in the 1958 constitution) provided for a period of four months during which overseas territories could choose either to remain in the Republic or to become an independent state (and to join the "Community").[55] Even

[52] The final result was 55.4 %. The Council of Europe specified that this threshold should not be seen as a precedent, but resulted from the country's specific situation.

[53] Spain's constitutional court has rejected the idea of sovereignty for the Catalan people (March 25th, 2014).

[54] Faberon, F., "Le fédéralisme, solution française de décolonisation: le cas de la Nouvelle-Calédonie", *Revue française de droit constitutionnel*, n° 101, 2015, p. 53–72.

[55] The constitutional referendum of September 28th, 1958, seeking consent from the French people for the adoption of the constitution of the 5th Republic, was also – in a way – a referendum on self-determination. Any overseas territories that rejected

after that period, the right of secession did not expire. Based on some audacious readings of the jurisprudence, France todays still maintains a right of secession. This may appear surprising since it is not clear from the constitution itself, even though the second paragraph of the preamble recognizes the right to self-determination of peoples overseas. In fact, a constitutional judge took it upon himself to construe a "right of secession" from another existing provision, article 53 of the constitution, which deals with "transfers, exchanges or adjunctions of territory"[56]. The first and third paragraphs of this constitutional provision set two conditions: first, a parliamentary votes in favour of a law authorizing secession and, second, the consent of the populations concerned.[57] This was the process implemented by the French authorities in 1975 to introduce self-determination for the Comoros. This construction of article 53 was validated by the constitutional council which even gave it general scope.[58] As a result, the government was able to pass a law authorizing the secession of this Indian Ocean territory following a referendum, and the Comoros form, today, an independent state. In

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the draft constitution presented immediately acquired independence. This is how Guinea became independent.

[56] To do this, the judge first used what is generally known as the "Capitant doctrine". Legal expert René Capitant contended that the overseas territories did not lose their right to self-determination on the expiry of the four-month time limit, although the ways in which the right was to be exercised changed, based on the procedure defined in article 53 of the constitution. Nothing the wording of this article provided for the right to statehood; instead, it required a consultation of the population concerned if territory was exchanged between two pre-existing states. René Capitant believed that the provisions applied equally to "the more limited hypothesis of a territory ceasing to belong to the French Republic in order to constitute and independent state". Given the lack of any other provision, this article was used as the legal foundation that enshrined the right of secession.

[57] In practice, the legislature had to intervene twice: once to organize the consultation, and a second time to rule on the action to be taken following the consultation. This was confirmed by the constitutional council in its decision dated December 30th, 1975, when it declared that "the islands of Grande Comore, Anjouan and Mohéli", where a majority of the inhabitants voted in favour of independence "cease, from the promulgation of this Act, to form part of the French Republic".

[58] "Considering that the provisions of this article must be construed as being applicable, not only in the event that France transfers to a territory to a foreign state, or acquires a territory from a foreign state, but also in the event that a territory ceases to belong to the Republic in order to constitute, or be attached to, an independent state" (C.C., December 30th, 1975).

other words, France today still has a procedure for the secession of a territory from the Republic.[59]

2.1.2 Federal constitutions excluding all forms of secession

The unitary Chinese state prohibits all forms of secession (article 52). The anti-secession law of 2005, which specifically targets Taiwan, reaffirms this position when it states that "the state will in no case authorize the secessionist forces supporting the independence of Taiwan to separate the island from China, under any name or by any means whatsoever". China gives itself the power, if necessary, to use "non-peaceful means" (article 8). This is clearly a provision to be borne in mind following the breakthrough made by independence supporters at the local elections in Hong Kong in September 2016. However, few federal or quasi-federal constitutions follow China's example in condemning all secessionist options so firmly. The approach is often more subtle even if the end result is identical: the prohibition of secession.

- *Union of the Comoros*

The 2001 federal constitution of the Comoros is clearly drafted. Article 7-1 states that "Any secession or attempted secession by one or more autonomous islands is prohibited."[60] The provision highlights

[59] However, the constitutional council, aware of the questionable suitability of article 53 as the foundation for a French right of secession, also used another provision of the French constitution for support, the second paragraph of the preamble, which enshrines the "principle of the free determination of peoples" (C.C., June 2nd, 1987, order 87 226 DC, *New Caledonia*; C.C., May 9th 1991, *Corsica*; C.C., May 4th, 2000, *Mayotte*). Nothing in the provision appears to limit it to "overseas territories", whatever the preamble to the constitution states, since the constitutional council extended it to Mayotte which had specific status as a "departmental community" and not an overseas territory. The same applies to New Caledonia. However, a close reading of the second paragraph of the preamble and the former article 1 of the constitution (struck out by the constitutional act of August 4th, 1995) do not allow for the possibility of the right of secession extending beyond the overseas territories, whatever their respective status. It reads as follows: "The Republic and the overseas territories which, by an act of free determination, adopt this constitution institute a community. The community is based on the equality and solidarity of the peoples of which it is composed." The constitutional council, in its decision dated May 9th, 1991, pointed out that "the constitution of 1958 distinguishes between the French people and the overseas peoples, which are recognized as holding a right of free determination".

[60] The constitutions of 1978 and 1996 contained no corresponding provision.

one of the main practical difficulties raised by any secession: "trapped minorities". The exclusion in fact targets a specific case: the island of Mayotte. The Comoros, a small archipelago in the Indian Ocean north of the Mozambique channel, obtained independence from France in 1975, but relations between the two countries quickly descended into conflict because of the way in which the results of a referendum were interpreted. Certainly, 95 % of the archipelago's population [spread over four islands] had voted for independence. However, one island – Mayotte – had voted by a large majority to remain part of the French Republic. This gave rise to a conflict that remains unresolved: which takes precedence, the territorial integrity of the Comoros or the choice made by the population of Mayotte and its own right to self-determination[61]? The French parliament eventually decided to treat the results of the referendum on an island-by-island basis, Mayotte remained French, and France has received at least twenty condemnations from the UN. This example – however circumscribed – deserves our attention because of the numerous inherent difficulties involved in secession. However tenuously, a parallel can be drawn with Kosovo, where 10 % of the population is Serb. Similarly, Brussels, although it has a French-speaking majority, is located in the Flemish part of Belgium.

- *Bolivarian Republic of Venezuela*

The preamble to the constitution of Venezuela, which promotes the right to the self-determination of peoples, should not be taken at face value. The constitution contains, in fact, a long litany of provisions designed to protect the territorial integrity of Simon Bolivar's birthplace. For example, article 126 carefully denies the right of the indigenous peoples to self-determination,[62] while article 159 prohibits the states from doing anything to harm the country's territorial integrity.[63]

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61 Given that Mayotte has a shared history with France that predates and is separate from that of the other Comoro Islands.

62 Article 126: Native peoples, as cultures with ancestral roots, are part of the Nation, the State and the Venezuelan people, which is one, sovereign and indivisible. In accordance with this Constitution, they have the duty of safeguarding the integrity and sovereignty of the nation. The term people in this Constitution shall in no way be interpreted with the implication it is imputed in international law.

63 Article 159: The States are politically equal and autonomous organs with full juridical personality, and are obligated to maintain the independence, sovereignty

• *Brazil*

The Federative Republic of Brazil was formed at the end of the 19th century. The constitution of 1891, promulgated after the proclamation of the Republic, repudiated the Empire and centralism and opted for federalism. This mirrored the republican slogan of "Centralization, Secession; Decentralization, Unity."[64] The same unity is, today, imposed. The first article of the 1988 constitution states that "The Federative Republic of Brazil (is) founded on the indissoluble union of the states, the municipalities and the federal district […]".[65]

• *Australia*

Australia has already faced secessionist movements, for example in Western Australia where a referendum was held in 1933. Although supported by almost two thirds of the electorate, the referendum result still needed to be endorsed by the British parliament, which refused to do so on the basis that the preamble to the 1900 constitution of Australia stated that "the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, […], have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland […]".

• *Switzerland*

The constitution of the Swiss Confederation contains no specific provisions on secession, but must be read in light of the spirit of the text. The absence of any "Schwexit" clause in the constitution of a country that promotes its own concept of *willensnation* is not accidental, but stems from a conscious decision by the founding fathers of 1848. In the wake of the Sonderbund War, it was feared that a right of withdrawal would imperil the newfound Swiss cohesion. The silence of the constitution of

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and integrity of the nation and to comply with and enforce the Constitution and the laws of the Republic.

64 Souza, C., "Federalismo, Desenho constitucional e Instituiçoes Federativas No Brasil Pos-1988", *Revista de Sociologia Politica*, n° 24, 2005, p. 105–121.

65 Title 1. Fundamental principles. This reference to an indissoluble union is present in the constitution of 1937 (art. 3), disappeared in the constitution of 1946, and reappeared in the first article of the constitution of 1967. The constitutions of 1891 and 1934 were more peremptory, stating that Brazil was a "perpetual and indissoluble union" (art. 1).

1848, which has been reconfirmed since, must be understood as a way to withdraw the right of secession from the cantons, and was intended as a new framework that did away with the principle of an alliance between sovereign cantons, re-established in 1815. The sovereignty of each canton is now constitutionally subservient to that of the Confederation.[66]

- *Mexico*

Like many other similar documents, the Mexican constitution does not mention "secession", but leaves the reader in little doubt as to its unconstitutionality. Although article 2 of the 1917 constitution enshrines "the right of the indigenous peoples to self-determination", the right is placed within a strict constitutional framework and cannot undermine the "preservation of national unity". The constitution also specifies, at an early point, that "the unity of the Mexican nation entails its indivisibility". Self-determination is reduced to its internal aspect: autonomy within the Mexican state.

And this should come as no surprise. The first federal document in Mexico, the constitution of 1824, written at a time when national disintegration was apprehended (Guatemala had seceded the previous year), aimed – through federalism – to defuse secessionist leanings and safeguard the union between the country's various regions.

2.1.3 Constitutions that remain silent on the question of secession

It is true to say that most federal constitutions remain silent on the question of secession. This is certainly the case in the Federal Republic of Germany, where nothing in the Basic Law (or in any other law) regulates secession. However, without wishing to create any false controversy, the question is superfluous given that secessionist problems are not part of German political reality, other than in an anecdotal way, even in Bavaria. In any case, in other countries the silence of the constitutional texts gives their Supreme Courts more interpretational scope and leaves room for *Realpolitik*.

[66] As provided for in article 3 of the constitution: "The cantons are sovereign, provided their sovereignty is not limited by the federal constitution […]."

a) Interpretation by Supreme Court justices: a centripetal constitutional force

- *United States*

The background to the US Civil War is well known. Following the election of Republican politician Lincoln[67] and his project to abolish slavery, the southern states – sure of their legal position – seceded and formed the Confederate States of America. It is important to note that states' rights had strong support in public opinion, not only in the South but also in the political class in the North. It is enough to look at a few episodes from American history, or a few statements selected from those made in the years leading up to the war, to understand the constitutional basis for the dispute.

This was not the first time that the United States had faced the possibility of a secession. During the War of 1812 between the United States and the United Kingdom, the New England states – opposed to the war launched by the federal government – had threatened to withdraw from the Union unless a compromise was found. Although nothing came of this in the end, it provided a foretaste of the Nullification Crisis that arose in 1830 and set the scene for the first secessionist attempt in the South, when South Carolina threatened to cancel the federal customs duties known as the "abominable tariff". The duties were applied to imports from Europe with the objective of protecting nascent industries in the north-eastern states. The conflict worsened when constitutional lawyer Calhoun, Vice-President of the United States, set out some theoretical legal considerations while President Andrew Jackson threatened South Carolina with military action.[68] The southern state retaliated with its own threat, to secede, and in fact secession was commonly used as a threat in the first decades of the American federal union.[69]

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[67] His election was due to a large extent to divisions in the Democratic Party, which put forward two candidates.

[68] Under the theory of nullification, a state is entitled to nullify any federal law deemed unconstitutional because it infringes on the state's powers.

[69] It is interesting to note that a new secessionist movement emerged in Texas following the re-election of Barack Obama. Over 100,000 petitioners signed up on a website made available by the Obama administration to organize a referendum. In 2013, 20 % of Texas electors supported secession and the movement gained ground – and

The right of secession was not necessarily contested in the North or by leading lawmakers. Even Thomas Jefferson defended a not dissimilar position in favour of freedom of choice by individual states. In a private letter, he wrote in 1816 that "if any state in the union will declare that it prefers separation […] to a continuance in union […], I have no hesitation in saying 'let us separate'."[70] The sixth US President, John Quincy Adams (son of the second president, John Adams) stated in 1839 – a few years after leaving office – that "If the day should ever come […] when the affections of the people of these states shall be alienated from each other […] far better will it be for the people of the disunited states, to part in friendship from each other, than to be held together by constraint."[71] And in 1860, a few months before the Civil War, President Buchanan, even though he believed secession to be illegal, still condemned the use of force.[72] Secession was clearly something that could be defended under the terms set in Philadelphia; at any rate, it did not justify federal execution, in other words the use of military force.

However, over the space of a few months secession became a *casus belli*, when the federal government declared the actions of the confederate states illegal and launched military action, a clear sign that nationalist ideology had replaced the idea of a pact. Of course, the context was specific: a fight between states either against, or for, slavery, but we know that in almost all federations the federal state tends to take action against the federated states in the name of equality and the promotion of individual rights.[73] Lincoln stated this unequivocally and his statement

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confidence – after the people of Scotland were given an opportunity to vote on their own destiny. Texas has an unusual history within the United States. It was an independent republic for almost a decade, following the fall of Alamo in 1836, until it joined the United States in 1845. The marriage was short-lived, since it then sided with the Confederate States in 1861.

70 Letter to W. Crawford, June 20th, 1816.

71 The Jubilee of the Constitution: A Discourse (1839) by John Quincy Adams.

72 "The fact is that our Union rests upon public opinion, and can never be cemented by the blood of its citizens shed in civil war. If it cannot live in the affections of the people, it must one day perish. Congress possesses many means of preserving it by conciliation, but the sword was not placed in their hand to preserve it by force", Fourth Annual Message to Congress on the State of the Union, December 3rd, 1860.

73 Donald Livingston sees this episode as a transition from federative legitimacy, inspired by Althusius, to a Hobbesian political order, see Livingston, D., "The Very Idea of Secession", *Society*, n° 5, July–August 1998, p. 19–42.

goes beyond the context of a battle for individual rights: the states enjoy no right to leave the union, which therefore is perpetual in nature.[74] This was confirmed at the legal level by the Supreme Court ruling in the famous case of *Texas vs White* (1868).

- *Canada*

The Canadian constitution contains no provisions dealing directly with secession. It is only possible to note the absence of a provision similar to the one deliberately included in the preamble to the Australian constitution. The Canadian confederation does not claim to be an indissoluble union.

However, this did not prevent the Supreme Court from ruling that Québec possessed no unilateral right of secession, either under international law or under the Canadian constitution. Although it did not exclude secession on principle, it made it subject to three conditions: a referendum clearly manifesting Québec's desire to leave Canada; negotiations between the federal and Québec governments based on four fundamental principles (federalism, democracy, constitutionalism and the rule of law, and the protection of minorities); and an amendment to the constitution to ratify the secession. The referendum itself would therefore not amount to secession, but a vote by a clear majority of Quebecers in favour of secession would create a constitutional obligation for the other players in the federation to negotiate.[75]

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[74] "I hold that in contemplation of universal law and of the Constitution the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper ever had a provision in its organic law for its own termination. Continue to execute all the express provisions of our National Constitution, and the Union will endure forever, it being impossible to destroy it except by some action not provided for in the instrument itself. Again: If the United States be not a government proper, but an association of States in the nature of contract merely, can it, as a contract, be peaceably unmade by less than all the parties who made it? One party to a contract may violate it – break it, so to speak – but does it not require all to lawfully rescind it? […] But if destruction of the Union by one or by a part only of the States be lawfully possible, the Union is less perfect than before the Constitution, having lost the vital element of perpetuity." (Lincoln, A., *First Inaugural Address*, March 4th, 1861).

[75] *Reference re Secession of Québec*, [1998] 2 S.C.R. 217. The decision was given more substance and precision in the *Clarity Act* of 2000.

• *Bosnia-Herzegovina*

Bosnia-Herzegovina, which in early 2016 submitted a request to join the European Union, has been divided since the Dayton Agreement of 1995 into three federated entities: the Federation of Bosnia and Herzegovina, the Republika Srpska and the Brčko District. The constitution of Bosnia-Herzegovina, like those in Canada and the United States, does not mention secession explicitly, either to authorize or prohibit it. However, given the strongly separatist context (especially among the Serbs of Bosnia), and in particular since the independence of Kosovo was recognized,[76] the constitutional court was asked, as early as 1998, to specify the status and rights of each of the country's entities. This resulted in a ruling that denies the sovereignty of the entities, denies their standing as states, and above all rejects any right of secession.[77]

• *Russian Federation*

At first glance the Russian constitution appears receptive to a right of secession. Faithful to Soviet tradition, the preamble enshrines the right of peoples to self-determination. However, a reading of article 5, § 3, of the constitution quickly suggests another interpretation, since it states that "The federal structure of the Russian Federation shall be based on its State integrity, the unity of the system of State power […] and self-determination of peoples in the Russian Federation." Understood in this

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[76] In late 2007, the survey firm *Partner* revealed that 77 % of Bosnian Serbs supported the secession of the Serbian Republic of Bosnia if the *Albanians* in Kosovo seceded from Serbia.

[77] "[…] the Constitution of BiH does not leave room for any 'sovereignty' of the Entities or a right to 'self-organization' based on the idea of 'territorial separation'. Citizenship of the Entities is thus granted by Article I.7 of the Constitution of BiH and is not proof of their 'sovereign' statehood. In the same manner, 'governmental functions', according to Article III.3 (a) of the Constitution of BiH, are thereby allocated either to the joint institutions or to the Entities so that their powers are in no way an expression of their statehood, but are derived from this allocation of powers through the Constitution of BiH. […] all the references in the provisions of the Preamble of the Constitution of RS to sovereignty, independent decision-making, state status, state independence, creation of a state, and complete and close linking of the RS with other States of the Serb people violate Article I.1 taken in conjunction with Article I.3, Article III.2 (a), and Article 5 of the Constitution of BiH which provide for the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina." (Constitutional Court of Bosnia and Herzegovina, case U-5/98).

way, the Russian constitution therefore enshrines only a right to internal autonomy,[78] a situation confirmed by the constitutional jurisprudence.

In 1995, Russia's constitutional court was asked to rule on four presidential decrees connected with the dispatch of troops to Chechnya, giving it an opportunity to review whether or not a right of secession existed. The decision is interesting in several aspects.[79] The court considered that the constitution of the Russian Federation, like the previous constitution of 1977, gave no unilateral right to the federation's entities to change their status or, *a fortiori*, secede.[80] The judgement continued by emphasizing that "State integrity is one of the foundations of the constitutional system of the Russian Federation". The jurisprudence was further strengthened when the court was asked to rule on the attempted secession of the Republic of Tatarstan. It considered that the right to self-determination provided no legal foundation for a unilateral secession, but had to be exercised in accordance with the principle of territorial integrity.

- *Republic of South Africa*

A similar logic prevails in South Africa, where the "rainbow nation" has a hybrid status strongly influenced by federalism. As in Russia, the constitution recognizes the right to self-determination, raising the question of whether this constitutional principle entails a right to separation. Fortunately the constitutional court in South Africa had an opportunity to rule on this question when it certified the constitution in 1996,[81] and its answer is not surprising: the right to self-determination,

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[78] Any movement towards secession appears to be prohibited, as indicated in article 13, par. 5, which prohibits the creation of movements that undermine Russia's integrity.

[79] The court rendered its decision on July 31st, 1995. An English translation of the judgement was published by the *European Commission for Democracy through Law* of the Council of Europe (Venice Commission), CDL-INF (96) 1.

[80] Except that, surprisingly, the soviet constitution of 1977 expressly provided for a right of secession (in article 72). However, as we know the right remained inoperative. The court's interpretation was probably guided here by political realism.

[81] "In this context 'self-determination' does not embody any notion of political independence or separateness. It clearly relates to what may be done by way of the autonomous exercise of these associational individual rights, in the civil society of one sovereign state" (Constitutional Court of South Africa, Certification of the Constitution, December 4th, 1996).

while respecting the sovereignty of the state, is to be understood only in its internal sense.[82]

b) Federal realpolitik

Some states, whose constitution remains silent on the question of secession, suggest that the political practice, or history, of the country concerned should guide the debate.

- *Belgium*

This applies, for example, to Belgium, where the constitution does not give the regions or communities a right of secession. Some eminent Belgian constitutional experts argue that a unilateral secession could only occur outside any legal framework.[83] In reality, however, the debate is essentially political.[84] Legal arguments are not predominant in the public debate to counter the discourse of the Flemish nationalists. It is important to note that the case of Belgium is unusual compared to the general run of nations invoking the right of secession, since the Flemish community is not a minority and in fact represents 60 % of the country's population. Belgium itself emerged from a (peaceful) secession from the United Provinces. The dissociative federalism that characterizes the Belgian state is seen by many as a transitional state prior to separation. Secession is therefore an integral part of Belgium's history, and nobody would seriously consider refusing the secession of Flanders if it set itself firmly upon that path.

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[82] A parallel could be drawn here with the constitutional court of the Italian regional state that ruled, in connection with the special status of Trentino-Alto Adige, that the recognized right of ethnic minorities to self-determination could only be exercised in compliance with Italian national unity.

[83] For example, Christian Berhendt stated that "a resolution of the Flemish parliament, calling unilaterally for the secession of Flanders (would be only) […] a sheet on paper that would immediately attract an international chorus of non-recognition", in Berhendt, C., "Ne pas changer de nationalité, c'est capital", *La Libre Belgique*, October 23rd, 2010.

[84] "There is no international code governing state scissions and secessions. This is why everything that has been said on this topic […] is based solely on the observation of past experience and is founded only on political practice", in Verdussen, M., "Une Belgique amputée de la Flandre? Pas si simple", *La Libre Belgique*, October 30th, 2010.

• *India*

It has been said about India that it is "unitary in spirit, but federal in form", or even "a unitary state with subsidiary federal principles",[85] and it is true that the constitution never uses the term "federation" despite this being an objective of the constituting parties in 1949, one of which stated that "what is important is that the use of the word 'Union' is deliberate […] The drafting committee wanted to make it clear that though India was to be a Federation, the Federation was not the result of an agreement by the States to join in Federation, and that the Federation not being the result of an agreement, no state has the right to secede from it […]."[86]

In any case, it is hard to imagine that Kashmir – or at least the part under India's administration, Jammu and Kashmir – where independence is invoked by certain movements and where tension with Pakistan is high,[87] could one day be left to secede by the federal government.[88]

• *Nigeria*

Although the Nigerian constitution does not expressly forbid secession, it appears to be prohibited in practice. The Igbos ethnic group, which represents just under 20 % of the country's population and is concentrated in the southeast, would like to see a right to secession incorporated into the constitution. The Igbo homeland, the former Republic of Biafra, whose attempt to secede in 1967 led, in less than three years, to the death of almost one million people, filed a request for

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[85] Wheare, K. C., *Federal Government*, 1963 p. 56, cited by Chaubey, R. K., *Federalism, Autonomy and Centre-State relations*, New Delhi, Satyam Books, 2007, p. 18 and 36.

[86] Pr. Abid Husain, cited by Chaubey, R. K., *op. cit.*, p. 36.

[87] Pakistan itself denied that West Pakistan had any right of secession in 1971. It possible that the same question will arise, soon, for the Kurdish communities in Iraq or Turkey. The federal constitution of Iraq appears to make any such attempt unconstitutional, since the unity of Iraq plays a central role in the constitution. It is covered by the first article of the 2005 constitution, and article 109 states that "The federal authorities shall preserve the unity, integrity, independence, and sovereignty of Iraq and its federal democratic system."

[88] Especially given that Schedule 1 of the Constitution, for the State of Jammu and Kashmir, gives parliament the power to take the necessary measures in the event of a movement for secession from the union.

a constitutional amendment in 2014,[89] but to no avail. On the contrary, the Biafran independentist Nnamdi Kanu, director of *Radio Biafra* (based in London) and a leader of the prohibited movement "Indigenous People of Biafra" was arrested in October 2015 and tried in March 2016 by the High Court of Abuja on the charge of "propagating a secession agenda".

- *Federated States of Micronesia*

Micronesia is a federal state in the Pacific with four federated states. With barely 100,000 inhabitants on 700 km^2 of land emerging from the ocean, it is not immune to separatist temptations – a referendum on secession was scheduled to be held on March 3, 2015 in the state of Chuuk. Although no legal provision explicitly prevented this, the President of Micronesia, Manny Mori, campaigned against independence on the basis of the unconstitutionality of the proposed secession and the need to first amend the founding legislation (requiring the assent of 75 % of voters and three quarters of the states).[90] The proponents of secession invoked international law and the example of Kosovo, unsuccessfully since President Mori was careful to specify that a "yes" vote in the March 3 referendum would not necessarily make the State of Chuuk an independent nation. In the end the referendum was never held, being postponed *sine die* by the governor of the state, who considered that the public needed to be made more aware of the issues.

- *Malaysia*

Malaysia has no right of secession. As is well known, Singapore left the federation in 1965, but as the result of exclusion rather than secession. Recent events have shown that the federal government tends to consider secession as an act of sedition. This can be seen in the authorities' reaction to the emergence in recent years, in particular via social media, of a separatist movement in the eastern states of Sabah and Sarawak (*Sabah Sarawak Keluar Malaysia*). Taking advantage of *Malaysia Day*, the Prime Minister has since pointed out that these states on the island

[89] "The Position of the Igbo Nation at the National Conference for a Renegotiated Constitution."

[90] Article XIII, Section 3, reads as follows: "It is the solemn obligation of the national and state governments to uphold the provisions of this Constitution and to advance the principles of unity upon which this Constitution is founded."

of Borneo are an integral part of Malaysia and that the very question of separation is inconceivable. The Attorney General, Tan Sri Abdul Gani Patail in turn specified that secession was against the "spirit of the constitution". It is important to note that the old *Sedition Act*, which dated from colonial times, has reappeared at a time of political repression against opponents of the regime, and plans have been proposed to make secession a criminal offence.

- *Iraq*

Iraq acquired a federal constitution in 2005 in well-known circumstances, mainly to deal with the Kurdish question, since it was a condition set by the Kurdish people before joining the "new Iraq". The land is strategically placed, since Kurdistan has substantial oil reserves in the North,[91] and the difficult period Iraq is experiencing has once again highlighted this issue. Already in 2006, the main leader in Iraqi Kurdistan had threatened secession if Prime Minister Nouri Al-Maliki confirmed his choice of the flag formerly used by the Saddam Hussein regime as a national emblem. At the time, Iraq President Jalal Tarabani had attempted to offer reassurance by refuting "any idea of a Kurdistan separated from Iraq". The separatist issue, however, refuses to disappear, and a few months ago Massoud Barzani, leader of Iraqi Kurdistan, called for a referendum on the creation of a Kurdish state. The Constitution remains silent on this issue. Like any other constitutional text, of course, it mentions the unity of the country, without indicating any clear conclusions, but Bagdad is not using legalistic arguments. A few months ago Prime Minister Haider al-Abadi, on a trip to Berlin, shared his hope that Kurdistan would continue to "be part of the country", pointing out that the area is "part of Iraq and will, I hope, remain so".

2.2 Using constitutional theory to cut the Gordian knot of secession

The question of secession pivots on the definition of the state. There is a historical reason for this: the federal state is a hybrid model containing two irreconcilable paradigms.

[91] The first Kurdish claims for the creation of an independent state were made at the end of the Ottoman Empire, and were supported by British Prime Minister Lloyd George as early as 1919.

2.2.1 The trap set by the syncretism of the federal state

The federal state is a hybrid. Its father is the state. As conceptualized by Jean Bodin (*Les Six Livres de la République*, 1576), the state is founded on indivisible (and perpetual) sovereignty, with the ultimate goal of providing security, as shown by Thomas Hobbes (*Leviathan*, 1651). But the federal state also has a mother, federation, inspired by Althusius (*Politica*, 1603) and, later, Kant, and is based on pluralism. From its father, the federal state has kept the imprint of its origin: a social contract between individuals who abdicate some of their powers to a state, which then becomes the sole holder of sovereignty. As a result, there is no right of secession, which would be synonymous with anarchy since it would give right to the – not inconsiderable – number of around 6,000 ethnic groups identified on the planet to set up their own state. On the other hand, through its mother, the federal state has retained a focus on particularities, which must be respected or – if it is not respected – can create a right to separate from a union which would have become form of tutorship. In short, the federal state is a child of the state,[92] with its Hobbesian conception of sovereign political authority, and the federation, derived from a multiplicity of holders of political authority, and a symbol of autonomy and freedom.

However, federal unions have, almost systematically, despite being initially the result of a pact, made federalism subservient to the construction of the nation-state.[93] One example is the United States, which has gradually become a single nation, with the Civil War marking the starting-point for the transition. In English, the term "United States" only began to be used in the singular following the victory of the Union in 1865.[94] The rejection of secession created a lastingly unitary reading

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[92] A copy of the *Six Books of the* Republic by Jean Bodin, annotated by Thomas Jefferson, was used during the drafting of the US constitution.

[93] In short, everything depends on the state's preference for the creation of a nation or, on the other hand, the strength of federal feeling and the meaning given by the state to the original pact. This is what creates the indeterminate nature of this field of study. The state's power is supported by the fact that federal constitutions remain silent on the question of secession, making the destiny of the federated peoples dependent on the decision made by a handful of Supreme Court judges. If they give preference to the national dimension, they reject secession, and can choose any number of reasons. If they give preference to the consociative dimension, they accept secession.

[94] Some historians even consider that study of the history of the United States should begin in 1865 rather than 1787, see Bensel, R. *Yankee Leviathan: The Origins of*

of the Philadelphia Convention. In any case, the question of secession remains insoluble if it is seen as a binary choice between the supporters of state unity and territorial integrity, on the one hand, and the partisans of States' Rights, on the other. This is why we must be beyond this apparent contradiction.

2.2.2 Redefining the constitutional basis for secession

In constitutional terms, it is not appropriate to consider secession from the point of view of a people's right to self-determination. This principle comes from international law, and it has been remarked on numerous occasions that it is more akin to a political principle, in its effective form, rather than a rule of normative law. As a result, secession must be given a suitable legal definition in the field of constitutional law. The question that must be answered is this: what does any secession ultimately consist of?

Regardless of the procedure used, whether a unilateral declaration of independence[95] or a referendum on secession[96], secession has no constitutional and/or institutional consequence for the residual state until its fundamental law is revised to take note of the departure and suppress obsolete provisions. The legal value of a local referendum on secession is questionable and even, in some cases, null,[97] because the thorny issue of

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Central State Authority in America, 1859–1877, Cambridge, Cambridge University Press, 1990.

95 For example, the Czechs and Slovaks agreed jointly to dissolve Czechoslovakia on 20 June 1992 without any form of referendum. Following the dissolution of the USSR some countries, such as Moldavia and the new countries of central Asia (Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan), were created by a simple parliamentary vote. There was no referendum.

96 On the other hand, referendums were held in Armenia, Azerbaijan, Georgia and Turkmenistan to ratify the unilateral declarations made by their governments. Unlike the states mentioned above, which were newly created, the states had existed prior to the USSR and their status as federated republics. In the case of Ukraine, which proclaimed its independence on 24 August 1991, a referendum was held a few months later, on 1 December 1991, in which 90 % of electors voted for independence. The following week the USSR ceased to exist.

97 Examples include the Basque nation and Catalonia, which were refused permission by the Spanish constitutional court to organize referendums, on the basis that this was a reserved power of the central state (Trib. Constit., September 11th, 2008; March 25th, 2014). Another example would be the United Kingdom, where parliament is sovereign. The May 2016 referendum on "Brexit" was not (legally) binding on parliament, as confirmed by the Supreme Court. In Canada, the Supreme Court specified in the *Reference Re Secession of Québec* that "Those

legality can only be dealt with through revision. This approach offers a way to dispel the uncertainty about whether a federation is based on a pact (*foedus*) or a constitution (fundamental law).

a) Partial versus total revision

In the field of constitutional law, two types of revision are generally considered: partial revision, and total revision. Partial revision uses constitutional amendments to rewrite/add/strike out one or more provisions. Total revision is of another nature altogether. It may involve the amendment of a substantial portion of the constitution or the substitution of a new text; or else the revision of a fundamental principle of the existing constitutional order (for example, when a republic becomes a monarchy). In both cases, a total revision in fact masks an abrogation of the existing constitution. However, many eminent legal experts believe that an abrogation of the constitution contravenes constitutional legality.[98] Raymond Carré de Malberg, repeating the position of Jellinek

[democratically elected] representatives may, of course, take their cue from a referendum, but in legal terms, constitution-making in Canada, as in many countries, is undertaken by the democratically elected representatives of the people" (par. 88). The legal effect of referendums, which are not provided for in the constitution, must be seen in a relative light. If only a part of the population is consulted, the result cannot be an expression of the sovereign (which alone can bind the government). This was confirmed by the Supreme Court of Canada, which pointed out that "the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme" (par. 87) (see also par. 151). In France, the consultation of the population in overseas territories interested by independence is considered to be a simple opinion, but not a decision-making referendum. This is shown by article 2 of Act 74-965 dated November 23rd, 1974 to organize a consultation of the population in the Comoros Islands, which stated that "parliament is required, on the expiry of six months following the announcement of the results of the poll, to rule on the action it considers must be taken in response to the consultation". However, the decision by the council on May 4th, 2000 concerning Mayotte also hints that the consultation was an obligatory (but simple) notice in the case of a change of status; but that, in the other case, secession, the government would be bound by the popular vote. Elsewhere, the holding of a referendum has been hotly debated. In the Baltic States, unilateral proclamations of independence by elected representatives were commonplace between 1988 and 1990, but were not recognized by the USSR. However, the Baltic government refused to organize referendums on self-determination, which would have given Moscow a power that they did not wish to recognize, and instead agreed to consider them as official "surveys".

98 Of course, not everybody agrees with the constitutional theory approach, which prohibits total revisions. Some people support a formalist approach to revision.

on the self-limitation of the state, considered that "however absolute the power of the state, and even if it was legally possible for it to do everything, it cannot abolish the legal order and found anarchy, because it would be destroying itself".[99] In his *Constitutional Theory*, Carl Schmitt refused to admit that constitutional laws could abrogate the constitution.[100] The state, a "mortal God" in the apt description of Thomas Hobbes, is based on a constitution that has a "claim to eternity".[101]

At a theoretical level, a total revision – an euphemism for the disappearance of the sovereign's work – can only be unconstitutional. At a formal level, a constituted power cannot dissolve the work of the original constituting power. Taking a material approach to the law, it is necessary to state that the state cannot itself abrogate its constitution.[102] "Political suicide is not a legal category."[103] On this basis, Georg Jellinek, who contrasted the right to leave, characteristic of a confederation, with the idea of the state, could logically write that "a union under public law such as the state […] can never be dissolved, legally, through the will of its members".[104] Only the people, by a revolutionary act (in the legal sense, meaning an upheaval of the established constitutional order),

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Doctrine in France (deeply influenced by Rousseau) still reflects a majority viewpoint that the derived constituent power, as the sovereign power, can carry out revision of all kinds, even of an intangible provision. Even the disappearance of the overriding constitution is not a limit.

99 Carre De Malberg, R., *Contribution à la théorie générale de l'État*, Paris, Dalloz, 2003, p. 229.

100 Schmitt, C., *Théorie de la Constitution*, Paris, Presses universitaires de France, 1993, p. 242 ff. Olivier Beaud, in turn, considers that the power to revise cannot infringe national sovereignty, *La puissance de l'État*, Paris, Presses universitaires de France, 1994.

101 This claim, in the formulation of Otto Kirchheimer, is attached by Olivier Beaud to the federation, *Théorie de la Fédération*, p. 266, note 2. Like Carl Schmitt, who considered the federation to be a perpetual union (*ewig*), Schmitt, C., *op. cit.*, p. 512.

102 All the limits placed on the state stem from its primary interest of self-preservation, whether in connection with sovereignty (which it cannot alienate) (a point of similarity with Hobbes), or in connection with respect for human rights. A violation of fundamental rights would call into question the legitimacy of the state in terms of national sovereignty by transforming the state into a private party: the nation would then have a legitimate right to overthrow it (an idea found in both Aristotle and Locke).

103 Jellinek, G., *Allgemeine Staatslehre*, n°9, Berlin, Häring, 1905, p. 768.

104 *Ibid.*, p. 748.

can adopt a *new* constitution; but it is not possible – legally – to amend an existing constitution completely or fundamentally.[105] As a result, if the text says nothing about a right of secession, one of two scenarios is possible:

Scenario 1: If the secession of a province requires a total revision of the federal constitution, it is unconstitutional.[106]

Scenario 2: If secession requires only a partial revision of the constitution, the revision itself is constitutional, and the federal authorities are then responsible for noting the choice expressed by a province and launching a revision process in accordance with the constitution.

b) Actual cases

As we have seen, most constitutions fail to mention secession, and it is not possible to define a general rule to interpret their silence. Each constitution must be interpreted *in situ* to ascertain if the departure of a member state will require a partial or total revision.

- *Secession of a Belgian community*

Let us look at the case of Belgium. The secession of Flanders would lead, *a minima*, to changes to seventy-five out of just under two hundred articles in the constitution, raising the question of whether the Kingdom

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[105] Some people will point out that a handful of states have already authorized the principle of a total revision: Austria (art. 44), Spain (art. 168) and Switzerland. Positive law can always free itself from legal theory. However, in these countries the procedure for total revision systematically requires a consultation of the population (and therefore of the sovereign), proof that a total revision is more than just a revision, since it is not possible to proceed simply be parliamentary means as usual. In Switzerland, well known for its direct democracy, a referendum is required whatever the question. Any revision systematically requires the intervention of the sovereign people.

[106] If the secession of a province requires a total revision, which is authorized by the constitution, then the secession is legal. The case remains extremely hypothetical, since it involves a federal referendum. Only the sovereign people is able to raze the constitutional edifice: we are in a state, under a constitution (a legislative instrument), and not a federative pact enshrining the sovereignty of a multitude of co-contracting sovereign peoples. Only the sovereignty of *the* people is enshrined in the constitutions of the United States and Canada, and the same applies in most federal states.

would maintain its legal personality if its constitution were to be so substantially amended. Beyond the quantitative aspect, it is above all the nature of the regime that would be irremediably affected. Belgium is built on its linguistic and cultural polarity, which is at the core of the federal state. As pointed out by Belgian constitutional expert Marc Verdussen, "if you remove one pole, the very foundation of the state will collapse".[107] If the Flemish community left, the Walloon community would be left on its own (ignoring the small German-speaking community).[108] The residual Belgian state would become a Walloon state, and federalism would be only an empty shell. At this point, it would be appropriate to ask if Wallonia could claim status as a "successor state" under international law.[109] The comments of Alexis Vahlas, a specialist in the question of state succession, are relevant here: "if […] secession occurs, but involves most of the population and territory of a state, or the seat of its government authorities, it will probably lead to the dissolution of the state. In this case, the remaining portion may be seen as being so different from the

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[107] Verdussen, M., *op. cit.*

[108] German speakers make up less than 1 % of the Belgian population. Minority rights suffice to protect this community, with no need to apply federalism. The question of the Brussels-Capital area, located in the Flemish region but mainly populated by French-speakers, is far more problematical. Brussels could possibly become a European federal district, like Washington.

[109] From the point of view of international law and the separation of states, the question becomes: it this a "simple" secession or the dissolution of an existing state? In the first case the existence of the state, although reduced by the loss of part of its territory and population, is not challenged, and it can claim the status of a successor state. In the second case, dissolution, the existing state disappears and becomes two or more new states. Although this distinction appears clear, in practice it is hard to discern and the International Law Association considers it impossible to establish a clear criterion to separate the two cases (73rd *Conference of the International Law Association*, Rio de Janeiro, Resolution no. 3/2008, p. 70). A comparative examination can still be instructive. In most cases (Pakistan/Bangladesh, Eritrea/Ethiopia, Montenegro/Serbia, South Sudan/Sudan) the loss of a territory, however large, was not considered to affect the legal identity of the original state. This residual state inherited the international personality and was recognized as the successor state. However, in other cases secession was equivalent to the dissolution of the state, as was the case on December 31st, 1992 for Czechoslovakia. Similarly, the Socialist Federal Republic of Yugoslavia, which became the Federal Republic of Yugoslavia (Serbia and Montenegro) and lost four of its six constituting entities (Slovenia, Croatia, Macedonia, Bosnia-Herzegovina), was not recognized as the successor state by most members states of the United Nations.

parent state as to no longer be considered as the state that succeeds to its legal personality."[110] This is exactly the case that would apply in Belgium.

To return to domestic law, it is not just amendments to the Belgian constitution that would be required – the change would result purely and simply in the abolition of the federal regime, to be replaced by a unitary regime. This type of constitutional upheaval, in the form of a regime change, resembles a total revision which, as mentioned above, is considered to infringe constitutional legality.[111] It should also be noted that section 195 of the Belgian constitution, which governs constitutional amendments, appears to prohibit such a substantial change.[112]

- *Secession of a German or Austrian Land*

Limits on the power of constitutional amendment are a common feature of European constitutions. In Germany, section 79, § 3 of the

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[110] Vahlas, A., *Les séparations d'États: l'Organisation des Nations Unies, la sécession des peuples et l'unité des États*, thesis, Université Panthéon-Assas, Paris 2, 2000, par. 23.

[111] A parallel can be made with Germany, whose constitution, in article 79, par. 3, states that "Amendments to this Basic Law affecting the division of the Federation into *Länder* […] shall be inadmissible". This is a material limit on revision which bars the federal state from becoming a unitary state.

[112] This point is naturally interpreted in various ways in the doctrine, but article 195 appears restrictive with respect to the scope or number of provisions that may be revised. It states that: "The federal legislative power has the right to declare that there are reasons to revise such constitutional provision as it determines." This formula is similar to article V of the US constitution which is the key example of partial revisions. The founding fathers, who clearly were not planning for any other approach, provided only for "amendments to this constitution" to become "part of this constitution". Even when it is assumed that a total revision is constitutional, it would be conditional on a consultation of the sovereign people. This is the less that can be drawn from positive law. In Austria, Switzerland, Italy and Spain, total revision is possible, but requires a consultation of the population. In Belgium, no referendum is necessary, but a revision leads to the dissolution of the two chambers of parliament and the holding of new elections. Such a revision/abrogation would involve consulting the federal people ahead of time by reviewing the composition of the two chambers and because of this the right of secession cannot be a unilateral right of the secessionist province. It requires the consent of a majority of the state's people, whether consulted directly on a total revision (as in Austria, art. 44, par. 3) or ahead of time by the election of new representatives prior to the revision (as in Belgium). This is where things could get difficult, because if it is hard for the separatist side to obtain a majority within its own area, as was the case for the referendums in Québec and Scotland, it is easy to see how hard it would be to obtain a majority at the federal level.

Basic Law and its explanatory note prohibit a total revision, as well as any revision intended to abolish federalism.[113] In Austria, total revisions are authorized, but require a referendum of the whole federal population, or in other words majority support for secession outside the separating entity. In reality, however, the question cannot truly be asked in this way in either country.

This is because, in Germany as in Austria, the secession of a Land would not require a total revision. The German constitutional regime would not be deeply affected in its legal shape by the departure of Bavaria. As a result, the secession of a Land, given the lack of a contrary constitutional provision, could legally by ratified by a revision of the constitution.[114] The same would apply in Austria as regards the secession of one of the nine *Bundesländer* (such as Tyrol).

- *Secession of a Canadian province*

Canada is made up of ten provinces, including Québec whose cultural singularity is reflected in the constitution. The word "Quebec" occurs almost seventy times in the Constitution Act, 1867, meaning that many sections would have to be tidied up in the event of secession. However, the nature of the Canadian federal regime would not be deeply affected, and federalism would continue. Obviously, the departure of the province with the most singular nature would make the federation even more homogeneous, but this is a different problem.

This view of the situation is confirmed by the Supreme Court of Canada since, if the *Reference Re Secession of Quebec* is re-read through the prism of total versus partial revision, the Court has already made up its mind. Québec's secession would – the Court states – require only a simple amendment of the constitution. The Court is even careful to signal its disagreement with certain authors who see a more complicated situation.[115] If Québec secession requires only a partial revision, and this

113 "The objective of this provision is to avoid a total revision or the abrogation of the constitution […]. An article such as this cannot prevent a revolution; any revolutionary movement is liable to generate new law; but at least it will not be able to use an apparent legitimacy or legal quality to justify a new legality."

114 We should note, however, that the constitutional court, in a case brought by a Bavarian citizen, recently excluded any form of secession.

115 *Reference Re Secession of Québec*, *op. cit.*, par. 84: "The secession of a province from Canada must be considered, in legal terms, to require an amendment to

is the approach taken by the Supreme Court, then secession would be constitutionally valid.

To sum up, the legality of a secession is, *in fine*, conditional on the degree of the constitutional interdependency established between the separating entity and rest of the federation. The stronger the interdependency, the more it affects the very nature of the regime (and this is the case in a binational state in which the very reason for the existence of the federation disappears if one half leaves), and the harder it is to claim that the process is legal. The close relationship between federalism and the organic integrity of the union cannot be undone. Only a revolution, in the legal sense, could further the secessionist project. On the other hand, if the existing constitutional regime can survive the departure with a few simple amendments to the constitution, the secession can be considered as legal, since it requires only a partial revision.

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the Constitution […]. The amendments necessary to achieve a secession could be radical and extensive. Some commentators have suggested that secession could be a change of such a magnitude that it could not be considered to be merely an amendment to the Constitution. We are not persuaded by this contention. It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, although the Constitution neither expressly authorizes nor prohibits secession, an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements. The fact that those changes would be profound, or that they would purport to have a significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada."