

Edited by
Jorge Cagiao y Conde &
Alain-G. Gagnon

Federalism and Secession



PETER LANG

■ The controversial issue of secession has received little attention from experts of federalism. The best federal studies either evade it or dismiss it in a few lines. However, the issue of secession has been present throughout the history of federations. This book is one of the first to explore the complex relationship between federalism and secession.

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

This book provides a nuanced portrait of the issue of secession in federal contexts and lays the groundwork for questioning the still too fragile legacy of the great thinkers of federalism.

■ **Jorge Cagiao y Conde** is a researcher and lecturer (with HDR qualification) in the Department of law and languages at the University of Tours. His book *Micronacionalismos. ¿No seremos todos nacionalistas?* (“Micronationalisms—are we not all nationalists?”) was published in 2018.

■ **Alain-G. Gagnon** is a professor in the Department of Political Science at Université du Québec à Montréal, where he holds the Canada Research Chair in Québec and Canadian Studies. He is also the director of the new Centre d’analyse politique – Constitution et Fédéralisme (CAPCF: <https://capcf.uqam.ca>).

Federalism and Secession



Peter Lang

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Diversitas

Vol. 26

The aim of this series is to study diversity by privileging an inter- disciplinary approach, through political, legal, cultural and social frame- works. The proposed method of inquiry will be to appeal, at once, to the fields of political philosophy, law, political science, history and sociology. In a period characterized by the increasing diversity of contemporary societies, the authors published in this series will explore avenues for the accommodation and management of pluralism and identity. Such studies will not be limited to assessments of federal states, but will include states that are on the path to federalization as well as non-federal states. Serious efforts will be undertaken to enrich our comprehension of so-called 'nations without states', most notably Catalonia, Scotland, Flanders and Quebec. A point of emphasis will also be placed on extracting lessons from experiences with civil law relative to those cases marked by the common law tradition. Monist and competing models will be compared in order to assess the relative capacity of each model to provide responses to the question of political instability, while pursuing the quest for justice in minority societies. The series also addresses the place of cities in the management of diversity, as well as the question of migration more generally and the issue of communities characterized by overlapping and hybrid identities. A profound sensitivity to historical narratives is also expected to enrich the proposed scientific approach. Finally, the works published in this series will reveal a common aspiration to advance social and political debates without privileging any particular school of thought.

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PETER LANG
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Introduction

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

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

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

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

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

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

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

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

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

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

Territorial federalism and multinational federalism

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

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

⁵ Schmitt, C., *op. cit.*, p. 518 ff.

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

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

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

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

Structure of the book

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

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

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

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

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

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

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

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

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

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

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

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

JCC, AGG

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

CHRISTOPHE PARENT

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

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!

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

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, it 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

¹⁴ This is one possible interpretation of the goals of the new and controversial President of the Philippines, Rodrigo 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-lived 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-units¹⁸ 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*”.

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 theory²⁴ generally considers that a confederation has five characteristics that distinguish it from other forms of association or political organization.

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

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

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

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

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

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,

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 inhabitants 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 today 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 vote 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

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 an 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-determination⁶¹? 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

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

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 Instituições Federativas No Brasil Pos-1988”, *Revista de Sociologia Política*, 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 preemptory, 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 Lincoln⁶⁷ 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

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

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

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

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,

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.

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

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 km² 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

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 Bense, 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 independence⁹⁵ or a referendum on secession⁹⁶, 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

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),

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

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 by 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

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: is 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

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 be 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.

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.”

Secession from a federation: a plea for an autonomous concept of federative secession¹

OLIVIER BEAUD

Introduction

It may appear a little impertinent for a legal expert from France – which offers the perfect example of a centralist state untroubled by the idea of federalism – to come to Montréal to talk about “seceding from a federation”. The theme is politically explosive here and also largely “pre-empted” by the well-known *Advisory Opinion* provided by the Supreme Court of Canada in 1998 on the question of Québec’s secession.² My goal here is to “delocalize” the topic – away from Québec and Ottawa – by annulling the Québec-Canada tropism.

My first reason for delocalizing the question is that the courts cannot have the last word on conceptual matters – doctrine still has a key role to play in addressing the question of secession within a federation. It is not clear, for example, that the Supreme Court of Canada has exhausted all possible avenues in its advisory opinion. Despite its shrewd approach,

¹ I would like to thank Jean-Marie Denquin for his precise and benevolent re-reading of this paper, and also my Canadian colleagues, Professor and Dean Jean-François Gaudreault-Desbiens for his invitation to Université de Montréal, Professor Gagnon for his invitation to present the paper at the UQAM conference, and Hugo Cyr for his comments.

² *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, par. 125.

I feel that the *Advisory Opinion* has the unfortunate effect of minimizing the federal issues that underlie the question of secession.

I also prefer to delocalize the question because the issue of secession is not unique to Canada. It has also been raised in the United States in recent years, both in Texas under Governor Perry, and in Vermont, where some people have called for the establishment of a second republic to avoid the state being melted down for inclusion in what could be called an Empire.³ When Donald Trump was elected to the presidency of the United States, the threat of secession was brandished in California, and in Australia the state of Western Australia was recently called the “still reluctant State”.⁴ In Europe, the question of secession has emerged recently in quasi-federal spaces. Brexit has revealed to the citizens of Europe the existence of Article 50 of the Treaty of Lisbon, updating the Treaty on European Union (TEU), under which the United Kingdom – a member state of the European Union – was able to exercise its right to withdraw from the Union.⁵ Although the word “secession” is not used, the right of withdrawal can be seen as its equivalent under the law governing international organizations.⁶ It is also hard to view the recent events in Catalonia without thinking of independence, the concept of secession in action, even though Spain is not a federation *stricto sensu*.

My last reason for delocalizing the subject is to have an opportunity to address the question of secession from the standpoint of a *general*

³ This is what can be learned from the paper by Sanford Levinson, “The 21st Century Rediscovery of Nullification and Secession in American Political Rhetoric”, in Sanford, L. (ed.), *Nullification and Secession in Modern Constitutional Thought*, Kansas, University Press of Kansas, 2016, not. p. 36 ff.

⁴ Zimmerman, A., “The still reluctant state: Western Australia and the conceptual foundation of Australian Federation”, in Appleby, G., Aroney, N., John, Th. (eds.), *The Future of Australian Federation: Comparative and Interdisciplinary Perspectives*, Cambridge, Cambridge University Press, 2012, p. 75–95.

⁵ “Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements” (Art. I-50, al. 1, TEU). The following paragraphs describe the procedure and its effects. Even though the terms of the withdrawal are to be negotiated, it can be deduced from the text that the withdrawal is unilateral, as shown by the fact that the initial decision must follow the “constitutional requirements” of the federated state rather than the rules of European law.

⁶ This is clear also in an article by Hans Kelsen, “Du droit de se retirer de l’organisation des Nations Unies” [1948], in Kelsen, H., *Écrits français de droit international*, pres. by C. Leben, Paris, Presses universitaires de France, 2001, p. 270 ff. He cannot avoid making a comparison with the right of secession, especially on p. 283–286.

theory of federation, without focusing on a single country. My starting-point for this is the judgement made by Carl Schmitt in Chapter 29 of his *Constitutional Theory*:

In the question of secession, this fundamental problem of the federation comes clearly into view. If the essence of the federation is that it should be ongoing, the entry into the federation must mean the continual renunciation of the right to secession. If, however, the federation should simultaneously be a contract and the states of the federation should not lose their independent political existence, then the federation members must remain in the position of deciding for themselves the question of the current impossibility, applicability, and annullability of this ‘contract’.⁷

Although there are many different antinomies in the political body constituted by a federation, the question of secession could be called the “antinomy of all antinomies”. It is the kind of question that frightens legal experts – a typical *hard case* – because it leads to the abyss. Is this why it has received so little attention? Possibly, but it is also important to note that cases of secession from a federation are rare and that empirical data is comparatively scarce. Given that federalism is an empirical way to prevent political unions from imploding by giving enough autonomy to certain sub-units that, in a unitary framework, could aspire to separation, the lack of data is probably normal. If we think in terms of political identity, are there not good reasons to posit that federalism provides a pragmatic alternative solution to secession, oppression or permanent dissatisfaction⁸ for minority groups?

The first factual observation that I would like to make is that there are very few studies of secession *from a federation*. Books and articles about secession *from a state* are legion, in both international public law and political philosophy, obviously because of the multiplication of cases in Europe, from the dissolution of the USSR and the former Yugoslavia to the secession of Kosovo from Serbia, all of which have attracted attention

⁷ Schmitt, C., *Théorie de la Constitution*, transl. by L. Deroche, Paris, Presses universitaires de France, 1993, p. 521–522 (*Verfassungslehre* K. 29, par. III, p. 375). Translation modified by: “Unmöglichkeit, Anwendbarkeit und Aufhebbarkeit dieses Vertrages” (p. 392).

⁸ Rubin, E., “Federalism as a Mode of Governance: Autonomy, Identity, Power and Rights”, in Lev, A. (ed.), *The Federal Idea: Public Law between Governance and Political Life*, Oxford & Portland, Hart Publishing, 2017, p. 130.

over the last twenty years.⁹ At the same time, however, a feature of this prolific literature is that it does not isolate the problem of secession within a federation. For example, in a recent Italian book on “secession and constitution, from theory to practice” (2007), there is no specific discussion about the relationship between secession and federation, even though three of the practical cases presented – the United States, the Canadian experience and the dissolution of the USSR – are tied to federalism.¹⁰ Astonishingly, in an article entitled “A ‘Federal’ Right of Self-Determination?”,¹¹ the author, a well-known German academic, fails to deal at all with the subject in the title, namely the relationship between secession and federalism. The same reticence about considering secession in a federal framework is found in the field of political philosophy. Cass Sunstein, in a study that is frequently cited, examines the relationship between secession and constitutionalism solely from the point of view of the nation, vigorously rejecting constitutional recognition for the right of secession.¹² Last, in a general overview, philosopher Allen Buchanan, author of a reference work on secession, refers to the case of Switzerland, Belgium and Canada, describing them as “multinational democratic states”¹³ but never as federal systems, instead putting the emphasis on the two adjectives that tie them to the ideas of democracy and nation.¹⁴

It would be easy to think that the literature on federalism deals more openly with the question of secession, but nothing could be further from the truth – the theme of secession is rarely addressed. One example is a book that constituted a reference when it was published: the volume

⁹ See Jovanovic, M., *Constitutionalizing Secession in Federalized States: A Procedural Approach*, Utrecht, Eleven International Publishing, 2007.

¹⁰ Tosi, D. E., *Secessione e costituzione tra prassi et teoria*, Napoli, Jovene, 2007, 350 p. The same can be said of Ferraiuolo, G., *Costituzione, federalismo, secessione: un itinerario*, Napoli, Editoriale scientifica, 2016, p. 213 (with thanks to Jorge Cagiao y Conde for sending me the book).

¹¹ Kiminich, O., “A ‘Federal’ Right of Self-Determination?”, in Tomuschat, Ch. (ed.), *Modern Law of Self-Determination*, Dordrecht & Boston, Martinus Nijhoff, 1993, p. 83–100.

¹² Sunstein, C. R., “Secession and Constitutionalism”, *The University of Chicago Law Review*, vol. 58, n° 2, 1991, p. 634–635.

¹³ Buchanan, A., “Secession”, *Stanford Encyclopedia of Philosophy online*, February 7th, 2003: plato.stanford.edu/entries/secession/.

¹⁴ He does this in order to discuss the thesis of John Stuart Mill that multinational states are incompatible with the modern notion of democracy.

edited by Arthur MacMahon, *Federalism: Mature and Emergent*.¹⁵ Not only does it contain no articles on secession, but the index offers only two references to the question. Almost at the same time – in the mid 1950s – two US professors, Bowie and Friedrich, decided to explain federalism to the Europeans who had just created the European Coal and Steel Community. They published a weighty tome, *Studies in Federalism*, translated into French in two volumes (*Études sur le fédéralisme*), that did in fact include a chapter on the defence of the constitutional order, but nothing on secession, a question that was neglected,¹⁶ or perhaps *repressed* or considered too *taboo*. It was mentioned briefly in the chapter on the “Admission of New States, Territorial Adjustments and Secession” which contained, first, a slim paragraph¹⁷ dealing essentially with the US Civil War and, second, at the end of the chapter, a single page in which the authors affirm – in a well-known formulation – that the right of secession for member states is incompatible with a *federal government*.¹⁸ In this way, the question of secession from a federation is not studied as part of the classical doctrine of federalism. The same quasi-silence is also a feature of more recent literature. In a work of ambitious scope, *Federal Vision*, resulting from a seminar organized in Oxford by Robert Howse and Kipsos Nicolaidis, secession is never mentioned, even though the goal of the book is to discuss the legitimacy of this type of governance.¹⁹ The same can be said of the seminar held in Montréal on the theme *Le fédéralisme dans tous ses états*,²⁰ which also managed to avoid the question of secession.

The silence is even more eloquent in the United States, where books on constitutional law seldom deal with secession. In the enormous commentary on the constitution, *Annotated Constitution*, edited by

¹⁵ MacMahon, A. W. (ed.), *Federalism: Mature and Emergent*, New York, Doubleday, 1955.

¹⁶ Bowie, R. R., Friedrich C. J., *Studies in Federalism*, Boston & Toronto, Little Brown, 1954.

¹⁷ *Ibid.*, p. 765–766.

¹⁸ *Ibid.*, p. 770–771.

¹⁹ Nicolaidis, K., Howse, R. (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, Oxford, Oxford University Press, 2001.

²⁰ Gaudreault-DesBiens, J.-F., Gélinas, F. (eds.), *Le fédéralisme dans tous ses états: gouvernance, identité et méthodologie*, Brussels, Bruylant; Cowansville, Yvon Blais, 2005.

Edward Corwin, the word secession is not even in the index, whether as a main entry or a sub-entry under *state*. In the US, the question of secession has a poor reputation, because it brings back memories not only of the Civil War of 1861 to 1865, but above all of the doctrines of John Caldwell Calhoun, the main political theorist of the southern states, who justified secession while fiercely defending slavery. The dark shadow of slavery and of the Civil War of 1861–1865 accompanies, and suppresses, the question of secession in the United States. A renewal of interest is timidly emerging, as reflected in the publication of a major book edited by Sanford Levinson on nullification and secession, focused on the American situation.²¹

The paucity of the “federalist” literature on secession stills provides two important pieces of information. First, it remains dominated by the misconception that secession is prohibited in a federal state but authorized in a confederation of states. This is made clear in Jellinek’s analysis of the state, in which he remarks, with respect to secession, that “political suicide is not a legal category”.²² The conceptual opposition of the two types of federation (federal state and confederation) overdetermines the question of the licitness of secession. This is not an opinion that we need to spend much time on, for several reasons. First, because a number of authors consider, not without reason, that secession is just as illicit in a confederation as in a federal state, at least if a confederation continues to be distinguished from a simple alliance.²³ Second, because a distinction between a federal state and a confederation has no bearing, in my view, on the legal understanding of federalism, meaning that I reject the further distinction between a constitution and a treaty (or confederal pact) as the legal foundation for each federative genre.²⁴ My approach to the theory of federation is based, more generally, on the thesis that a

²¹ Levinson, S., *Nullification and Secession in Modern Constitutional Thought*, Lawrence, Kansas, University Press of Kansas, 2016.

²² Jellinek, G., *Allgemeine Staatslehre*, 3rd ed., Athenaenum, 1911, p. 768. Transl. of 2nd ed. by G. Fardis, *L'État moderne et son droit*, t. II, Paris, Panthéon-Assas, 2002, p. 538–539.

²³ See the analyses by Charles Durand, in Durant, C., *Confédération d'États et État fédéral. Réalisations acquises et perspectives nouvelles*, Paris, Librairie Marcel Rivière et Cie, 1955.

²⁴ I refer to my own book, *Théorie de la Fédération*, Paris, Presses universitaires de France, 2007, chap. 2.

federative pact constitutes the legal foundation, whatever legal form the federal union then takes.

The second lesson we can draw from the literature on federalism is what could be called a negative lesson. Few legal experts have taken the time to study actual cases of secession in the history of federal countries. Setting aside the second half of the 20th century and the well-documented cases of former Yugoslavia and the USSR, and a historical attempt in Canada (Québec), it becomes clear that few legal studies, especially constitutional studies, have focused on the US War of Independence or the *Sonderbund* conflict of 1847 in Switzerland or the secession of Western Australia in 1932. Would it not be useful to examine the question of secession from a federation using these actual cases? This paper results from a partly incomplete investigation, since I was unable to complete my reading about real-life cases of federative secession, meaning that the fundamental question of how secession should be interpreted (is it or is it not admissible in a federation?) will be examined in a slightly theoretical way – but not only from a theoretical standpoint (see section 3.2) – without the substrate for the praxis which, in retrospect, I now consider essential.

However, the incomplete nature of my research does not prevent me from putting forward at least one idea, a *plea for an autonomous concept of federative secession*. In my view, the dominant literature is wrong to define secession on the basis of self-determination, and therefore to view it simply by reference to the state. Compared to “normal” secession, meaning secession from a unitary state as envisaged by the doctrine of international law, federative theory attempts to identify, in other words specify, what is meant by federative secession. My initial discussion of the legal dogma attempts to compare federative secession with secession from a unitary state (1). After this, I examine the important, and difficult, question of whether secession is admissible, or licit, in a federation, a question that is viewed from several standpoints that highlight not only its paradoxical nature (2), but also the impracticality of sanctioning attempts to achieve secession (3).

1. Defining and identifying the concept of federative secession

My approach here stems from my survey of the literature, which showed that federative secession has not been examined as a stand-alone concept. Why? I believe the answer lies in the way in which secession is viewed in the doctrine of international public law and in political philosophy, in other words essentially based on the notion of self-determination which is itself overdetermined by the notions of state and nation. My first task is to perform a critical analysis of this dominant conception of secession, and then to propose a description of secession within a federation that identifies its specific nature.

1.1 The dominant conception of secession

The dominant conception is imposed by the literature in the fields of international law and political philosophy, which considers secession to be what happens when a group claiming the right to self-determination questions its membership in the larger state.

1.1.1 *Secession seen as the aspiration of an infra-state (or infra-nation) group to constitute its own state or nation*

The doctrine of international law views the secession of a federated state as the normal case of a group leaving a state to create a new entity. Treatises on international public law examine secession as part of their study of the way in which new states form, defining it as “the amputation of part of a state’s territory, with the amputated part constituting the spatial foundation for the new state”.²⁵ The Supreme Court of Canada defined it as follows in its 1998 *Advisory Opinion*: “Secession is the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane.” (§ 83). An even

²⁵ Combacau, J., Sur, S., *Droit international public*, 6th ed., Paris, Montchrestien, 2004, p. 264. See also the definition proposed by Gérard Cahin: “the action by which a community is detached from a state to form a new state on the excised portion of the territory or, exceptionally, to join an existing state”, in Cahin, G., *La France, l’Europe et le Monde. Mélanges en l’honneur de Jean Charpentier*, Paris, Pedone, 2008, p. 41.

more restrictive definition is given by Marcelo Kohen, who sees secession as “the creation of a new independent entity through the separation of part of the territory and population of an existing State, without the latter’s consent”.²⁶ It is clear that international law specialists see secession in terms of the formation of a new state, or in other words consider only the result of a successful secession. Alongside substitution, it is one of the two modes of “the emergence of a state collectivity”;²⁷ unlike substitution, secession has the particular feature of allowing “the survival of the existing state or states”.²⁸ From a practical point of view, this really only occurs in the case of decolonization, following which “secession allows the parent state to continue in law”.²⁹ Decolonization makes it possible to justify secession, legally speaking, by admitting the “right of peoples to self-determination”.³⁰ The question that remains to be discussed is whether it is possible to admit “the right to self-determination in situations other than decolonization”,³¹ to borrow the title of a thesis. If this right is admitted, it would call into question the principle of territorial integrity that has been raised in opposition to other dependent peoples whose right to secede, unlike that of colonized peoples, has not been recognized.³²

Seen in this way, secession is *state-centric*: it describes the departure or withdrawal of a group from State A to become State B. This is logical, since international law remains broadly *inter-state*. Under this doctrine, a federation is first and foremost a state, and has no need to question its specificity or that of a secession within the state, since its “internal” constitutional structure remains the same from the point of view of international law.

²⁶ Kohen, M. (ed.), *Secession. International Law Perspectives*, Cambridge, Cambridge University Press, 2006, p. 3.

²⁷ Combacau, J., Sur, S., *op. cit.*, p. 263 ff.

²⁸ *Ibid.*, p. 264.

²⁹ *Ibid.*

³⁰ *Ibid.*, p. 266 ff.

³¹ Christakis, T., *Le droit à l'autodétermination en dehors des situations de décolonisation*, Paris, La Documentation française, 1999.

³² “The right of secession, recognized unconditionally for colonial peoples in contemporary practice, has on the contrary been constantly denied to dependent peoples who do not fall into this category by a sort of syndicate of established states, and there is no sign in the events of recent years of any sustainable legal change to reverse this situation” (Combacau, J., Sur, S., *op. cit.*, p. 268).

Political philosophers, in turn, have studied secession above all from the point of view of *legitimacy*. Unlike legal experts, most of whom³³ deny that a *right of secession* can validly exist except in the case of decolonization, philosophers tend to defend its legitimacy. We will refer here to the work of the most influential of these philosophers, Allen Buchanan. In his book on secession as a political divorce, he examines the “morality” of secession.³⁴ On what basis can a fraction of a state, or of its population, claim the right to leave that state to found another? This type of normative question requires an examination of secession from the angle of the *right to self-determination*. This can be seen clearly in the definition that Buchanan gives of secession, as “a kind of collective action, whereby a group (whether officially recognized as a legitimate political subunit or not) attempts to become independent from the state that presently claims jurisdiction over it and, in doing so, seeks to remove part of the territory from the existing state”.³⁵ Secession therefore expresses the wish of a “small” group to separate from the larger political grouping to which it belongs. Its claim is based not on individual rights but on a collective right, in other words the right of a group or grouping, generally territorial.³⁶ In fact, secession is perceived as a legitimate claim by a nation to be recognized as a nation-state. This focus on the *group* raises the question of whether an ethnic group or a people can claim a right to secession. The justification for this is not just liberal, as suggested by those who see it as a remedy, the ultimate “corrective action” when faced with oppression from a state that does not tolerate minority nations, but is often, in fact with increasing frequency, supported by a democratic justification. The only modern way to legitimize a claim by part of a people to express its wish to achieve emancipation is to allow its voice to be heard. In this case, self-determination is acquired on the basis of the decision by this emerging people that formally and objectively expresses its desire to constitute a new political entity: a *nation*. The

³³ Only a minority of legal experts defend the idea of “remedial secession”. See Van den Driest, S., *Remedial Secession. A Right to External Self-Determination as a Remedy to Serious Injustices*, Cambridge, Intersentia, 2013.

³⁴ From the subtitle of the book by Buchanan, A., *Secession: the Morality of Political Divorce from Fort Sumter to Lithuania and Quebec*, Boulder, Westview Press, 1991.

³⁵ *Ibid.*, p. 75.

³⁶ This point is highlighted by A. Buchanan who talks about “group rights” as opposed to “individual rights” (*op. cit.*, p. X–XI).

argument based on democratic principles has been analysed at length, and critiqued, by the Supreme Court of Canada in its *Advisory Opinion*.

This initial “overview” of the existing literature shows that legal experts and philosophers alike view secession as the consequence of a people’s right to self-determination, by virtue of which a socio-political group claiming to be a *people* or *nation* can successfully emerge on the international stage as a state.

1.1.2 The legal dogma on secession

The literature of international law is also interesting, since it proposes a sort of legal dogma for secession. The authors studied suggest that the act of secession resembles a unilateral right of withdrawal raised by a group with the state to which it belongs,³⁷ but that its implementation does not result in the disappearance of the “parent” state. From this first statement, however vague, arise two consequences: secession is not dissolution, and it is not devolution.

a) Secession is not dissolution

To understand this point, we need to examine the respective effects of secession and dissolution. In the first case, the creation of a new state by the seceding group does not affect the sovereignty of the state from which it secedes. Pakistan, for instance, did not disappear after its eastern portion, Bangladesh, seceded. *Secession* is therefore not the same as the *dissolution* of the state, which occurs when “the pre-existing state breaks into several new states”.³⁸ From this point of view, the collapse of the former USSR is instructive, even if there are doubts about the actual federative nature of this very unusual political entity, dominated by Russia but above all subject to the iron hand of the Communist party. First, the three Baltic republics declared their independence in 1990 and August 1991, based not on their right to secession, but on the illegal nature of their annexation by the USSR in 1940. Next, following the failed coup in August 1991, the Soviet Union recognized their

³⁷ If the parent state gives its consent in whatever way, another legal hypothesis applies, the case of a “transfer of territory”, which France, for example, has experienced many times with its overseas territories.

³⁸ Daillier, P., Nguyen Quoc, D., Pellet, A., *Droit International Public*, 5th ed., Paris, L.G.D.J., 1994, p. 500, n°346.

independence and the twelve states, including the Russian Republic, agreed to end the federation. Legally, the dissolution was defined in the Minsk Agreement, which created the Commonwealth of Independent States (Russia, Belarus and Ukraine), followed by the Alma-Ata Protocol, signed by eleven of the twelve republics (excepting Georgia). This was the basis for the claim that “the republics did not secede as such from the union, they dissolved it [...] No rule of international law prohibits the mutual dissolution of a state by its component units”.³⁹

The precedent of Yugoslavia does nothing to contradict the Soviet case. It served as the first “test” for the right of secession in a situation other than decolonization, and confirmed the unwillingness of international public law to recognize the right of secession of member states. The federative union of six states broke down in 1991 when four states (Slovenia, Croatia, Bosnia-Herzegovina and Macedonia) decided to leave the federation and proclaim their independence. In the case of Yugoslavia, the survival of the federal entity was at the heart of the opposing claims made by the former components of the federation. Serbia considered that the federation continued to exist (represented by itself), while the “secessionist” states (which in fact refused to use the term “secession”) claimed that it had disintegrated. In its response to Lord Carrington, the Arbitration Commission – known as the Badinter Commission – stated “the Socialist Federative Republic of Yugoslavia is in the process of dissolution”⁴⁰ with the result that, for the succession of the state, Serbia could not legally consider itself the successor to Yugoslavia. In addition, the Commission considered that the defection of the four member states no longer authorized the Federal Republic of Yugoslavia to claim that its authorities were able to represent its member states, as required by the federal dogma.⁴¹ A majority of international law commentators describe this fragmentation of Yugoslavia as a “process of dissolution”,⁴² resulting

³⁹ Blay, S., cited by Papartzis, P., “Secession and international law: the European Perspective”, in Kohen, M. (ed.), *Secession. International Law Perspectives*, *op. cit.*, p. 363, note 45.

⁴⁰ *Advisory opinion* n°1, November 29th, 1991, *RGDIP*, 1992, p. 265. With respect to the Arbitration Commission, see the remarks by Charpentier, J., “La Déclaration des Douze sur la reconnaissance des nouveaux États”, *RGDIP*, vol. 96, 1992, p. 344–345. See also *RGDIP*, 1993, p. 565–589.

⁴¹ *Advisory opinion* n°1, ILM 31 (1992), 1494.

⁴² Papartzis, P., “Secession and international law: the European Perspective”, in Kohen, M. (ed.), *Secession. International Law Perspectives*, *op. cit.*, p. 365.

from the fact that a majority of member states (4 out of 6) decided to leave the federation. However, a minority consider that the eighth notice of the Arbitration Commission hints that it implicitly recognized the republics' right of secession.⁴³

It is only possible to understand the interest of international law doctrine in distinguishing between secession and dissolution if we also take into account the fact that international law aims above all to “[determine] certain legal consequences pertaining to the situation after secession”.⁴⁴ Describing a separation process as a “dissolution” has the key advantage of making the principle of territorial integrity inapplicable: each new state can enjoy its own territory, with no problems for the former state which has disappeared. However, this tells us nothing about the right of the members of a federation to secede from it.

b) Secession is not devolution

One of the main questions in legal dogma is to know if secession is unilateral or not. Obviously, a lot depends on the definition. Here, we will rely on the statement by Marcelo Kohen that “the lack of consent of the predecessor State is the key element that characterises a strict notion of secession”.⁴⁵ The advantage of this definition is, in my view, that it can be opposed to another concept that is common today, *devolution*, which can be interpreted as a territorial arrangement under which State A agrees to divest itself of control over part of its territory.⁴⁶ This is why the question of consent is constantly discussed in international law. By positing a broader conception of secession, it is possible to admit the idea of a “negotiated” secession. In fact, the Supreme Court of Canada, in its *Advisory Opinion* on Québec secession, appears to be leaning in this direction.

The tension between the two approaches can be examined using the accurate observation that secession is a “process” that, within the

⁴³ Voir Murswiek, D., “The issue of a right of secession reconsidered”, in Tomuschat, Ch. (ed.), *Modern Law of Self Determination*, New York, Springer, 1993, p. 21–39. See also Blay, S., “Self Determination a Reassessment in the Post-Communist Era”, *Denver Journal of International Law and Policy*, vol. 22, 1994, p. 310–312.

⁴⁴ Kohen, M., “Introduction”, in Kohen, M. (ed.), *Secession. International Law Perspectives*, *op. cit.*, p. 6.

⁴⁵ *Ibid.*, p. 3.

⁴⁶ *Ibid.*, p. 4.

overall movement, contains two decisive phases: the *decision* to secede, and the *implementation* of the decision. In the first case, I believe we have no choice but to admit that it can only be unilateral. Secession is a separation decided and imposed by the party that wishes to leave, but the fact remains that once the decision has been made, the focus shifts to how it can be implemented. The negotiations concern the implementation of the decision, rather than the secession decision itself. This, at any rate, is how I interpret Brexit, the conceptual equivalent of secession within the European Union (the right of a state to withdraw from an international organization).

The discussion of the matter of secession as part of international law doctrine is interesting and sometimes highly theoretical.⁴⁷ It contains subtle conceptual distinctions, but whether or not these legal speculations apply to a secession from a federation remains to be determined.

1.2 Federative secession and conceptual autonomy

International law specialists and political philosophers alike reason as if a federation was a state. Because of this, I believe that they fail to account for the specific nature of *federative secession*, which results from the fact that since a federation is not a state it cannot be understood using the same concepts.

1.2.1 Why the state-centric view of secession fails to account for the specific nature of federative secession

According to the thesis I am defending here, *federative succession is an autonomous concept, because of the nature of a federation* and its legal foundation, the federative pact. Compared to a state, the nature of a federation is to be both a union of states and a political entity.⁴⁸ Because of its specific nature, a federation has a decisive impact on the nature of each member, or federated, state. A federated state represents not just a part or fraction of the total territory and population of the larger state but, unlike an intra-state group seeking secession, is in itself a *member*

⁴⁷ See in particular the thesis by Beaudouin, A., *Uti possidetis et sécession*, Paris, Dalloz, 2011.

⁴⁸ This is one of the ideas developed in my *Théorie de la Fédération* (*op. cit.*, see Part II, p. 99–193).

state, with its own territory and population. This stems from the principle of federative duality, which allows two political units, two political bodies, to co-exist within the same structure. There are two territories, the federated territory and federal territory, as well as two nationalities and two citizenships within the federal construct.⁴⁹

In terms of territory, it is enough to note that there are borders between the member states and that the first measure taken under the constitution of the Helvetic Republic, inspired by the French Directory, was to define the Swiss territory as “one and indivisible”. In Switzerland, “cessions between cantons” are possible.⁵⁰ The population is also at the heart of discussions about secessionist self-determination. In the view of the dominant international law doctrine, which thinks in terms of states, there can only be one people within a state, which runs completely counter to the conception of the Supreme Court of Canada, which allows for the possibility of a different “people” – in this case, the Québec people – within the Canadian people.⁵¹ This creates a major difference for secession within a federation: the population of the federated state concerned is *already* a people or nation, and is not seeking to become one through secession. The characteristic of a federation is to have a people of peoples, or composite people.⁵²

In addition, when a member state expresses the wish to leave the federation to which it belongs, it can *obviously* invoke the right to self-determination, since it was under its free determination that it entered the federation. As noted by Anton Greber, it has “a ‘pre-positive’ right (*vorpositiv*) to self-determination”.⁵³ In other words, in a federation, the

⁴⁹ This point has been impeccably demonstrated by Schönberger, C., in his thesis *Unionsbürger: Europas föderales Bürgerrecht in vergleichender Sicht*, Tübingen, 2005. For a summary in French, see “La citoyenneté européenne en tant que citoyenneté fédérale. Quelques leçons à tirer du fédéralisme comparatif”, *Annuaire de l’Institut Michel Villey*, 2009, n°1, p. 255–274.

⁵⁰ Dominicé, Ch., “The Secession of the Canton of Jura in Switzerland”, in Kohen, M. (ed.), *Secession. International Law Perspectives*, *op. cit.*, p. 454.

⁵¹ See Kohen, M., *Possession contestée et souveraineté territoriale*, Paris, Presses universitaires de France, 1998, p. 407–423.

⁵² This is demonstrated in the article “Das Volk in einem Bund”, in Buchstein, H., Offe, C., Stein, T. (eds.), *Souveränität, Recht, Moral: die Grundlagen politischer Gemeinschaft*, Frankfurt am Main, Campus, 2007, p. 82–91.

⁵³ Greber, A. R., *Die Vorpositiven Grundlagen des Bundesstaates*, Basel, Helbing & Lichtenhahn, 2000, p. 247.

state that wants to secede already has a legal status and certain rights. The only difference with a “subnational” entity in a state, although this is a key difference, is that it wants to reuse its self-determination to leave the federation it has joined. The situation within a federation is highly specific, because of its dual nature (federation + member states), and also derives from the nature of the legal foundation for the federation, the *federative pact*. Member states are not subject to a constitution, as are the communities or territorial units of a unitary state. They are the true authors of the federative constitution, because they not only helped draft it, but also, above all, gave it effect by ratifying it. In other words, after entering the federation by signing a pact with the other member states, a federated state can claim an entitlement to free itself of the federative links by breaking the pact it signed with the other federated states that gave birth to the third party known as the federation, if it considers, at its own discretion, that the functioning or evolution of the federation does not match the goals of the federative pact.

For such a member state, secession does not have the same meaning as for an infranational group aiming for secession from a state. It is not trying to *become* a sovereign state, but to *become once again* a sovereign state, in other words what it was before it began its federal adventure, or even to continue being the sovereign state it claims to be within the federation⁵⁴ after signing the federative pact or asking to be admitted to an already-created federation. In other words, while secession in international public law leads to a presumption of illicitness because it undermines the principles of territorial integrity (the corollary to state sovereignty), the presumption is reversed in a case of federative secession. The member state already has a defined population and territory, and belongs to a federation whose defining feature is that it is based on a political duality; the federation and its member states coexist in the same framework without it being possible to claim a hierarchy between the two political entities, or in other words a right held by the federation to command the member states. So, unlike a secession “from” a state, a federative secession involves a political body, the federated state, recovering the integral political existence it previously enjoyed by separating from the unit it helped to form or joined.

⁵⁴ In its *Advisory Opinion* of 1998, the Supreme Court incidentally refers to Québec as a sovereign state, clearly marking the “state” credentials of a community that is a member of a federation.

In short, it appears that the originality of the federal situation – its structural duality (federation and members states) – inevitably colours the question of secession. The conceptual autonomy of the federation necessarily leads to the conceptual autonomy of any secession from the federation. This type of secession must be given a different name, and this is why I refer here to a *federative secession* as opposed to *secession from a state*. The difference between the two can also be seen as a difference of perspective: the dominant international law doctrine views secession in terms of its outcome, the creation of a new state (in spatial terms, “downstream”), while the theory of federation sees it as the *departure* of a state which changes the composition of the federal institution (in spatial terms, “upstream”). Without ignoring the consequences of secession, from the point of view of the doctrine they are secondary matters.

1.2.2 *Dogma on federative secession*

Federative secession can only be fully appreciated if it can be distinguished from other similar concepts. The first step is to clearly identify from what a political entity is separating when it secedes from a federation.

a) Federative secession and intra-federative secession

In the sense in which it is used here, federative secession is the separation of a member state from the federation to which it belongs. However, in a federation, another hypothesis can be considered: when, within a federated state, a socio-political group wants to become a new federated state. In this case, the secession divides the federate state. This is not just a hypothetical possibility, since it actually occurred in the United States during the Civil War when a non-secessionist part of Virginia wanted to join the Union in 1861; it separated from Virginia to create West Virginia after being admitted to the Union by Congress in 1862.⁵⁵

More recently, a highly documented case in 1978 involves the birth of Jura as the twenty-third canton of the Helvetic Confederation (Switzerland). It resulted from the scission of part of the canton of Berne, called the “Berne Jura”. The separation relied on a mixed process, based

⁵⁵ All the relevant historical documents can be found on the website: www.wvculture.org/history/statehood/primarydocuments.html.

on both federated and federal law. Legally speaking, the creation of the new canton appears to derogate from the principle of the intangibility of the cantons. The competent authorities took endless precautions to ensure that the scission did not follow the course of a unilateral secession, since it had been “authorized” by the Confederation and its authorities.⁵⁶ The procedure took place at two levels: the cantonal level, with a referendum in the canton of Berne (in 1970) to accept the principle of referendums for the two parts concerned (the North and the South of the Swiss Jura), and a series of referendums, the first of which that was favourable to self-determination taking place on June 23, 1974 (the so-called act of free disposition in the preamble to the Jura constitution) that made it possible to determine the districts willing to found a new canton, and those that wished to remain within the canton of Berne. Last, a constituent assembly for Jura was formed and, in 1977, adopted a constitution that was approved by the populations concerned. At the federal level, the procedure involved the issue of a federal guarantee for the cantonal constitution of Jura and a decision by the federal assembly (March 9, 1978) proposing a revision of the federal constitution that was approved by a federal referendum on September 24, 1978.⁵⁷ As a result, the Swiss constitution was amended in two places. In article 1, Jura was added to the list of the 22 previous cantons, and in article 80, the number of members of the state council was increased from 44 to 46 because each canton has two delegates.⁵⁸ Following this, “the entry into ‘sovereignty’ of the republic and canton of Jura was set for January 1, 1979”.⁵⁹ The quote marks are necessary for “sovereignty” since, despite the wording of the Swiss constitution (former article 3, Const. 1874), “the Swiss cantons are not sovereign states”.⁶⁰ The new canton did not leave the Swiss federation, but only the canton of Berne.

⁵⁶ For the details of the procedure, see Aubert, J.-F., *Traité de droit constitutionnel suisse. Supplément*, n°544–552, p. 58 ff.

⁵⁷ See the federal order of 9 March 1978 (*FF* 1978, I, 663) and its acceptance following a constitutional vote (*FF* 1978, II, 1278). The text of the revision is in Kölz, A., *Quellenbuch*, t. II, p. 469.

⁵⁸ The text of the constitution of Jura dated 3 February 1977 is in Kölz, A., *Quellenbuch*, t. II, p. 98 ff.

⁵⁹ Dominicé, Ch., “The Secession of the Canton of Jura in Switzerland”, in Kohen, M. (ed.), *Secession. International Law Perspectives*, *op. cit.*, p. 456.

⁶⁰ *Ibid.*

To set it apart from federative secession, I have applied the name of intra-federative secession to this splitting of a member state into two parts following the departure of part of a federated entity to create a new federated unit within the same federation. This is not a federative secession in the sense that I use it here, because the entities that secede intend only to change their status within the federation,⁶¹ without leaving it to become a separate state. In other words, the division occurs within a federated state, and not within the federation. Intra-federative secession concerns the member state and not the federation; it results in an increase in the number of the federation's member states, while federative secession has the opposite effect by causing a reduction.

b) Secession of a member state and exclusion of a member state

One of the particular features of federative secession is the effect it produces. Secession from a unitary state mainly affects part of its territory and population (as I have said, constituting an amputation). Federative secession, on the other hand, affects the federation more, because it modifies its composition and reduces the number of its members by the number of secessionist portions. This decrease in the number of federated entities resembles the exclusion of a member state, which also results in a loss to the federation's substance.

The similarity between the two actions concerns the "disaffiliation" of the member state from its federation and the fact that it is caused by what could be called a serious loss of confidence. In the case of exclusion, a majority of member states agree to separate from a member that they consider undesirable for a serious reason, while in the case of secession, one or more members of the federation no longer have confidence in the federal authorities' ability to represent them and want to return to their former status of monad-state. The difference between secession and exclusion is, however, clear if the criterion of initiative is taken into account. In the first case, the member state makes a decision alone to leave the federation while, in the second case, the decision is made by the federation which decides, on a majority basis, to exclude one of its

⁶¹ The case in which the two types of secession would coincide would be if the part of the federated state wanted to leave not just the federated state, but also the federation; for example, if the Swiss canton of Jura had also wanted to become part of France.

members. In addition, the justification is not the same: secession is based on the principle of self-determination, while exclusion is a manifestation of the disciplinary power a federation holds over its members, a power that exists in any institution that holds disciplinary rights alongside statutory rights.

However, it is striking to see the general reticence to consider secession and exclusion as licit actions. We will come back to the case of secession, but here I will briefly address the reasons for which a federation cannot exclude, or expel, one of its members at its own discretion. It is even considered in Switzerland that it is not “within the power of the constituent [power of constitutional revision] to expel a canton”,⁶² apparently because the Swiss federal constitution guarantees the existence of the cantons (and their territories). This affects even the power of constitutional revision, and highlights the goal of stabilizing the composition of the federal family. This element of federal public order is corroborated by another rule that prevents the cantons from making agreements between themselves to unite or merge, which would upset the balance between the cantons defined by the federative pact.⁶³ It can therefore be considered that the expulsion of a member state from the federation is illicit, since it would ignore the “teleology of the federative pact”.⁶⁴ On the other hand, the voluntary departure of a member state from a federation may be based on far stronger reasons, as we saw earlier.

c) Unilateral or non-unilateral secession?

We saw above that secession from a unitary state may be analysed in a strict sense as a unilateral action resulting from a decision by a group to leave the state to which it belongs. In my view, there is no reason to consider things differently in the case of a federation. We can apply the idea examined above, according to which secession is a “process” (M. Kohen) that has a certain duration and involves a series of actions.

⁶² Aubert, J.-F., *op. cit.*, t. I, n°561, p. 214. Technically, this type of prohibition is interpreted as limiting the power of constitutional amendment, since that power cannot be used to freely amend the former Article 1 of the 1874 constitution, which listed the cantons limitatively. Legally speaking, the federal constitutional lawmakers cannot “remove” the name of a canton, while as we have just seen, in the case of Switzerland, they can easily add one.

⁶³ As noted in Aubert, J.-F., *op. cit.*, t. I, n° 541, p. 207.

⁶⁴ Greber, A., *op. cit.*, p. 248.

Concerning the actual secession decision, it is clearly unilateral in the sense that it does not require the consent or agreement of any other party.

If one follows, and generalizes, what was decided by the Supreme Court of Canada in its 1998 *Advisory Opinion*, this unilaterality is not constitutionally licit. The Court sees a unilateral action of secession as “the right to effectuate secession without prior negotiations with the other provinces and the federal government” (§ 86, p. 264) and considers that the underlying constitutional principles of the *Constitution Act, 1982* oppose this legal claim. For now, its conclusion as to licitness is not important, but only the fact that the Court has clearly identified the determining criterion for unilaterality: neither the federation nor the other member states need to give their consent to the decision of the secessionist entity. Just as a state facing a declaration of secession from a state-like group does not need to give consent, so a federation does not need to give consent in a case of federative secession.

On this specific point, the difference with intra-federative secession is striking, since in the latter case the federation is entitled to accept, or not accept, the secession occurring within a member state, exactly as it would do for the admission of a new state. There is therefore a process of application and authorization that is typical of intra-federative secession. This does not occur in a federative secession. The member state seeking to leave the federation does not ask for the federation’s authorization, but places it before a *fait accompli*, a little like a divorce demanded by one partner and refused by the other. As we will see, and this is the major hurdle facing federative secession, there is no third party to settle the dispute, unlike divorce in the field of civil law (the judge) and also, above all, unlike intra-federative secession. In the latter case, the authority of the federation is interposed between the member state and the intrafederated entity to decide whether or not to allow an internal secession within the federation.

However, since secession is a process, the decision to leave the federation – federative secession in the strict sense – has no effect in and of itself. The decision has to be implemented, in other words be capable of execution. Other decisions are required to give it effect. Three hypotheses arise in the second period of the process: amiable secession, refused secession, and conflictual secession.

In the case of amiable secession, negotiations take place after the actual secession decision, meaning that secession no longer appears to

be unilateral in its effect, since the players must agree on the terms of separation. This, I believe, is one possible way to interpret the decision by the Supreme Court of Canada in the *Reference Re Secession of Québec*. It proposes a model for a peaceful departure.

A second case is more specific, and concerns the federations that were at the same time British dominions. In both Canada and Australia, a member state decided unilaterally to secede, but saw its decision rejected by the British crown, in other words by the Empire. We learn incidentally in the 1998 *Advisory Opinion* that just after the *British North America Act* was passed, Nova Scotia decided to secede and its Premier at the time, Joseph Howe, travelled to London to obtain endorsement for the decision by his province to leave the recently-formed Canadian federation. However, he was rebuffed by Her Majesty's government.⁶⁵ The same thing occurred in Australia with the secession of Western Australia in 1932. In December 1932, the parliament of the federated state decided to order a referendum on the question of whether Western Australia should stay in or leave the Australian federation. The referendum was held on April 8, 1933 and a majority voted for secession (138,000 for and 70,000 against).⁶⁶ The result of the vote was surprising, given that on the same day the electorate, whether facetiously or in a state of contradiction, elected an opponent of secession to lead the state government. It is as if on the day of the Brexit vote, the British electors had elected to the House of Commons the party led by Cameron, an adversary of Brexit. The new head of government, however, decided that he could not oppose the popular will or ignore the referendum result. The political authorities and the government of Western Australia had three choices: to confirm the decision by opting for unilateral secession and independence; to follow the legal process and obtain a revision of the Australian constitution (section 128) to change the composition of the member states; or to petition the British parliament to obtain an amendment to the Australian federal constitution. Western Australia chose the third solution, and submitted a petition, along with a delegation to London to plead the cause of

⁶⁵ *Reference re Secession of Québec, op. cit.*, par. 42.

⁶⁶ Based on the previously cited article by Zimmerman, A., "The still reluctant state: Western Australia and the conceptual foundation of Australian Federation", in Appleby, G., Aroney, N., John, Th. (eds.), *op. cit.*, p. 79–82. We haven't been able to consult the work of Craven, G., *Secession: The Ultimate States Right*, Melbourne, Melbourne University Press, 1986 (with thanks to Nicholas Aroney for informing me of its existence).

succession. However, the British authorities refused to allow grant the petition of the secessionist state of Western Australia, on the grounds that constitutional conventions did not allow an amendment to the legislation of a dominion with respect to its internal affairs without the consent of the government of the Dominion of Australia. In other words, secession, in the form of an amendment to the Australian constitution via an act of the parliament in Westminster, required prior approval from the Australian federal government. Both of these examples prove that unilateral secession can be rejected by an interested third party. From this point of view, it is clear that the sovereignty acquired by Canada in its constitution of 1982 changes the situation, since there is no longer the possibility of an appeal to London to arbitrate the case of Québec's secession.

On the other hand, when unilateral secession is refused by the federation (and in particular by a majority of the other member states), it can lead to a conflictual secession. This is the case we will look at in the second part, which examines whether or not a right of secession exists.

d) The effects of secession: secession and dissolution

As we saw above, the doctrine of international law distinguishes between secession and dissolution, because dissolution leads to the disappearance of the existing entity, while secession maintains the so-called parent state (the state which the secessionist entity leaves). The two emblematic historical cases are the disappearance of the USSR and Yugoslavia resulting from the departure of their member entities.

The same analysis appears to apply to the ideal-typical case of secession in the United States in 1861. Based on the ideal-typical interpretation of this event, secession without dissolution is possible. The northern states remain united and therefore the Union remains viable, despite the amputation of the southern states, which do not intend to dissolve the union based on the wording of their unilateral acts to break away from the Union. For example, South Carolina, the first state to secede in December 1860, states that it wishes to dissolve the union with "the other states of North America".⁶⁷ This is proof that the federation of the

⁶⁷ See the conclusion to the first grand Ordinance of Secession, issued by South Carolina on December 24th, 1861. It reads as follows: "We, therefore, the People of South Carolina, [...] have solemnly declared that the Union heretofore existing

United States of America is broken into pieces; it is no longer united, but divided into the southern states and northern states.⁶⁸ South Carolina wants to break its ties with the northern states, and claims the right to become a “free and independent State”. The effect of this secession is to make the former member states, up to then “sister states”, strangers to one other. From this point on, the northern states are “foreign” in the eyes of the South.

To summarize the previous discussions, federative secession can be provisionally defined as the action by which a member state decides unilaterally to leave the federation to which it belongs. The decision does not necessarily lead to the annihilation or dissolution of the federation, provided that secession does not prevent the federal union from continuing to exist despite losing one of its member states.

2. Deciding the licitness of federative secession: neither authorized nor prohibited (like secession from a unitary state)

Now that we have isolated the concept of federative secession, we can turn to the question of whether it is licit. In other words, does a member state have a right to leave the federation? This is the type of hard case that legal experts sometimes like to address, but it would be a mistake to believe that all legal experts, even the most theoretically inclined, would consider this a “hard” case. For example, Hans Kelsen sees no difficulty at all. In his view, secession is licit if it is provided for, and therefore authorized, in the federative pact (under specific conditions), and illicit in all other cases.⁶⁹ This position is coherent in philosophical

between this State and the other States of North America, is dissolved, and that the State of South Carolina has resumed her position among the nations of the world, as a separate and independent State” (avalon.law.yale.edu/19th_century/csa_scarsec.asp).

⁶⁸ The Ordinance of Secession of Virginia, dated April 17th, 1861, ratified by a referendum on May 23rd, 1861, mentions the dissolution of the bond with the other states: “Now, therefore, we, the people of Virginia, do declare and ordain, [...] *the union between the State of Virginia and the other States under the Constitution aforesaid is hereby dissolved*, and that the State of Virginia is in the full possession and exercise of all the rights of sovereignty which belong and appertain to a free and independent State” (www.constitution.org/csa/ordinances_secession.htm#Texas) (italics added).

⁶⁹ *Allgemeine Staatslehre*, Berlin, Springer, 1925 (Nachdruck, Wien, 1993), p. 224–225.

and legal terms since it is based on the idea that a right of secession can never be a natural right, resulting from the sovereignty of the state, but only a “positive” right, prescribed by law. Although coherent, the position is also unrealistic, given that an immense majority of federative texts do not deal with the hypothesis of secession.⁷⁰ It is true that the authors of federative constitutions find it difficult to introduce such a clause explicitly since, as noted humorously by Joseph Weiler, there is a “reluctance to talk about divorce on the wedding day”.⁷¹ On the rare occasions on which the issue is addressed in a pact, it is generally to prohibit secession, for example in the Vienna Final Act of 1820, which founded the German Confederation.⁷² In addition, the only federal constitutions that provided for secession were those adopted in the Soviet Union,⁷³ and nobody imagined that the clause would ever be effective given the massive contradiction between the principle of free secession and the real supporting pillar of the Marxist constitution: the dictatorship of the Communist Party.

However, if the question is not resolved in a legal text, legal experts can construe the rule that is supposed to apply to secession from

⁷⁰ As noted, “No federal constitution makes provision for secession” (Bowie, R., Friedrich, C. (eds.), *op. cit.*, p. 765).

⁷¹ Weiler, J., “Alternatives to Withdrawal from an International Organization: the Case of European Economic Community”, *Israel Law Review*, vol. 20, n°2–3, 1985, p. 282.

⁷² Article 5 of the Vienna Final Act (1820) states that “the Confederation has been founded as an indissoluble union” and continues “and therefore no member of the same is at liberty to secede from this union.” (“Der Bund ist als ein unauflöslicher Verein gegründet und es kann daher der Austritt aus diesem Verein keinem Mitglieder desselben frey stehen”).

⁷³ The formula is found in the *Treaty on the Creation of the USSR* in its final article, article 26, and was repeated in the 1924 constitution: “Each one of the member Republics retains the right to freely withdraw from the Union.” Next, it is found in article 17 of the 1936 constitution: “To every Union Republic is reserved the right freely to secede from the U.S.S.R.” In French, this is translated as “À toute République de l’Union est réservé le droit de se séparer librement de l’Union” (cited in the article by H. Kelsen, *op. cit.*, p. 283). Georges Scelle noted the paradoxical nature of this right in a Stalinian constitution in the preface to his thesis on federalism in Russia, since in his view it shows “the radical antagonism between the core idea of Marxism and that of federalism, while the most advanced federal political constitution we have studied, the only one that includes, at least normatively, free secession and free aggregation (the features of deep federal dialectics) is, in fact, Marxist” (Preface to De Lacharrière, G., *L’idée fédérale en Russie de Riourik à Staline*, Paris, Pedone, 1945, p. VII).

this empty space, and also from other articles in the pact or another unwritten principle.⁷⁴ This is clearly the reasoning behind the Supreme Court of Canada's approach to the secession of Québec, since there was no text it could turn to. In a classical manner, it distinguished two points of view on the possible licitness of secession: that of the constitution (constitutional law) on the one hand, and that of international public law, on the other. Its examination was therefore based on the classical opposition between domestic public law and international public law. The "international law" part of its reasoning need not concern us here, even though it is both interesting and instructive, and in our view the most persuasive. Instead, we will look at the constitutional portion. To affirm the illicitness of Québec's secession, understood as a unilateral secession, it based most of its argument on the following reasoning. First, it described secession as requiring an amendment to the constitution (§ 84),⁷⁵ and then deduced, implicitly, that this would need the agreement of the other member states and of the federation, which it interpreted as an obligation to negotiate. Last, it drew the conclusion that "under the Constitution, secession requires that an amendment be negotiated" (§ 97, p. 270). In reality, Québec could only secede if the people of the whole of Canada consented, since the constitution is the "expression of the sovereignty of the people of Canada".⁷⁶

According to the *Advisory Opinion*, the main question is whether or not secession should be interpreted as an amendment to the Constitution. It is interesting to note that the Court does not pay much attention to the most serious objection to its thesis, namely that "secession could be a change of such a magnitude that it could not be considered to be merely an amendment to the Constitution" (§ 84). As we will see below, it is reasonable to ask whether changing the composition of the federation is not in fact more than a mere amendment to the constitution.

The thesis I propose to defend here is slightly different to the position taken by the Supreme Court of Canada, although I cannot claim that

⁷⁴ For a summary of this type of argument, see Durant, Ch., *op. cit.*, p. 115.

⁷⁵ "The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation." (par. 84).

⁷⁶ The official French translation, "souveraineté de la population du Canada" (par. 85), appears to me to be clumsy because, in constitutional law, sovereignty is assigned not to the population, but to the people.

it is original. It involves the idea that secession is neither licit nor illicit, in other words neither prohibited nor permitted. More specifically, I apply the description of Anton Greber that it “cannot be either prohibited or understood as a unilateral right”.⁷⁷ This double negation – neither authorized nor prohibited – of a federative secession contrasts with secession from a unitary state, which in international public law is considered to be non-authorized.⁷⁸ In the doctrine of international public law, the question posed by secession is above all a question of fact because, if a new state is created, it is important to know how to consider the question in normative terms, integrating the idea of “juridical fact”.⁷⁹

Before showing that the specific nature of federative secession turns above all on the fact that no legal sanction can be taken against the seceding state, we would like to return to the double negation, “neither prohibited nor permitted”, which is another way of describing the antinomy included in the concept of federative secession. In other words, I believe it is necessary to deal with the question of secession based on the federal principle, unlike the Supreme Court of Canada, which only used the principle of federalism to create an obstacle to the democratic principle of self-determination. This focus on the federal principle leads me to consider that the question of democracy (or of the democratic principle) is not relevant to a decision on a case of federative secession which, on the contrary, can only be resolved using the federal principle. On the other hand, because of the ambivalence of the federal principle, it can also be used to explain why the unilateral secession of a member state cannot be admitted *a priori*.

2.1 Federative secession cannot be prohibited a priori

The literature on federative secession, in my view, too often reduces it to the sole example of the US Civil War of 1861 or, some years previously, the nullification crisis opposing Calhoun from the South and

⁷⁷ Greber, A., *op. cit.*, p. 177.

⁷⁸ Christakis, T., *op. cit.*, p. 316–317. There is no right of secession, except in the specific and now unusual case of decolonization.

⁷⁹ The goal of the thesis of Annouche Beaudouin, cited above, is to show that law is present in the reflections of international law experts on the principle of effectiveness.

Webster from the North, or Andrew Jackson.⁸⁰ Since the political issue was whether to maintain slavery (the position in the south) or abolish it (as proposed in the North), to justify secession was to justify slavery. *Mutatis mutandis*, in Switzerland, defending the right of secession of the seven conservative cantons during the Sonderbund War (1847) involved defending a certain form of conservative Catholicism. However, the question of secession from a federation must be separated from the circumstantial content of the surrounding political issues⁸¹ and analysed in itself, from the sole standpoint of federative logic.

From the point of view of federative theory, the thesis that secession has intrinsic legitimacy can be based on two extremely serious arguments.

The first is drawn from the principle of self-determination for member states, otherwise interpreted as a “right to self-preservation” that can be invoked as a last resort – a sort of *ultima ratio*⁸² – in a case of necessity, if required using the metaphor of the federative pact. Under this theory, secession is a right based on the idea that the member states of a federation have not renounced their sovereignty, which they can reclaim at any time depending on the circumstances. The theory, which encapsulates the opinion of Calhoun and his supporters, indicates that federated states do not renounce their sovereignty or consent to unlimited submission to the government created by the initial agreement. If, at any time, the federal government, in exercising its authority, exceeds the powers given to it, each state is entitled to determine itself the nature and scope of the measures needed to remedy the situation. The measures include, in addition to a revision or annulment of the constitution, “the ultimate remedy, secession, and following the logic of a close reading

⁸⁰ Voir sur ce point Feldman, J.-Ph., *La bataille américaine du fédéralisme. John Calhoun et l'annulation*, Paris, Presses universitaires de France, 2004 (an abridged version of his law thesis).

⁸¹ This is one of the contributions made by the book by Allen Buchanan which shows, for example, how defending the Union took precedence for Lincoln over the abolition of slavery (*op. cit.*, p. 1). He cited his open letter to Horace Greeley in 1862, after Greeley criticized him for not declaring the emancipation of slaves in Union-held territory, in which he wrote “My paramount object in this struggle *is* to save the Union, and *is not* either to save or to destroy slavery.”

⁸² The expression “self-preservation” is borrowed here from J.-Ph. Feldman, commenting a passage from a letter written by Calhoun in January 1833: “We must not think of secession, but in the last extremity”, letter to Preston, January 1833 (cited by Feldman, J.-Ph., *op. cit.*, p. 842).

of the constitution, this measure was perfectly legitimate”.⁸³ Based on this reasoning, the initial expression of sovereignty is the signing of a federative pact, but the pact is not a constitution in the sense of a constitutional law that binds the newly-federated states by imposing absolute obedience. The federative pact is based on the supposition that the federating states have a form of sovereignty that is latent and can re-emerge at any time if the states consider that the aims of the pact have been violated by the federation. This type of pact also includes the supposition that a federative constitution is not of the same nature as a unitary constitution and that the fact that it is initially entered into as an agreement – through an “accord” or “pact” between the federating units – has repercussions on the degree to which the member states are bound by the pact. This argument, the strongest advanced by the partisans of secession, highlights the symmetry that should exist between entering and leaving a federation. The principle of free aggregation and the free signing of a federative pact corresponds to the principle of free departure, or freedom to leave the federation for an overriding reason.

The second argument is drawn from the fact that this sovereign prerogative illustrates the *founding equality* that must exist between a federation and its member states, so that neither is subordinated to the other. This idea underlies much of the reasoning of John Calhoun when he describes the constitution of the United States as a *compact*, and it was also defended a century later by a legal scholar, Kenneth Wheare, who wrote a reference work on federalism, based on the principle of *coordination* between the legal orders, which I prefer to call *federative parity*. On the one hand, he denies that the moderate solution of annulment can be compatible with federalism, since it subordinates the federation to its federated units, but on the other he authorizes the radical solution of secession for the following reasons:

The right of secession [...] claims that states may decide whether or not they will be members of the union. They can choose whether they will submit to the laws of the general government entirely and without exceptions, or whether they will reject the authority of the general government entirely. The right to secede does not make the general government the agent of the states as does the right to nullify; on the contrary it recognizes that the general government is to be either co-ordinate with a state government within the area of the state, or is to have no connection with it.

⁸³ Barker, A., *La guerre de Sécession*, Paris, Seghers, 1961, p. 163.

But while the existence of a right to secede unilaterally or a right to expel unilaterally may be quite consistent with federal government, it is not, I believe, consistent, as a rule, with good federal government. It is well not to exaggerate. There are cases where to grant the right to secede is to ensure that states will never exercise it. But as a rule it weakens government. It places a weapon of political coercion in the hands of governments which they may use in order to get their own way.⁸⁴

To illustrate the fact that the right of secession, if officially recognized, weakens the federation and reveals a bad federation, Wheare takes the paradoxical example of the USSR which recognized Ukraine's right of secession. He adds sarcastically that such a right was officially recognized where "the exercise of the right is least likely to be permitted".⁸⁵ The argument of this English legal specialist is based on two key points: secession is licit in a federation, but to give it prior recognition weakens the federation. The most interesting point in his argument is the justification for this prerogative: since the federal order is *juxtaposed* with but not superior to the federated orders, the federation has no general and absolute right to be obeyed by the federated states. Interpreted in this way, as opening up the possibility of ultimate disobedience by the member states, the right of secession illustrates the principle of federative parity. In other words, the secession of a federation member cannot be prohibited by law even though, in actual fact, as pointed out by Wheare, the political use of secession is bad.

Here, the distinction between law and fact does not cover the same ground as the Supreme Court of Canada, which considers secession as contrary to law but able to succeed in fact. This is how it described, in a critical manner, the way in which the doctrine considers the principle of effectivity (§ 106), lucidly recognizing that "this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession" (§ 106). Wheare takes the opposite stance: secession may be licit, but it may also be a poor decision and a poor way to govern the federation.

It will perhaps appear surprising that I have excluded the democratic principle from the list of arguments justifying secession, since it has clearly become the principle the most often advanced to support the

⁸⁴ Wheare, K. C., *Federal Government*, Oxford, Oxford University Press, 1963, p. 87. He makes a clear distinction between the legality and opportuneness of secession.

⁸⁵ *Ibid.*

right to secession, whether from a federation or a unitary state. Under the democratic principle, which is the principal legitimizing principle for power in modern federative republics, procedures organized within a federated state must allow the people to express its will, clearly and on an ongoing basis. If, at some point, the same people manifests, in an unequivocal and repeated way, its desire to leave the federal union, a serious conflict arises between the democratic principle, as it applies in the federated unit, and the principle of membership in the federation and its corollaries (the duty of federal fidelity, the duty to respect the federal constitution, etc.). The conflict becomes unsustainable over time, since membership in the federation is meaningless if it requires the federated people to abandon the democratic principle. This principle of democracy, used here with the meaning of sovereignty of the people, is not only a principle that supports legitimacy – under which the governing powers act “on behalf of the people” – but also a constitutional and effective principle that indicates that the people retains political control over its own fate.⁸⁶ The people can either give the leaders it elects responsibility for making decisions in its place or, on rarer and more solemn occasions, take responsibility itself (in a referendum) for definitively settling politically important questions such as decisions about secession.

Readers will, of course, realize that I have assigned sovereignty here to the “federated people”, the people of the member state, since, as we have seen, it is not possible to imagine a federation without a plurality of peoples, without a plural understanding of the federative people.⁸⁷ This view can be challenged – and has been on many occasions – by claiming that the majority/minority division that structures the democratic principle has moved into the federal space and no longer applies within the territorial framework of the federated sphere, but within the broader framework of the federation, meaning that one or more federated peoples must yield before the majority of votes expressed by the other federated peoples within federative structures. However,

⁸⁶ As J.-M. Denquin points out, “what legitimizes democracy is the right of citizens to become involved in their own affairs and express their views on decisions that will affect their lives”, (Denquin, J.-M., *La monarchie aléatoire*, Paris, Presses universitaires de France, 2000, p. 123–124).

⁸⁷ See Hannebeck, A., *Der demokratische Bundesstaat des Grundgesetzes*, Berlin, Duncker u. Humblot, 2003, who offers a pluralist reading of democracy under the German Basic Law, and gives new meaning to the concept of the *Landesvolk* (federated people) as opposed to the *Bundesvolk* (federal people).

this shifting of the application of the majority/minority division ignores the federative logic⁸⁸ that structures the political and legal space of the federation, which is built around the duality of powers (federal and federated). There is no longer any true democracy in a federated state if it is clear that the people have definitively and *irreversibly* given the federal authorities responsibility for deciding its political fate in its stead. If the federated people can no longer oppose the federal decision, it has lost its sovereignty. Or conversely, political life no longer exists in a federated unit if existential decisions are made only at the federal level⁸⁹ and if, as a correlation, the people of the member state loses its ability to determine “its” policies. From this point of view, the so-called law of participation, under which member states, through their representation in the federal authorities, play a part in the exercise of the federal will, can never offer an adequate substitute for the dispossession of democratic power.⁹⁰ Self-determination has greater weight when institutions at the federated level are democratized, and democratization gives the people of each federate unit a greater role to play in the institutional balance. For example, a referendum at the federated level that expresses a clear and affirmative desire for separation from the federal entity is a factor to be taken into account under constitutional law.

This was recognized, tellingly, by the Supreme Court of Canada, when it observed with respect to Québec that “the clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed”.⁹¹ The Court’s argument is subtle, since it

⁸⁸ To admit this is to deny the principle of federative plurality, and therefore to transform the federation into a state.

⁸⁹ This is the problem that is totally ignored by Carl Schmitt in his own theory of federation. He sees the existential aspects of politics only through the right to wage war, while democracy is more than the right to die for one’s country. For more on Schmitt’s blindness to the reconciliation of democracy and federalism, see the persuasive arguments of Greber, A., *op. cit.*, p. 191–193.

⁹⁰ It is perhaps time to challenge the central role of the law of participation in the legal dogma on federalism, following the lead of A. Greber in the first chapter of his book (*op. cit.*, p. 12–19).

⁹¹ *Reference re Secession of Québec, op. cit.*, par. 88.

places on the other member states an obligation of understanding or benevolence towards the people of the recalcitrant member state trying to recover full sovereignty through secession, in the name of the democratic principle of popular sovereignty within the federated framework.⁹²

However, despite the resonance and strength of the democratic principle, I do not believe that it can be used to explain the meaning and scope of secession within a federation. It is important to distinguish, here between, the state and its form of government. If a right of secession exists in a federation, it belongs to the federated state or member state, and not to its organs or the sovereign people. The state makes the decision on secession, and it is not necessary for it to be a democratic state. For example, in the 19th century, Prussia seceded from the German Confederation while it was still a monarchy. The key factor is the decision made by the member state, whoever makes it and legitimizes it. Obviously, in the modern world, the democratic principle legitimizes the decision to secede, but it is not an essential element in the definition of the concept, given that it is possible for a monarchy, as a member state in a federation, to have a right of secession.

To summarize this first argument, secession cannot be truly prohibited, since the prohibition would infringe the constitutional principles that are inherent to the existence of the federation and that ensure that the federated entities are not merely territorial communities subordinated to the central power, and therefore subject to absolute obedience. At the same time, it cannot be authorized, and this is the paradoxical nature of the situation.

⁹² “However, we are equally unable to accept the reverse proposition, that a clear expression of self-determination by the people of Quebec would impose *no* obligations upon the other provinces or the federal government. The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. This would amount to the assertion that other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of Quebec. Such a proposition fails to give sufficient weight to the underlying constitutional principles that must inform the amendment process, including the principles of democracy and federalism. The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others” (*Reference re Secession of Québec, op. cit.*, par. 92).

2.2 *The impossible licitness of unilateral federative secession*

Jean-François Aubert writes that “with respect to secession, we scarcely need note that the cantons do not have the right to declare it unilaterally”.⁹³ This statement is interesting, since it indicates that for a legal expert commenting on a federal system, the prohibition on unilateral secession is self-evident. I will attempt to examine this in more detail, using the discussions that Anton Greber has devoted to the “statutory” nature of the federative pact which affects the perception of secession. This examination of the licitness of federative secession should not be assessed solely on the basis of international or constitutional law,⁹⁴ but above all on the nature of the federative pact, which can have as many hybrids as federation itself.⁹⁵

It is too often overlooked that the specific legal nature of the federative pact is that it is an institutional, or “statutory”, pact. It results from an agreement, and presupposes that the parties were autonomous and that all members signed it freely. Once signed, however, the pact acquires traits that are no longer strictly contractual, to the extent that it creates an “institution”, an organization that gives its members specific status, rights and duties that clearly relativize their claims to autonomy. As a result, a pact of this kind is different from an ordinary contract, as has been recently demonstrated convincingly by Anton Greber. It is also a pact that cannot be dissolved as simply as an ordinary contract for a sustainable exchange of sustainable deliverables. In the case of a private contract, it is possible to renounce a deliverable, while if a statutory pact is dissolved, the “existential link” between the parties to the pact is broken.⁹⁶ This existential dimension of the federative pact has legal

⁹³ Aubert, J.-F., *op. cit.*, t. I, n°561, p. 214.

⁹⁴ As was done by the Supreme Court of Canada, obviously based on the “means” suggested by the parties involved in the Québec secession case.

⁹⁵ This hybrid is the statutory pact, which ranges from “legal community” to “legal person” and cannot be understood in terms of private common law (Greber, A., *op. cit.*, p. 176 and note 511, p. 176). On the question of the federative constitution as a pact, see my article “La notion de pacte fédératif. Contribution à une théorie constitutionnelle de la Fédération”, in Mohnhaupt, H., Kervégan, J.-F. (eds.), *Liberté sociale et contrat dans l’histoire du droit et de la philosophie*, Francfort, Klostermann, 1997, p. 197–270.

⁹⁶ A kind of “de-linking”, in German: “ein Ausscheiden aus einer existenziellen Bindung” (Greber, A., *op. cit.*, p. 177).

scope, just as the details of a marriage contract affect the way in which divorce is envisaged (the conceptual equivalent of secession).

The first major consequence of the statutory nature of the federative pact concerns the effects of secession on the pact. Federative secession is often presented as having the effect of dissolving the federation, establishing equivalency between secession and the annihilation of the federation. This equivalency, however, is questionable. Legally speaking, secession has an apparently more limited effect, which is to change the composition of the federation. As we saw previously, the analogy with the exclusion of a member state or the admission of a new member state is clear. However, a change of this kind can be considered as major and highlights a significant element in the difference between a federative pact and an international treaty.⁹⁷ Why, we ask, is this change, the voluntary departure of one of the contracting parties from the federal group, legally considered as an amendment that always requires a formal revision of the pact? The reason derives from the very specific nature of these institutional pacts where the “parties” do not really stand outside the pact they have signed, but are part of the “actual content of the pact” because of the close union between the authors of the contract and its object. In other words, the quality of the parties influences the signing of the contract, meaning that the signatories constitute a *substantial* element of the pact. In the event of a unilateral attempt at separation, the particularity of the statutory pact is that the law must take into consideration not only the demand of the dissatisfied party to “separate”, but also the interests of the other parties to the same pact that are directly affected by the demand. More precisely, the obligation to take the other parties to the contractual union into account arises from the obligation of loyalty towards the other contractants, which is known to have existed prior to the signing of the statutory pact.⁹⁸ The result is that secession involves negotiation to avoid it causing a radical conflict between the “unionists” and the “separatists”. For this simple reason, the “statutory” nature of the pact has an impact not only on its signing, as we have seen, but also on the possibility of amending or terminating it. If secession involves, as a last resort, a change to the persons who are “party to the

⁹⁷ *Ibid.*, p. 186–187.

⁹⁸ “The obligation of loyalty (*Treuepflicht*) extends to the procedure of separation (divorce, *Ausscheidungsverfahren*) in which the parties are bound to preserve the interests of the other parties” (Greber, A., *op. cit.*, p. 177).

pact” (partners in the pact) and if they are also an important element in the pact, then it is logical to admit that the voluntary departure of one party constitutes an amendment to the federative pact, which is not necessarily an amendment to the constitution.

Federative secession therefore poses a specific problem, compared to secession from a unitary state, since the latter does not call into question the loyalty of the group’s members towards each other. The idea of federative loyalty is an integral part of the pact entered into by the member of a federation. They undertake not only to respect the contract, like any other, but also to take into consideration the interests of the other parties.

The legal consequence of this is that the amendment procedure applies. As Anton Greber writes, “the federative pact differs from the international treaty in that the withdrawal of a member (*Ausscheiden*) is equivalent to an amendment to the pact, and is therefore subject to the normal amendment procedure”.⁹⁹ However, in a federal context, an amendment necessarily requires a decision by the other member states, whether unanimously or on a qualified majority vote. It is clear that the logical conclusion leads to a prohibition of unilateral secession, of the type claimed by Calhoun that is inherent to the concept of secession as outlined above.¹⁰⁰ It is important to note in passing that it was to resolve the impassable gulf between the democratic principle and the federal principle – between secession and the maintenance of the federation – that the Supreme Court of Canada concluded on the need for a “negotiated secession”¹⁰¹ in a key paragraph of its decision (§ 104) that is worth citing at length:

Accordingly, the secession of Quebec from Canada cannot be accomplished by the National Assembly, the legislature or government of Quebec unilaterally, that is to say, without principled negotiations, and be considered a lawful act. Any attempt to effect the secession of a province from Canada must be undertaken pursuant to the Constitution of Canada, or else violate the Canadian legal order. However, the continued existence and operation

⁹⁹ *Ibid.*, p. 186–187.

¹⁰⁰ As Greber notes, “a unilateral withdrawal must be understood *eo ipso* as a violation of the pact entailing the legal consequences set out in the federative pact” (*ibid.*, p. 187).

¹⁰¹ The obligation to negotiate is the point of equilibrium reached by the Supreme Court of Canada (par. 104).

of the Canadian constitutional order cannot remain unaffected by the unambiguous expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The primary means by which that expression is given effect is the constitutional duty to negotiate in accordance with the constitutional principles that we have described herein. (§ 104).

As noted by Anton Greber, the Supreme Court did not rely on a theoretical analysis of the federal state.¹⁰² The “duty to negotiate” leads us to consider secession as a consent-based secession that, I believe, can take the shape of an informal amendment to the federative constitution. This is where I diverge from the analysis of Anton Greber, who requires a “revision of the Constitution”.¹⁰³

The current trend is to encourage peaceful forms of divorce from a federation, in other words to aim as far as possible for a secession based on mutual consent to avoid the potential tragedy of a non-negotiated secession that can lead to armed conflict, made even more painful and violent because it is a fratricidal conflict between confederates. However, the term “negotiated” or “consent-based” secession raises a major conceptual problem, because it changes the legal nature of secession from unilateral to “bilateral” and “agreement-based”.

Redefined in this way, secession can be licit and recognized in both a federation and a unitary state, the only question being whether it is still secession. After examining the paradox that secession – as a unilateral action – can be neither prohibited nor permitted, we still have some surprises in store, since the ultimate problem raised by federative secession is the question of whether or not it can be sanctioned. What can the federation and its member states do to oppose a secession that they do not support?

3. The impossibility of imposing a legal sanction on federative secession

The possibility of imposing a sanction following a decision by a member state to secede from a federation can only be considered in

¹⁰² “Ohne überzeugende Argumentation, die sich auf eine staatsrechtliche Konstruktion des Bundesstaates”, dans Greber, A., *op. cit.*, note 1, p. 247.

¹⁰³ “Verfassungsrevision”, in Greber, A., *op. cit.*, note 1, p. 248. He adds: “Secession must lead to an agreement (*Einigung*) endorsed by an amendment to the Constitution.”

light of federative law, which contains two mechanisms authorizing the federation to interfere in the affairs of a member state and, ultimately, to impose constraints on a recalcitrant member state. Once we have examined this initial point, we will be in a position to answer the question of whether one or other of the mechanisms can be used to settle a fratricidal conflict between confederates triggered by a declaration of secession.

3.1 The distinction between federal intervention and federal execution

The concept of federal execution (*Bundesexekution*) is unique to Germanic doctrine (found in Germany, Austria and Switzerland).¹⁰⁴ Contemporary doctrine presents it, above all, as an atypical measure that should be seen as an exception to the normal principle governing relations between the federation and its member states, which is the principle of “federal courtesy”. It is understood that if the federated units fail to defer to the “wishes” of the federal power, the federal level has a more effective way to impose its will and ensure compliance with the federal constitution.¹⁰⁵ This explanation has the advantage of highlighting the derogatory nature of “federal execution”, which is a “means of control”¹⁰⁶ exercised by the federation with respect to its member states, and was introduced to settle cases where the good intentions of both parties to cooperate amicably no longer sufficed. However, it is also clearly marked by a hierarchical vision of the relations between the federation and the member states, in which the latter must *defer* to the instructions or orders of the federal authorities.

¹⁰⁴ The most doctrinal description is found in Kelsen, H., “Die Bundesexekution”, *Mélanges Fritz Fleiner*, Tübingen, Mohr, 1927, p. 127–187. On this point, see my article “Hans Kelsen, théoricien constitutionnel de la Fédération”, in Herrera, C.-M. (ed.), *Actualité de Kelsen en France*, Paris, L.G.D.J., 2001, p. 47–84.

¹⁰⁵ As pointed out by Aubert, J.-F., “It is enough for the federal council to ask the confederate governments to repudiate an illegal attitude that it deems illegal for them to immediately obey its ‘wish’. The invitation is a polite order” (Aubert, J.-F., *op. cit.*, t. I, n° 804, p. 303). Federal execution begins when the canton fail to obey its “wish”, or recommendation, and the execution measures are graduated, ranging from financial pressure to substitution to “military execution” (*ibid.*, n° 809 et n° 812, p. 305).

¹⁰⁶ The expression is used by Aubert, J.-F., *op. cit.*, t. I, n°813, p. 306.

Here, I plan to present federal execution differently, based on the initial observation that, with its twin, “federal intervention”,¹⁰⁷ it is one of the institutions designed to protect the federal constitution (*Bundesverfassungsschutz*).¹⁰⁸ The similarity between the two notions can be seen at two levels. First, they both describe actions that are part of internal federative law, concern relations between the federation and its member states, and are exceptional in that they clearly undermine the principle of autonomy for the member states. Whether through federal intervention or federal execution, the federation interferes in the so-called internal affairs of the member states in an imperative way, by giving orders to the federated units.¹⁰⁹ Because of these similarities, and especially in the 19th century, the two notions have often been confused. The similarities arise, first, from the fact that both are institutions of internal public law, under federative law. Their existence shows that “there is no federation that consists only of an external relation between its members and coming only under international law” and that, as a result, membership in a federation has immediate effects on internal public law (*Staatsrecht*).¹¹⁰

If this distinction was already part of German doctrine during the Weimar years, Ernst Rudolf Huber, to shed more light on the major events in German constitutional history, was forced to propose more fine-scaled definitions that we will use here. “Federal intervention is a rescue operation (*Hilfsleistung*) by the federation to help a member state threatened by actions undertaken by enemies of its constitution (*verfassungsfeindlichen*). On the other hand, federal execution is action taken (*Einschreiten*) by the federation against the member state when it violates its constitutional federal obligations.”¹¹¹ He summarizes the difference as follows: “Federal intervention is the quintessence (*Inbegriff*) of the executive measures by which a federative group (*Gesamtverband*)

¹⁰⁷ For a commentary on this concept in French, see Aubert, J.-F., *op. cit.*, t. I, n° 803 ff; p. 306 ff, which is based on comparative law observations from the United States.

¹⁰⁸ I rely here on the definitions of Huber, E. R., in the article “Bundesexecution und Bundesintervention”, *Archiv des öffentlichen Rechts*, t. 79, 1953–1954, p. 1 ff, reworked in Volume 3 of the monumental *Deutsche Verfassungsgeschichte*, p. 543.

¹⁰⁹ See the relevant remarks of Carl Schmitt in Schmitt, C., *op. cit.*, chap. 30, I, 2, p. 528–529 (*Verfassungslehre*, p. 380–381).

¹¹⁰ *Ibid.*, p. 528 (*Verfassungslehre*, p. 380).

¹¹¹ “Bundesexecution und Bundesintervention”, p. 1. The distinction is based on the example of the *deutsche Bund*, referring to article 26 in the Vienna Final Act for federal intervention and to articles 19 and 31 for federal execution.

offers assistance that has been requested, or in certain circumstances, not requested, to the government of a member state that has respected its obligations of constitutional and federal loyalty, in order to maintain or re-establish public security and public order under threat from forces hostile to the constitution.”¹¹² On the other hand, “federal execution is the quintessence (*Inbegriff*) of the executive measures by which a federative group takes action against a member state to force it by constraint to accomplish the federal constitutional obligations that it has neglected”.¹¹³ The use of the term *constraint* highlights the resemblance between these two ways in which the federation can interfere in the affairs of its member states and the constraints that the state can exercise against citizens, since a failure to respect the law results in a forced execution and therefore, if required, in the use of force.

This conceptual comparison indicates the two key criteria for use in isolating each of the two concepts that provide measures to protect the federative pact. The first is the trigger event, and the second, the procedure followed to implement the federal action. In the case of federal execution, the trigger event is the existence of a failure on the part of the federated unit to respect its constitutional commitments. The event is observed by the federation, which has the power to interfere in federated affairs by sanctioning the failure of the member state. In contrast, federal intervention does not result from a failure by the federated unit, but rather a request for assistance from the federal authority because it cannot control public order in its territory. Logically, intervention is always requested by the member state, and cannot be imposed on it, although Huber concedes that in some cases intervention may be justified even without an actual request from the threatened state.¹¹⁴ The Swiss federal pact of 1815 is instructive from this point of view, since federal intervention can be seen as federal assistance requested by the cantons, which call for the help of the federation to resolve a public order problem in a member

¹¹² *Ibid.*, p. 4.

¹¹³ *Ibid.*, p. 6.

¹¹⁴ From this point of view, the definition by Huber is questionable because it relies too much on the practice of the *Deutscher Bund*, which was extensive and open to criticism. Practice in the United States and Switzerland confirms that the request for intervention is necessary as a procedural criterion, and is the only way to preserve the autonomy of the federated state and avoid falling straight into federal tutorship.

state, either because of internal disorder (§ 4, 1st par.)¹¹⁵ or because of external attack (§ 4, 2nd par. 2). Federal intervention is therefore an institution to protect a member state. It gives the federation a role that is similar to that of a protector, and this protectorship is dangerous for state independence, especially when the federation intervenes without being asked to by a member state. This possibility is accepted by the Huber in an emergency and in exceptional circumstances, and was demonstrated by practices in the German Confederation.

Federal execution, on the other hand, is an action taken against a member state; it is a *sanction* imposed by the federation as the guardian of the federal constitution. It is applied when a member state fails to respect the pact, and when the federation observes this and implements measures to ensure compliance. In this specific case, federal execution is substituted for the normal method used to settle conflicts between a federation and its member states, which is jurisdictional arbitration. It therefore gives preference to a political solution, as compared to a jurisdictional solution, and requires careful application. This is why, in a long article in 1927 entitled “Die Bundesexekution”, Hans Kelsen stated his opposition to this federal institution, which he wanted to replace with a control based on constitutionality. In his view, the very notion of *Bundesexekution* appeared to be a primitive legal technique to sanction legal relations, a sort of residue of international law in the federal state. Kelsen wanted, as far as possible, to eliminate every remnant of international law in the construction of the federal state.¹¹⁶ Kelsen’s thesis means, simply, that a verification of constitutionality by a jurisdictional

¹¹⁵ “In case of external or internal danger, every canton has the right to demand a loyal attitude from its Confederates. When troubles break out in one canton, the government in question may urge the help of the other cantons, but the Vorort should be notified immediately; in case of an enduring danger, the Tagsatzung will, at the request of the government in question, take additional measures” (article 4, par. 1, 1815).

¹¹⁶ In his *General Theory of Law and State*, Kelsen describes the dynamic decentralization of international law concerning both the creation of law (statutes, etc.) and its application. On the latter point: “General international law leaves it to the parties to a controversy to ascertain whether one of them is responsible for a delict, as the other claims, and to decide upon, and execute, the sanction. General international law is, in this respect, too, a primitive law. It has the technique of self-help. It is the State, violated in its right, which is authorized to react against the violator by resorting to war or reprisals. These are the specific sanctions provided by general international law.” (transl., p. 375).

authority would be a suitable substitute for federal execution (seen as forced execution). This is the logical conclusion of the whole Kelsenian system of federation, and the logical endpoint for his constitutional theory.

The other interesting point in the Kelsenian doctrine is the reversibility of federal execution, which can also act as a mechanism to sanction the federation for violating the rights of the member states. In Kelsen's view, the dominant doctrine does not even consider "the possibility that an infraction can be attributed to the higher state or federative power (power of the federation *stricto sensu*)" and sees federal execution only as "a constraint that the higher state of federative power directs against a member state or individual state (*Einzelstaat*)".¹¹⁷ In defiance of this dominant conception, Kelsen considers that the constraint can also be directed against the higher state, in other words against the federation *stricto sensu*. However, this would require making the procedure jurisdictional in nature, to avoid military execution, the war that Kelsen was trying to avoid. In a way, Schmitt and Kelsen agree on this point, even though Schmitt sees federal execution as a way for the federation to sanction member states. However, he rejects the idea that federal execution can be implemented in full, to the extent of forced execution. For example, as he writes in his *Constitutional Theory*: "That the federal enforcement action is a public law, not an international law act, is essentially part of the federation character, because the enforcement action otherwise would be a war, which would contradict the essence of the federation and dissolve it."¹¹⁸

This discussion of the concepts that protect the federation and its member states shows how difficult it is to provide for a sanction against both political units: the federation and the member states. Secession raises the question of sanctions and federal execution, as illustrated below based on an atypical case of conflictual secession in the United States.

¹¹⁷ Kelsen, H., "Die Bundesexekution", in *Festschrift Fritz Fleiner*, 1927, p. 130.

¹¹⁸ Schmitt, C., *op. cit.*, p. 528 (chap. 30), *Verfassungslehre*, p. 380, 397.

3.2 The Civil War, or the division of the union institutionalized by war

Unlike the major theoretical debates, a historical examination of secession shows that the main aporia of federative secession lies in the practical means available to oppose a unilateral withdrawal. As we saw previously, the secession of Western Australia was “smoothed over”, as a first step, and then refused by the third party constituted by the British Empire, as represented by the parliament of Westminster, when it rejected the petition from the federated Australian state to obtain secession. However, this was a special case. A chemically pure case is provided in the case of the secession of the “southern” US states in 1861, which remains an open wound in American history, to the point where there is no constitutional literature worthy of the name that deals with this significant event. Although the controversy between Haynes and Webster in the House of Representatives in 1840 on the subject of slavery has been re-published, there is no book that gathers together the arguments for and against secession, just as there is no constitutional law textbook – as far as I know – that deals in depth with the secession of 1861. It will not be possible here to correct this deficiency.

However, I can highlight the irreducible views of the supporters and adversaries of secession, and also the totally impractical nature of federal execution in the event of a major constitutional conflict between the federation and its member states. The dilemma of federative secession is nowhere more evident than in the State of the Union Address given on December 3, 1860 by James Buchanan, the outgoing US President: the members of the federation perhaps had no right to leave the federation, but the federal government had no legal way to prevent them from doing so. When the Address was delivered, the Democratic Party had just lost the presidential election and President Buchanan, a Democrat, did not have the legitimacy of the newly-elected Republican President, Lincoln. This explains the lack of energy in his document; he was not in a position to impose a solution, since he was on already his way out.¹¹⁹ The document deserves close scrutiny if we want to understand the legal difficulty inherent in any federative secession. In the first part of his address, Buchanan explains that South Carolina had no constitutional

¹¹⁹ A point raised by Belperron, P., *La guerre de Sécession, 1861–1865: ses causes et ses suites*, Paris, Plon, 1947, p. 214.

right of secession. According to him, adopting the contractual theory of the constitution also meant accepting the corollary that the member states could leave the Union as and when they saw fit. This option, defended by the southern states, amounted to treating the federation (referred to be Buchanan as the “confederacy”) as if “the Confederacy is a rope of sand, to be penetrated and dissolved by the first adverse wave of public opinion in any of the States”.¹²⁰ The message was clear and matched the classic thesis of supporters of the Union: secession is illicit, in other words unconstitutional.

However, in the second part of his address, James Buchanan reviewed the legal means available to the federal authorities to fight a claim to secession from the member states. He stated that the Executive had no such means: “Has the Constitution delegated to Congress the power to coerce a State into submission which is attempting to withdraw or has actually withdrawn from the Confederacy? If answered in the affirmative, it must be on the principle that the power has been conferred upon Congress to declare and to make war against a State. After much serious reflection I have arrived at the conclusion that no such power has been delegated to Congress or to any other department of the Federal Government.”¹²¹ His conclusion relied heavily on two speeches by James Madison to the Philadelphia Convention on May 31 and June 8, 1787, in answer to the question of whether the Union could use force against a member state.¹²² His conclusion revealed the limits of federal power

¹²⁰ “If this be so, the Confederacy is a rope of sand, to be penetrated and dissolved by the first adverse wave of public opinion in any of the States”, *Fourth Annual Message to Congress on the State of the Union* (Richardson, J., *Messages of Presidents*, vol. V, p. 626–653). Taken from the website *American presidency history*: www.presidency.ucsb.edu/ws/?pid=29501.

¹²¹ “Has the Constitution delegated to Congress the power to coerce a State into submission which is attempting to withdraw or has actually withdrawn from the Confederacy? If answered in the affirmative, it must be on the principle that the power has been conferred upon Congress to declare and to make war against a State. After much serious reflection I have arrived at the conclusion that no such power has been delegated to Congress or to any other department of the Federal Government.”

¹²² The first quote is as follows: “The use of force against a State would look more like a declaration of war than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound.” The second is: “Any government for the United States formed on the supposed practicability of using force against the unconstitutional

in the face of radical opposition by a federated power: “The power to make war against a State is at variance with the whole spirit and intent of the Constitution.”¹²³ The speech showed that the Union had no “constitutional right of coercion”.¹²⁴

The result of this analysis may appear paradoxical: “although a State had no right to withdraw from the Union, the federal government had no practical means at its disposal to force it to remain against its will.”¹²⁵ In the next part of his Address, Buchanan raised, for the sake of balance, the hypothesis – that he then excluded – that the federal authority had the constitutional right to force a recalcitrant member state to obey. He described the risk of civil war and the considerable damage it would wreak. This is why, at the end of the Address, he proposes a middle way, an “explanatory amendment” of the Constitution on the question of slavery. This Address by James Buchanan, which offers a true lesson on constitutional law, highlights the impractical nature of a sanction against a member state wishing to leave the federation. The US Civil War, which began after the departure of Buchanan and the arrival of Abraham Lincoln, clearly illustrates the difficulty.

After Congress failed in December 1860 to launch a constitutional revision procedure to reach a final compromise (including the maintenance of slavery), the new President of the United States, Abraham Lincoln, who officially took office on December 8, 1860, assumed responsibility for the serious constitutional conflict caused by the concerted actions of the southern states. Just after his inauguration, South Carolina declared its secession on December 20, 1860, in an ordinance adopted unanimously by the Convention, which proclaimed at the end: “the Union heretofore existing between this State and the other States of North America, is dissolved.” The United States was presented as a union of states, from which one member claimed the right to separate. This first secession was followed, in January 1861, by the secession of several other southern states which, in addition to seceding, formed a new confederacy at the Montgomery Convention. Shortly after his official inauguration, the new

proceedings of the States would prove as visionary and fallacious as the government of Congress.”

¹²³ *Ibid.*

¹²⁴ The two remarks are brought together by J.-Ph. Feldman, *op. cit.*, p. 861. Buchanan’s speech is published in Richardson, J., *Messages of Presidents*, vol. V, p. 626–653.

¹²⁵ Lambert, J., *Histoire constitutionnelle des États-Unis*, Paris, Sirey, p. 308.

US President, Lincoln, had to face this challenge too. In his inaugural address on March 4, 1861, he listed various legal and political arguments against the claim of the southern states that they could withdraw from the Union,¹²⁶ including the impossibility of dissolving a federal union such as that of the United States. “The Union of these States is perpetual”, Lincoln stated, and “it is safe to assert that no government proper ever had a provision in its organic law for its own termination.” And he continued, “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?”¹²⁷ As a result, “It follows from these views that no State upon its own mere motion can lawfully get out of the Union; that resolves and ordinances to that effect are legally void”.¹²⁸ In another argument, secession is compared to anarchy, because it gives a minority discretion to oppose the decisions made by the legal majority and therefore denies the democratic principle that the only way to replace a political majority is through an electoral victory. “Plainly the central idea of secession is the essence of anarchy. A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people.”¹²⁹ Lincoln therefore considered implicitly that the majority/minority division had the same significance in a federal republic as in a unitary democracy. He invoked his legitimacy

¹²⁶ See the summary of the address in Feldman, J.-Ph., *op. cit.*, p. 862–864.

¹²⁷ “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?”, Inaugural Address, March 4th, 1861 (avalon.law.yale.edu/19th_century/lincoln1.asp). Excerpts from the Address are in Heffer, J., *L'Union en péril: la démocratie et l'esclavage (1829–1865)*, Nancy, Presses universitaires de Nancy, 1987, p. 200 ff.

¹²⁸ “It follows from these views that no State upon its own mere motion can lawfully get out of the Union; that resolves and ordinances to that effect are legally void, and that acts of violence within any State or States against the authority of the United States are insurrectionary or revolutionary, according to circumstances” (*ibid.*).

¹²⁹ “Plainly the central idea of secession is the essence of anarchy. A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people” (*ibid.*).

as an elected president to oppose the secessionist movement, since his election had proved the strength of the abolitionist movement. Here, Lincoln intended to express his opposition to the ideas of John Calhoun, based on the idea of an institutionalization of the rights of minorities through the idea of a “concurrent majority” to safeguard minority rights.

However, Lincoln did not just declare that secession was unconstitutional – he intended to combat it by ensuring that federal constitutional law prevailed. In other words, secession was considered as an internal public law dispute, under American federative law. He deemed the secession of the southern states to be a grave breach of the federal public order, one that the Union was entitled to suppress. This led him to describe the secessionist states as “insurrectionary” or “revolutionary”. To support this reasoning, he had to assume that the Union, despite the secession proclaimed by certain states and the loss of effective federal power over certain confederate areas, continued to exist as the legitimate federal government. As the wielder of executive power, he was entitled to his prerogatives under the federal constitution of the United States to ensure “that the laws of the Union be faithfully executed in all the States”.¹³⁰ As the President of the Republic, Lincoln believed that his duty was to ensure that the Union could “constitutionally defend and maintain itself”.¹³¹

This duty authorized him, he believed, to exert federal power over individuals living in the southern states, even if, theoretically, the American federation, as a collective body, had no power over the other collective bodies, the individual states.¹³² By presenting himself as the

¹³⁰ “I consider that, in view at the constitution and the laws, the Union is unbroken; and to the extent of my ability I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States” (*ibid.*).

¹³¹ “Doing this I deem to be only a simple duty on my part, and I shall perform it so far as practicable unless my rightful masters, the American people, shall withhold the requisite means or in some authoritative manner direct the contrary. I trust this will not be regarded as a menace, but only as the declared purpose of the Union that it will constitutionally defend and maintain itself” (*ibid.*).

¹³² An especially important application of this principle (raised by Madison in *Federalist Papers*) is the general “no commandeering” rule in the United States, mentioned by Zoller, E., in *Cours de La Haye*, “Aspects internationaux du droit constitutionnel. Contribution à la théorie de la fédération d’États”, *RCADI*, t. 294, 2002, p. 137, n° 155 (with jurisprudence from the Supreme Court). The rule essentially prevents the federation from using direct constraints (except legal constraints) against a member state. For example, the union cannot give orders to a federated state

defender of the unity of the American nation and federal public order, Lincoln could deal with the southern “insurrectionary” or “revolutionary” states and use force to execute federative law. He reasoned as though the federation was a state (a federal state)¹³³ and above all as though the member states were simply individuals using force to resist the material execution of the law, which is prohibited on principle in a state.¹³⁴

This speech by Lincoln, as one might expect, failed to convince the southern states, which understood that war was approaching. The military conflict erupted on April 12, 1861 when the federal Fort Sumter was shelled by the confederate forces. Its commander, short of supplies, surrendered the next day. War could still be avoided, since it was possible to claim that South Carolina had simply recovered a federal property in the name of its territorial sovereignty. However, Lincoln, in his proclamation of April 15, 1861 to the governors of the states in the Union, called up the state militias, numbering 75,000 men, to repress manoeuvres “too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the marshals by law”,¹³⁵ confirming that a war within a federation, between the federation and other member states, was a form of forced execution to resolve a political conflict. It is striking that, in the various proclamations he used to create a state of war, Lincoln referred only imprecisely to the constitution to justify the power to declare war, mobilize the state militias, convene an extra session of the United States Congress, blockade the harbours of confederate cities, and declare as pirates any person who attacked Union shipping. In his Proclamation Calling Forth the Militia, he simply stated

about how to exercise its legislative power. For a comparative study of the rule, see D. Halberstam, “Comparative Federalism and the Issue of Commandeering”, in Nicolaïdis, K., Howse, R. (eds.), *The Federal Vision*, Oxford, Oxford University Press, 2001, p. 213 ff, which shows a different situation in present-day Germany.

¹³³ In a federal state, explains Louis Le Fur, “in the event of resistance from a specific state, there can be revolt, or rebellion, but not outright war” (Le Fur, L., *État fédéral et confédération d’États*, Paris, Panthéon-Assas, 2000, p. 685). This means, according to Murray Forsyth, that in a federal state, constitutional law “entirely replaces” international law (Forsyth, M., *Union of States: The Theory and Practice of Confederation*, Leicester, Leicester University Press, 1981, p. 143).

¹³⁴ As pointed out by Durant, Ch., *op. cit.*, p. 107.

¹³⁵ “Too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the marshals by law” (Proclamation of April 15th, 1861 by President Lincoln *Calling Forth the Militia and Convening an Extra Session of Congress*: presidency.proxied.lsit.ucsb.edu/ws/index.php?pid=70077).

that the execution of the laws of the United States had been obstructed in the State of South Carolina and six other confederate states, and that, as President of the United States, he was entitled to call forth the militia “in virtue of the power in me vested by the Constitution and the laws”.¹³⁶ Similarly, he justified convening an extra session of Congress because of the “present condition of public affairs” and “the power in me vested by the Constitution”, without referring to a single article of that Constitution.¹³⁷

The response of the South, or the Message to Congress of Jefferson Davis – The response from Jefferson Davis, president of the confederate states, is found in his message to congress on April 29, 1861.¹³⁸ War had already begun following President Lincoln’s proclamation. The Message, intended to ratify the constitution of the confederate states, refuted, point by point, the claims made by Lincoln in his inaugural speech. Davis expressed the classical point of view of the partisans of States’ Rights, that the clauses of the Philadelphia Convention were intended to establish the United States government as a “compact between States”, meaning that the federal powers could not be seen as a “national government, set up above and over the States”. The southern states believed that the federal creature had escaped from the hands of its creators and had been “perverted into a machine” to allow the northern states to dominate the southern states.¹³⁹ Above all, Davis criticized Lincoln for basing his defence of the rights of

¹³⁶ “Now, therefore, I, Abraham Lincoln, President of the United States, in virtue of the power in me vested by the Constitution and the laws, have thought fit to call forth, and hereby do call forth, the militia of the several States of the Union to the aggregate number of 75,000” (*ibid.*).

¹³⁷ “Deeming that the present condition of public affairs presents an extraordinary occasion, I do hereby, in virtue of the power in me vested by the Constitution, convene both Houses of Congress. Senators and Representatives are therefore summoned to assemble at their respective chambers at 12 o’clock noon on Thursday, the 4th day of July next, then and there to consider and determine such measures as, in their wisdom, the public safety and interest may seem to demand” (*ibid.*).

¹³⁸ The text is presented in Commager, H., *Documents of American History*, n°203, p. 389–391, and commented in Feldman, J. Ph., *op. cit.*, p. 865. The quotes come from the version available on Internet: avalon.law.yale.edu/19th_century/csa_m042961.asp.

¹³⁹ “It is none the less true that all these carefully worded clauses proved unavailing to prevent the rise and growth in the Northern States of a political school which has persistently claimed that the government thus formed was not a compact between States, but was in effect a national government, set up above and over the States. An organization created by the States to secure the blessings of liberty

the Union on the principle of democratic majority, shattering federalism by daring to compare the relation between the Union and the states (between the federation and its member states) to the relation between a state and a county situated within it.¹⁴⁰ Most of Davis' Message was a reminder that slavery in the United States was indirectly recognized by the federal constitution, which contained two clauses on fugitive slaves and the future prohibition of the slave trade, and that the northern states wanted to impose abolition on the southern states. Referring above all to US political history, Davis claimed that, since 1798 (the date of the Kentucky and Virginia resolutions), there had always existed a political party that recognized the right of the states (the member states) to defend themselves against the actions of the federation they considered harmful. He invoked the "right of self-preservation" of the member states of the Union, as sovereign states, authorizing them, as in the present case of secession, to break away from the federal government and "dissolve their connection with the other States of the Union".¹⁴¹ The rest of the Message was intended to justify the actions undertaken to resist the Union and President Lincoln, who was considered by the South as the person who initiated military hostilities and the war between the Confederacy and the rest of the Union. Davis ended by invoking, not only the Divine Power, but also the southern states' "inherent right to freedom, independence, and self-government".¹⁴²

and independence against foreign aggression, has been gradually perverted into a machine for their control in their domestic affairs. The creature has been exalted above its creators; the principals have been made subordinate to the agent appointed by themselves" (*ibid.*).

¹⁴⁰ "He asserts as an axiom, which he plainly deems to be undeniable, of constitutional authority, that the theory of the Constitution requires that in all cases the majority shall govern; and in another memorable instance the same Chief Magistrate did not hesitate to liken the relations between a State and the United States to those which exist between a county and the State in which it is situated and by which it was created. This is the lamentable and fundamental error on which rests the policy that has culminated in his declaration of war against these Confederate States" (*ibid.*).

¹⁴¹ "In the exercise of a right so ancient, so well established, and so necessary for self-preservation, the people of the Confederate States, in their conventions, determined that the wrongs which they had suffered and the evils with which they were menaced required that they should revoke the delegation of powers to the Federal Government which they had ratified in their several conventions. They consequently passed ordinances resuming all their rights as sovereign and Independent States and dissolved their connection with the other States of the Union" (*ibid.*).

¹⁴² *Ibid.*

The secessionists also rejected the use of terms taken from the lexicon of internal public law and described the conflict as a *war*, in other words using a concept from international law¹⁴³ that the dominant doctrine considered to apply only to confederations¹⁴⁴ and not to federal states. However, as we saw above, President Buchanan had already described the Union as a *Confederacy* and not as a federal state, which provides extra proof of the lack of relevance of the distinction between *Bundesstaat* and *Staatenbund* to understand the real functioning of a federation.

The consequence of this radical approach is that secession cannot be sanctioned by the federation. Taken to its logical conclusion, secession leads to the breakup of the federation into two enemy parties, supporters and adversaries. The lack of unity is shown by the fact that some member states claim to represent the federation, which continues to exist and to use federative law to combat, even using force, the secession claimed by the other member states. However, the seceding states, in turn, consider that they are no longer bound by the federative link, and deny the legitimacy of the federal authority that wants to impose federal law by force. The conflict, before being an armed conflict, is a *conflict of legitimacy*. It is because the strength of the federation is considered gravely illegitimate by the seceding parties that they oppose it.

This type of conflict of legitimacy culminates in a conflict over representation. The “secessionists” consider that the “unionists” – representing the federation – have usurped their functions and no longer truly represent them. The unity of the federative whole begins to dissolve, and an irreparable schism appears between the two parties, one wishing to maintain the federation and the other wishing to leave. From a conceptual point of view, the arithmetic question opposing a majority to a minority is legally moot. In the cases studied here, the secessionists have been in the minority, but if the southern states had become a majority (in terms of the number of states) in 1861, nothing

¹⁴³ For a description of the alternative, see Huber, E. R., *Verfassungsgeschichte*, t. 3, p. 543.

¹⁴⁴ Louis Le Fur is once again the obvious witness: “If a confederated state refuses to fulfill the obligations to which it has consented in a pact of union, the confederation clearly has the right to oblige it to perform them using military force. But, unlike what would happen if the recalcitrant member was a member of a federal state or *a fortiori* a mere province, when a confederated state opposes force with force, it is a genuine war and not a revolt by a non-sovereign community against the state of which it forms a part”, (Le Fur, L., *op. cit.*, p. 502–503).

would have changed in the reasoning presented here – on the one hand the legal federal authority, President Lincoln, claiming to represent the Union and the continuity of the federation, and on the other the southern states, assembled in a new confederacy, denying the right of the Union to represent them and putting forward other representatives named in the confederate constitution of March 7, 1861. Taken to the extreme, the secession of single member state poses the same problem as the secession of a majority of states.¹⁴⁵ The actual number is a secondary matter, and the “secessionists” may form a majority and the “unionists” a minority, provided that the division between them is between those who want to leave the federation and those who want to remain.

The conflict of representation becomes, in fact, a conflict of sovereignty. Although the federation is based on the idea, as identified by Carl Schmitt, that the question of sovereignty and of pre-eminence between the federation and member states will never be raised, the American conflict of 1861 shows how it quickly becomes a conflict. Jefferson Davis uses the language of sovereignty to respond to Abraham Lincoln and his own use of the same language. In the United States, the point of view of the victors has prevailed, and history books talk about the “Civil War”.¹⁴⁶ In other words, “the fundamental controversy about where sovereignty resides”, which was never settled in the debate between “unionist” Webster and “nullifier” Calhoun, was only resolved “following the civil war between the northern and southern states” for the greater benefit of “the sovereignty of the United States which was finally consolidated”.¹⁴⁷

Last, the most far-sighted comment about the war was made by Walt Whitman: “The South was technically right, and humanly wrong.”¹⁴⁸ I believe this provides yet another reason to look in more depth at the

¹⁴⁵ This is a remark made by Christoph Schönberger to which I subscribe wholeheartedly.

¹⁴⁶ The legal reality was more complex, as noted by A. Tunc and S. Tunc, who observe that soldiers in the South were accorded the status of belligerents (and were not traitors), just as the Confederates’ ability to make international agreements with third-party states was recognized, etc. See Tunc, A., Tunc, S., *Histoire constitutionnelle des États-Unis*, Paris, Monchrestien, t. I, n°63, p. 170.

¹⁴⁷ Grimm, D., “La souveraineté”, in Chagnollaude, D., Troper, M. (eds.) *Traité international de droit constitutionnel*, t. 1, “Théorie de la Constitution”, Paris, Dalloz, 2012, p. 576.

¹⁴⁸ Cited by Belperron, P., *La guerre de Sécession, ses causes et conséquences*, Paris, Plon, 1949, p. 211.

constitutional arguments advance on both sides, from the South and the North, to understand the meaning to be given to the word “secession”, the weapon of last resort in a conflict between a member state and the federation. Secession can appear as an *ultima ratio*, a right to obtain justice oneself, which explains part of its bad reputation. It is an argument that needs to be handled carefully, because the risk of war accompanies the threat of secession if it is carried out. At the same time, secession within a federation must also be seen as “the ultimate possibility for a people to choose its destiny”.¹⁴⁹ This presupposes that the member state of the federation concerned retains a strong sense of its political existence, and that its citizens see themselves as forming a “people” able to break their ties to another political body that they consider, at a specific point in time, as an oppressor they can no longer endure. Secession contains an element of tragedy that is only found, in the field of constitutional law, in its equivalent: the right of individuals to resist oppression by the state.

¹⁴⁹ We have transposed the formula used by A. Lamassoure when discussing the right to withdraw from the European Union, which was already provided for in the Treaty establishing a Constitution for Europe: Lamassoure, A., *Histoire secrète de la Convention*, Paris, Albin Michel and Fondation Robert Schuman, 2004, p. 338.

Are federalism and secession really incompatible?

JORGE CAGIAO Y CONDE

Introduction

Secession has always been a difficult topic for the specialists of federalism to address and has even, over time, become almost taboo. And, of course, when someone decides to break a taboo and courageously speaks out, the words often appear hasty or clumsy, given the underlying fear of offending the audience. It is easy to understand why, at this point, the person decides to cut the presentation short, to the relief of both speaker and audience.

It is this kind of hasty, embarrassed (and often contradictory)¹ approach to secession that is found in the literature on federalism, whether militant² or

¹ This applies, as we will see, to the authors who define federalism by emphasizing the contractual nature of the relationship or federative logic, while at the same time refusing the principle of secession. For a concrete example, see the following footnote.

² In a classical work of militant federalist literature, Voyenne, B., *Histoire de l'idée fédéraliste*, t. III, Paris-Nice, Presses d'Europe, 1981, p. 131–158, the author returns to Calhoun's famous dilemma: "Either the treaties that led to the state's birth continue to apply, in which case the state exists only by virtue of the sovereignty of its members; or else, as the federalists claim, the compact is definitive, in which case the state is actually a unitary state" (p. 134). And as a conclusion: "[...] a true federation can only, in our opinion, refuse [...] to explicitly recognize a right [of secession]" (p. 153). According to Voyenne, the federative compact is definitive

academic.³ It leads to a conclusion that has come to dominate most specialized studies: that federalism and secession are incompatible.

The incompatibility is explained as being logical, with the result that any properly constituted and federative system should be designed so as to reject the secession of a federated unit. In a federation, whether constituted through the aggregation of formerly independent states (such as the United States) or the disaggregation or decentralization of a single existing state (such as Belgium), the federated units should be unable to leave the federation, and should not be able to rely on the principle of federalism to legitimize their secessionist project. In addition, the small number of procedures to regulate secession identified through comparative public law studies should be considered as exceptions to a rule which is, and must be, strict. The suggestion is that these exceptions can only be “non-federal” in nature.

I believe that this approach is problematical, especially since the dominant theory on federalism can be astonishingly flexible in the way it analyses federative systems. For example, the notion of sovereignty constitutes the classical dividing line between federative systems under domestic law, on the one hand, and under international law on the other (federal state/confederation).⁴ However this dividing line, observed by most specialists in the field of federalism, is increasingly considered to

(perpetual) and the member states no longer have the freedom to leave the federation.

³ In keeping with the celebrated comment by Jellinek about the impossibility of legally dissolving a union under public law based on the mere will of its members (“political suicide is not a juridical category”, *Allgemeine Staatslehre*, 3rd ed. Athenaeum, 1911, p. 768; French translation: *L'État moderne et son droit*, t. II, Paris, Panthéon-Assas, 2005, p. 538–539), the dominant doctrine is hostile to secession, as shown in the following examples from specialists in the area of federalism: Watts, R. L., *New Federations: Experiments in the Commonwealth*, Oxford, Clarendon Press, 1966, p. 312; King, P., *Federalism and Federation*, London, Croom Helm, 1982, p. 112; Bowie, R. R., Friedrich, C., *Études sur le fédéralisme*, vol. II, Paris, L.G.D.J., 1960, p. 770. It can also be seen as highly significant, in this connection, that one of the most far-ranging and complete studies of recent years (Beaud, O., *Théorie de la Fédération*, Paris, Presses universitaires de France, 2007) does not develop the question of secession, despite the fact that the author's theoretical construction, critical of the dominant doctrine and focused on the contractual nature underlying the federal relationship (and also on the freedom of the contracting parties), would have provided a perfect opportunity for an in-depth examination of the question of secession.

⁴ See, on this point, the criticism and developments of Beaud, O., *op. cit.*, p. 67 ff.

be irrelevant in properly informed studies of the federative objective in certain cases because – apparently – there is no sovereignty in a federative system.⁵ The contradiction accepted, on this point, by the dominant doctrine can be upheld only by accepting a great deal of flexibility. The same can be said of the fact that the doctrine agrees to classify, as federative systems, decentralized unitary states such as Spain.⁶ Many other examples could be given.

At this point in the examination, we simply need to remember that the dominant theory can be flexible when it wants to be. When this is not the case, flexibility is replaced by rigidity, as illustrated by the question that interests us here: secession. As we have just seen, sovereignty either exists (in the distinction between federal state and confederation, it is fundamental) or does not exist (to distinguish between a federation and a state, it cannot exist), depending on the argument applied. This shows a great deal of flexibility. But, to emphasize the point once again, flexibility tends to disappear when in a given federation (despite being described as non-sovereign) a demand to secede is made by a federated unit: the doctrine insists that it must be rejected, if needed by invoking the sovereignty (and the power that comes with it) of the federation (or its people).

⁵ See Carl Friedrich, for example: “There can be no sovereign in a federal system, a political order in which autonomy and sovereignty are mutually exclusive” (Friedrich, C., *Tendances du fédéralisme en théorie et en pratique*, Bruxelles, Institut belge de science politique, 1971, p. 19). It is important to note that this thesis is not merely descriptive (or intended as such). Many other specialists of federalism also believe that one cannot (or must not) consider federalism and sovereignty at the same time, since the two concepts are antinomic. Even Olivier Beaud, the author who, in my view, has produced the most far-ranging and rigorous review of federalism in recent years, shares this opinion: “It is not enough to claim that the theory of sovereignty is not a suitable tool for thinking about federalism and federal norms. In my view, it is necessary to go further by putting forward the idea that, *far from being the basic condition for a study of federalism, sovereignty is, on the contrary, the obstacle that must be removed in order to think about federalism*” (*ibid.*, p. 58–59, emphasis original; see the development of this question p. 37–97). I, in turn, believe that it is pointless trying to think about federalism while ignoring or sidestepping the notion of sovereignty, because that notion, whether we want it to or not, plays the role of the cat that becomes a woman in the fable by La Fontaine: we can drive an inconvenient fact out through the door, but it will always come back through the window. Given this situation, we might just as well include it in the discussion.

⁶ My criticism of this approach is found in “L'autorité de la doctrine en droit. L'exemple du fédéralisme”, in Cagiao y Conde, J. (ed.), *La notion d'autorité en droit*, Paris, Le Manuscrit, 2014, p. 101–134.

Everyone will probably agree that it is hard to move forward over solid ground and to achieve any certainty about the phenomena studied (here the relationship between federalism and secession) when key concepts in the academic debate are ambivalent and plastic for political reasons. A scientific observer must, of course, note this ambivalence and plasticity, but without incorporating them into the approach used to address the issue. Although sovereignty, for example, is used as an argument by a state's decision-making authorities and politicians, and more broadly by academics, to refuse to respond to secessionist demands and then, sometimes in the same breath, to state that it is important to move towards greater political integration in the European Union because sovereignty is a concept that no longer describes the actual functioning of states (which are no longer sovereign or independent, but non-sovereign and interdependent),⁷ this is not a valid reason for a researcher in the field of political science or law to validate the message conveyed in a discourse that, obviously, has no scientific or analytic goal or intention. Is it even possible for states to be sovereign within their borders and non-sovereign in their relations with other states?⁸ Is it not

⁷ Olivier Beaud describes the difference between internal and external sovereignty as follows: "Internal sovereignty is a power to command that manifests itself in unilateral acts that reflect a relationship of subordination between the author and the receiver of a norm. In a contract, international sovereignty can only be defined as a 'power' to command since it is manifested positively in juridical acts (treaties, customs) that require the consent of the receiver of the norm and negatively in the prohibition of norms imposed by other state powers. The notion of sovereignty is therefore asymmetrical: it is *absolute* in its internal sphere, and *relative* in its external sphere, where it encounters its *alter ego*, the sovereignty of the other state" (Beaud, O., *La puissance de l'État*, Paris, Presses universitaires de France, 1994, p. 16).

⁸ Some confusion and misunderstandings doubtless come from the meaning selected or preferred for the concept of "sovereignty", whether weak (sovereignty as a "competence" in law) or strong (deciding without appeal or adapting the law to its will). This is why we can say that a judge is sovereign in his or her function (the competence to state the law), or that a US state is sovereign in the area of civil law, where sovereignty is understood in its weak meaning. We know this because both the judge and the US state can see their "sovereign" will disavowed by a later sovereign decision (a judge in a court of appeal or final jurisdiction, in the first case, or the Government of the United States or the Supreme Court, in the second). If a sovereign is a party able to impose its own will, then the only holder of sovereignty from which no appeal lies is sovereign in the strong and authentic sense. See Beaud, O., *La puissance de l'État*, *op. cit.*; Troper, M., "La souveraineté, inaliénable et imprescriptible", in Troper, M., *Le droit et la nécessité*, Paris, Presses universitaires de France, 2011, p. 77–98.

a little strange, after a demand for secession is received, to respond or explain that there is no point in aspiring to a sovereignty that no longer exists, even though the political will that blocks the secessionist process is probably the best demonstration that state sovereignty is thriving? Clearly, if we are looking for straight answers to our questions about secession and federalism, and as pointed out by Olivier Beaud,⁹ we need to move away from the state-centred – and, we are tempted to add, nationalist – ideological bias¹⁰ that is currently the dominant focus in the doctrine produced in this area.

⁹ Beaud, O., *Théorie de la Fédération*, op. cit.

¹⁰ The impact of nationalism (and state nationalism in particular) on the federal idea and the evolution of federalism is well known today in the specialized literature, based on the classical studies of Hobsbawm, Gellner, Smith, Anderson, Billig and others: Norman, W., *Negotiating Nationalism. Nation-building, Federalism, and Secession in the Multinational State*, Oxford, Oxford University Press, 2006; Burgess, M., Gagnon, A.-G., *Federal Democracies*, London, Routledge, 2010; Caminal, M., *El federalismo pluralista. Del federalismo nacional al federalismo plurinacional*, Barcelona, Paidós, 2002; Requejo, F., Caminal, M., *Political Liberalism and Plurinational Democracies*, London, Routledge, 2011; Máez, R., *La frontera interior. El lugar de la nación en la teoría de la democracia y el federalismo*, Murcia, Tres Fronteras, 2008; Kymlicka, W., Norman, W. (eds.), *Citizenship in Diverse Societies*, Oxford, Oxford University Press, 2000; Gagnon, A.-G., *The Case for Multinational Federalism. Beyond the All-encompassing Nation*, London, Routledge, 2010; Gagnon, A.-G., *Minority Nations in the Age of Uncertainty. New Paths to National Emancipation and Empowerment*, Toronto, University of Toronto Press, 2014; Requejo, F., *Fédéralisme multinational et pluralisme de valeurs. Le cas espagnol*, Brussels, Peter Lang, 2009; Seymour, M., Laforest, G. (eds.), *Le fédéralisme multinational. Un modèle viable?*, Brussels, Peter Lang, 2011; Burgess, M., *In Search of the Federal Spirit. New Theoretical and Empirical Perspectives in Comparative Federalism*, Oxford, Oxford University Press, 2012. The topic is relatively unexplored in the field of public or constitutional law, although a few studies by legal specialists have appeared in the last fifteen years, in which the authors incorporate lessons from academic debates on nationalism (mainly by historians and political scientists) and debates between classical liberal philosophers and cultural liberal philosophers starting in the 1990s. For example: Brouillet, E., *La négation de la nation. L'identité culturelle québécoise et le fédéralisme canadien*, Sillery (Québec), Septentrion, 2005; Parent, Ch., *Le concept d'État fédéral multinational. Essai sur l'union des peuples*, Brussels, Peter Lang, 2011; Bossacoma i Busquets, P., *Justícia i legalitat de la secessió. Una teoria de l'autodeterminació nacional des de Catalunya*, Barcelona, Institut d'Estudis Autònoms, 2015; Ferraiuolo, G., *Costituzione Federalismo Secessione. Un itinerario*, Napoli, Editoriale Scientifica, 2016; Cagiao y Conde, J., *Tres maneras de entender el federalismo: Pi y Margall, Salmerón y Almirall. La teoría de la federación en la España del siglo XIX*, Madrid, Biblioteca Nueva, 2014.

In this study, my goal is not to produce yet one more opinion for or against the difficult question of secession, but rather, in an approach that is both simpler and more far-reaching, to gather the scant empirical evidence and certainties that can be assembled on this topic. It is this evidence that will help us answer the question of whether or not federalism and secession are incompatible under internal public law, as the dominant theory holds.

Given that my analysis is limited to the known empirical facts and evidence to which researchers have access, it is probably advisable to say (1) a few words about my methodology before developing my argument in three parts, as follows: (2) secession as viewed by federal theorists; (3) secession in federal positive law; (4) secession as seen from the standpoint of what could be called “legal logic” or “legal linguistics”,¹¹ which comes down to almost the same thing.

1. General approach

The dominant approach in federal studies consists, in general and in summarized (and perhaps slightly deformed) form, in scrutinizing known federative law and federal practices to identify a regular feature (the rejection of secession) and in seeing this regularity as proof of the logical incompatibility of federalism and secession. This description of the federative experience is essential in order to build a (normative) theory of federalism in which secession has no place. As proposed as part of the theory of federalism, this approach matches an obvious legal naturalism: the end result (the rejection of the possibility of secession)

¹¹ In the meaning given by Bobbio: a discourse about the law. It is important to distinguish clearly between this discourse about the law and the discourse of the law, which is the object studied by legal science. The expression “legal logic” can also refer to two forms of expression: the first scientific (discourse about the law) and the other legal (discourse of the law). Only the second form of logic, in a strictly Kelsenian sense with which we agree, is actually “legal”, in other words uses prescriptive language. But, as we will see below, both forms of logic can converge on a legal conclusion, each in its own way: the first by descriptively recording the various positive law experiences that have made federalism and secession compatible and incompatible – showing that there is neither compatibility nor incompatibility *a priori*; the second by highlighting that the law, in the Kelsenian explanation, is subject to interpretation; in other words the will of the implementing authority may or may not want federalism and secession to be compatible, depending on the political context.

is deduced from a fact (that in practice, the general rule is a rejection of secession). Besides the fallacious reasoning (we have known since Hume that just because something *is* does not mean that it *ought to be*), the dominant approach to the question is problematical in that it tells us with certainty what federative systems do most frequently, without telling us why they do it or whether what they do matches the principles of federalism. However, we know that the evolution of federalism (an evolution of which rejection of secession forms a part) was significantly impacted by other political projects of the modern era, including nation-building, state-building and democratization. We know today that these projects have changed the way in which the federal idea was initially understood, and created a gap between federal practices and the principles of federalism.¹² The dominant approach, by ignoring the constant adaptation of federalism to two of the hegemonic political and legal theories of our modern political system (the state and the nation), states how federative systems generally deal with the problem of secession in nation-states (or federation-nations), but fails to explain, in any satisfactory way, why they do what they do. Apparently, the reasons lie hidden in the principle of federalism, but after taking a close look this seems doubtful.

In the following pages we will not follow this dominant approach. To ensure that our proposal is understood, we need to specify how we intend to focus on our subject. First, we must specify how the words “federalism” and “secession” are to be considered. The meaning of “secession” does not pose any specific problem (it immediately evokes a separation, a withdrawal, or independence, whether unilateral and against the will of the state – this is the most common definition – or negotiated and legally defined), but we intend to emphasize a more flexible and open-ended definition of federalism in order to answer the question placed at the head of this chapter. Last, we need to explain briefly why the legal approach used, which aims to produce a scientific result and say real things about its object, also comes to resemble the dominant theses of political science, by showing that there is no reason to abandon their

¹² Carl Schmitt pointed this out in his *Constitutional Theory*, published in 1928: “The connection of democracy and federal state organization leads to a distinctive, independent type of state organization, to the *federal state without an alliance foundation*.” (Schmitt, C., *Théorie de la Constitution*, Paris, Presses universitaires de France, 1993, p. 537).

flexibility and open-mindedness and occasional variations when looking at the question of secession.

First, the words “federalism” and “secession”. This article will examine the compatibility between the ideas of federalism and secession, and also the compatibility between a federal structure (a federal state or federation as an institution) and the right of secession guaranteed by that structure. The word “federalism” needs to be understood as both an idea and as the concrete or institutional expression of that idea (a federation).¹³ Although the relation between federalism and federation is complex and context-dependent, formal federations “without federalism” are not especially rare,¹⁴ and our investigation here is based on the congruence of federalism and federation. The question in the title of this paper could be phrased as follows: when federations follow the principles of federalism (another vast subject!),¹⁵ can they accept that their constituent units have a right of withdrawal or secession?

Our second observation concerns the meaning of the word “federalism”. What are we talking about here? The approach outlined in the preceding paragraph appears to call for an open and flexible meaning, as found in the specialized literature in the fields of political and legal science. Even if we stick to a rigid or restricted definition of the federal idea from a theoretical point of view (centring on two or three key concepts), we cannot ignore that even in the federal systems whose “federal” label has never been doubted (United States, Switzerland, Canada, Germany, Australia), the federal idea is, in practice, expressed through different approaches to various fundamental aspects: attribution or non-attribution of powers; constitution-pact or constitution-statute; presence or absence of a territorially-based second federal chamber; and so on. Although the systems are convergent in terms of principles (but not completely), they can easily diverge in the way they are implemented. This means that even if our investigations lead to the conclusion that federalism and secession are incompatible in theory, this may not apply in practice. Obviously, our goal here is also to find out if they are compatible at the theoretical level.

¹³ On these two concepts, voir King, P., *op. cit.*

¹⁴ See Burgess, M., *op. cit.*

¹⁵ *Ibid.*

My last methodological remark concerns the legal approach to the problem, which clearly has had the greatest impact on the evolution of the debate. Like any other word or concept, federalism and secession can be examined from a legal standpoint. This occurs when a court is asked to rule on their compatibility, as the Supreme Court of Canada¹⁶ did after the second referendum on Québec independence in 1998 (the referendum was held in 1995). The Supreme Court provided an interpretation of the problem, since it will have legal effect. We know, since the work of Kelsen, that this interpretation is not intended to extend knowledge or provide an objective explanation of the problem posed.¹⁷ A court rules on the legal problem brought before it, an intellectual exercise that requires it to assign, to each legal word or statement (“federalism”, for example) one out of a range of possible meanings in a given context. In other words, the court explains which of a range of possible versions it intends to select as the only legal version, the one that will have effect in law. We also know, once again thanks to Kelsen, that this way of settling a problem in law does nothing to settle the problem in terms of knowledge (or principles): other meanings, and therefore other responses or solutions to the same problem, remain possible.¹⁸

Although nothing in the above explanation will meet with much resistance from experts in the science of the law (teachers, researchers), at least in theory, it is important to note that when they actually examine a matter they often tend to act like judges when explaining a problem.¹⁹

¹⁶ *Reference re Secession of Québec*, [1998] 2 S.C.R. 217.

¹⁷ Kelsen, H., *Théorie pure du droit*, Paris, L.G.D.J., 1999, p. 335 ff.

¹⁸ See Troper, M., *Pour une théorie juridique de l'État*, Paris, Presses universitaires de France, 1994; Troper, M., *Le droit et...*, *op. cit.*

¹⁹ I developed this point in a recent study of the opinion of Spanish legal specialists with respect to the Catalan independence referendum and its possible incorporation in the Spanish constitutional order. I explained that most Spanish constitutionalist doctrine has adopted a position on the independence referendum that appears to move away from an approach based on legal positivism (in the sense given by Bobbio) and closer to the specific form of legal positivism found in legal systems. In this way, the dominant doctrine relies on the “discourse of the law” that places it at a distance from the “discourse about the law” used in legal science. Cagiao y Conde, J., “¿Es posible un referéndum de independencia en el actual ordenamiento jurídico español? El derecho explicado en la prensa”, in Cagiao y Conde, J., Ferraiuolo, G. (eds.), *El encaje constitucional del derecho a decidir. Un enfoque polémico*, Madrid, La Catarata, 2016, p. 142–182.

If the question, for example, is whether federalism, properly understood, and secession, properly understood, are compatible (in terms of knowledge rather than in terms of decisions, since as we will see it is perfectly possible to decide not to make them compatible), they will argue that there is only one possible answer,²⁰ rather than two or three. Their discourse is neither explanatory nor descriptive (analytical or scientific), but normative. Judges, of course, rule on a legal dispute because that is their job. They must state the law. Their discourse is the discourse of the law. However, this is not the case for scientists of the law: even if they want it to, their discourse is not the law, at least not in the sense that it makes the law. All they can do – and this is their function as teachers and researchers – is to explain and describe the operation of the law. Their discourse is not a discourse of the law, but a discourse about the law. They do not produce law (at least not directly, but can do so indirectly if they influence the law-makers), but knowledge of the law. If knowledge of the law is generally plural, as indicated by the scientific interpretation of Kelsen, we have every reason to believe that the answer to the question posed in this chapter will be an expression of the flexibility and plasticity that the political and legal scientific literature discovers when it turns its attention to these issues.

I can now turn to the question of what can be said about the federalism-secession relationship once positioned and examined using the tools described above.

2. Secession as seen by the theoreticians of federalism

This section will focus on the viewpoint of theoreticians of federalism concerning compatibility between federalism and secession. As mentioned above, the majority opinion sees an absolute incompatibility between the two terms. This view became dominant in the 19th century and was confirmed in the United States, after the Civil War (1861–1865), by *Texas vs Whyte*²¹ in which the Supreme Court described the federation as *an indestructible Union, composed of indestructible States*.

²⁰ *Ibid.*

²¹ *Texas vs White*, 74 U.S. 7 Wall. 700 700 (1868). According to Cass Sunstein, “no serious scholar or politician now argues that a right to secede exists under American constitutional law” (Sunstein, C., “Constitutionalism and Secession”, *The University of Chicago Law Review*, vol. 58, n° 2, 1991, p. 633).

Doctrine then took up the task of validating this solution and, as pointed out by Laurent Déchâtre in a recent study, authors such as “Jellinek, Laband and Le Fur considered that the members of a federal state are in a subordinate relationship with the federal authorities, making their sovereignty impossible, and from this they deduce the exclusion of any right of secession.”²² This dominant thesis has strengthened over time and is now, today, in very good health. It appears to be followed even by authors who, like Olivier Beaud, offer far-reaching criticism of the dominant theses in studies of federalism. It is important to remember that Beaud’s theoretical construction views federalism on the basis of its contractualist or pactist foundation, with a double objective (union and particularism) that must guarantee states that commit voluntarily to a federal relation the freedom they initially enjoyed. From this point of view, Beaud’s intention is to distance the theory of the federation from the single-state version of federalism (federal state) that dominates federal studies and positive law based on the notion of “sovereignty”. According to Beaud, the notion of federation must be addressed without relying on sovereignty, which prevents us from understanding it properly. Beaud’s approach hits a major snag, however, when the federation is considered as a perpetual union, a sort of trap into which federated states fall voluntarily, since they lose “their sovereignty (in the strict sense) when they become member states”.²³ At this point it is reasonable to ask, as mentioned above, if this conclusion does not let sovereignty in by the window after the door has been closed. If secession is no longer an option for the member states of a federation, then it can only mean that the federation disposes of all the resources that the federative system makes available (including the use of force) to prevent secession by a state. If this is true, then the federation is sovereign.²⁴

However, it is not the dominant opinion that interests us here. We know it does not support secession, and that support for this thesis and its various versions is widespread. We are more interested in the opposite

²² Déchâtre, L., *Le pacte fédératif européen*, thesis, Université Paris Panthéon Sorbonne, 2012, p. 42.

²³ Beaud, O., *Théorie...*, *op. cit.*, p. 266.

²⁴ The same criticism is found in Déchâtre, L., *op. cit.* See the development and nuances introduced by Beaud on the topic of secession from a federation, in this book.

position: does it have any defenders among theoreticians of federalism? This is an important question, since if it transpires that no theoretician or observer of federalism has considered the possibility of secession from a federation, we could close our investigation. In a hurry, we could conclude that the two terms are incompatible. But this is not the case, as we will show briefly here.

In reality, the idea that a federation is a free union of free and independent states, based on a compact, and that the sovereignty of the member states remains intact during the union, was relatively widespread in the United States prior to the Civil War.²⁵ If it was taken for granted by the defenders of *States' Rights* in the South like John Calhoun, it also had support among the supporters of the Union: in a free union, a state could leave the federation if it so wished. For example, this is what Thomas Jefferson stated in 1816: "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'."²⁶ Of course, the Civil War provided an opportunity for everyone to demonstrate, by armed force, that secession was an act of rebellion that would be blocked by the federation. However, the theory in favour of the right of withdrawal was not necessarily in contradiction with the spirit of federalism, as recognized a few years later by Carl Schmitt, an observer unlikely to have secessionist sympathies. In his view, it involved "essential concepts of constitutional theory for a federation".²⁷ Secession had major support among the theoreticians of compact-based federalism in the United States.

At around the same time, another theoretician of federalism was defending the same thesis in France: Pierre-Joseph Proudhon, author of the well-known *Du principe fédératif* (1863). His contribution is especially interesting since it explicitly refers to the principles of federalism (Proudhon was writing in a country fiercely opposed to federalism, and his thoughts did not reflect a federal system and practices like those in

²⁵ See Feldman, J.-Ph., *La bataille américaine du fédéralisme. John C. Calhoun et l'annulation (1828–1833)*, Paris, Presses universitaires de France, 2004; Zoller, E., "Aspects internationaux du droit constitutionnel. Contribution à la théorie de la fédération d'États", *Recueil des Cours de l'Académie de La Haye*, t. 294, 2002, p. 41–166; Robel, L., Zoller, E., *Les États des Noirs. Fédéralisme et question raciale aux États-Unis*, Paris, Presses universitaires de France, 2000.

²⁶ Cited by Sunstein, C., "Constitutionalism and Secession", *The University of Chicago Law Review*, vol. 58, n°2, 1991, p. 633, 657.

²⁷ Schmitt, C., *op. cit.*, p. 520.

the United States and Switzerland)²⁸ and attempted to conceptualize federal rules and procedures (the federation) on the basis of those principles. Proudhon considered that the federation did not follow the logic of the state:²⁹ “It is a group of sovereign and independent states.”³⁰ These sovereign and independent states were linked by a federative pact, but according to Proudhon the question of perpetuity was not an issue. The pact could be created with that intention without depriving the states of their right to withdraw if they considered that the federation no longer protected their legitimate interests effectively. This was how he viewed the secessionist conflict in the United States and the Sonderbund War in Switzerland, in 1846, in both cases defending the legitimacy of the secessionist parties: “Separation operates by reason of law.”³¹ If the federation is not a state, if the federated states do not transfer their initial sovereignty to the federation, and if the federal relationship is not intended to modify the initial situation against the will of the federated units, then Proudhon’s conclusion appears to respect the initial logic: states federate, but not with the aim of losing their sovereignty.³² If they are still sovereign once the federation has been created, they should be able to leave in the same way they entered, by expressing their will to withdraw.

²⁸ See Beaud, O., *Fédéralisme et Fédération en France. Histoire d’un concept impossible?*, Strasbourg, Presses universitaires de Strasbourg, 1999, p. 7–82.

²⁹ Proudhon, P.-J., *Du principe fédératif*, Antony, Tops-Trinquier, 1997, p. 88.

³⁰ *Ibid.*

³¹ *Ibid.*, p. 90.

³² “The contract of federation [...] is essentially limited. The authority responsible for its execution can never overwhelm the constituent members; that is, the federal powers can never exceed in number and significance those of local or provincial authorities, just as the latter can never outweigh the rights and prerogatives of man and citizen. If it were otherwise, the community would become communistic; the federation would revert to centralized monarchy; the federal authority, instead of being a mere delegate and subordinate function as it should be, will be seen as dominant; instead of being confined to a specific task, it will tend to absorb all activity and all initiative; the confederated states will be reduced to administrative districts, branches, or local offices. [...] The same will hold, with even greater force, if for reasons of false economy, as a result of deference, or for any other reason the federated towns, cantons or states charge one among their number with the administration and government of the rest. The republic will become unitary [...].” (*ibid.*, p. 87–88).

Here we have two theoretical contributions from federalists who considered federation and secession to be compatible. What remains of this position today? Has it been able to resist a century and a half of evolving federalism that has brought it closer to the state model, or must we conclude that it belongs to a 19th-century view of federalism that is completely outmoded today? In fact, the topical nature of secession in politics and comparative law has become ever more evident in recent decades, and it has also been enriched by new approaches and theoretical contributions following the collapse of the former USSR and the independent countries that have emerged. An essay by Allen Buchanan, *Secession. The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec*, published in 1991,³³ is clearly the most important of a growing list of works devoted to secession that do not lead to the immediate rejection and moral condemnation of the idea.³⁴ Two main theories of secession have emerged: secession as reparation for a wrong (remedial secession) and secession as a primary right enjoyed by all peoples, and even any human group that requests it (without necessarily being a “people” or “nation”). Although the first theory considers secession as being morally founded only in certain cases (the difficulty being how to decide if there is a just cause for secession),³⁵ the second appears to come closer to the position of the contractualist theoreticians of the 19th century who defended the moral nature of any secession desired by a people or nation (the difficulty being how to know which

³³ Buchanan, A., *Secession. The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec*, Boulder, San Francisco, Oxford, Westview Press, 1991.

³⁴ Norman, W., “The Ethics of Secession as the Regulation of Secessionist Politics”, in Moore, M. (ed.), *National Self-Determination and Secession*, Oxford, Oxford University Press, 1998, p. 34–62; Norman, W., *Negotiating Nationalism. Nation-Building, Secession and Federalism in the Multinational State*, Oxford, Oxford University Press, 2006; Lehning, P. B. (ed.), *Theories of Secession*, London, Routledge, 1998; Beran, H., “A Liberal Theory of Secession”, *Political Studies*, vol. 32, n°2, 1984, p. 21–31; Beran, H., “A democratic theory of political self-determination for a new world order”, in Lehning, P. B. (ed.), *op. cit.*, p. 32–59; Bauböck, R., “Why stay together? A pluralist approach to secession and federation”, in Kymlicka, W., Norman, W. (eds.), *Citizenship in Diverse Societies*, Oxford, Oxford University Press, 2000; Weinstock, D., “Vers une théorie normative du fédéralisme”, *Revue internationale des sciences sociales*, n°167, mars 2001; Sorens, J., *Secessionism: Identity, Interest, and Strategy*, Montreal & Kingston, McGill-Queen’s University Press, 2012; Casesse, A., *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge, Cambridge University Press, 1995.

³⁵ See Buchanan, A., *op. cit.*; Bossacoma, P., *op. cit.*

human groups or collectives should be considered as a people or nation for the purposes of secession).

One interesting point deserves to be highlighted in the academic literature that has developed on this question: the fact that secession can be considered a moral right³⁶ or a morally legitimate aspiration. To simplify, this favourable (or at least not unfavourable) opinion of secession was formerly specific (for obvious partisan reasons) to independentist movements or leaders, but only a few non-independentist thinkers (Proudhon being one of them) defended the morality and legitimacy of secession. The situation has changed somewhat and the scientific literature today presents secession not only as a moral right held by certain peoples (or by all peoples, depending on whether the theoretician supports “remedial” secession or secession as a primary right), but also as a way to ensure the stability of the system and of the federal principles³⁷ (loyalty, trust, fidelity, freedom, etc.) within a federation. The work of authors such as Daniel Weinstock,³⁸ Wayne Norman³⁹ or Miodrag Jovanovic⁴⁰ appears to point in this direction. Not only is the constitutionalization of secession not incompatible with federalism but, by not making this legitimate aspiration of a federated union to recover its full freedom non-viable, the federation can be made stronger: unity is not imposed, but desired. In addition, as the empirical evidence shows in democratic contexts such as Canada or the United Kingdom – Weinstock’s contribution also suggests this – the existence of a “constitutionalized” right of secession could create a danger for secessionist movements, since they could be defeated not by a federation logically opposed to their claims, but by their own people.⁴¹ The experience of Québec in 1995 shows that a referendum defeat, even extremely close, is not without consequences for an independentist movement. The two-edged sword of

³⁶ For example: Bastida, X., “El derecho de autodeterminación como derecho moral: una apología de la libertad y del deber político”, in Cagiao y Conde, J., Ferraiuolo, G. (eds.), *El encaje...*, *op. cit.*, p. 218–268. The French version of this text was published in *Cahiers de civilisation espagnole contemporaine*: “Le droit à l’autodétermination comme droit moral.”

³⁷ Burgess, M., *op. cit.*

³⁸ Weinstock, D., *op. cit.*

³⁹ Norman, W., *Negotiating nationalism...*, *op. cit.*

⁴⁰ Jovanović, M., *Constitutionalizing Secession in Federalized States. A Procedural Approach*, Portland, Eleven International Publishing, 2007.

⁴¹ Weinstock, D., *op. cit.*

a secession clause would probably incite independentist movements to be more careful, aware that independentist processes in liberal democracies tend to involve an uphill battle, unlike non-democratic or violent contexts (Sorens describes these as a “secessionism of despair”).⁴² Seen from this standpoint, the constitutionalization of the right of withdrawal, rather than being an ideal instrument allowing independentists to secede easily, can be viewed as a dissuasive element and therefore as a factor that strengthens, rather than weakens, a federation.

Between the theoreticians of federalism in the 19th century and the present day, the defence of the right of withdrawal has taken on a new dimension. Not only are federalism and secession seen as compatible, but the former may need the latter to gain strength and achieve its aims. In any case, this brief survey of the theory of federalism shows that some theoreticians have been able to consider the two terms as being compatible, and even necessarily compatible. From this point of view, it is making them incompatible that appears to be incompatible with the principles of federalism, or at the very least counter-productive, since the federated units would then tend to feel their links with the federation at a particular time as being imposed rather than desired. Federalism, at least in theory, relies on the freedom of all the parties in the federative relationship.

3. Secession in positive law

The numerous constitutions of the past and present that either reject the possibility of secession or remain silent on the question have, inevitably, led to the development of jurisprudence and doctrine that deny the existence of a right of secession.⁴³ In this section, we will attempt to discover if there are any federative systems that accept secession as a legal possibility. In addition, if it is possible to identify non-federative systems that accept the secession of part of their territory, this would probably support the compatibility of secession and federation since a federation, unlike a unitary state (centralized or decentralized), is already made up of distinct territorial units that may have been independent at some point in the past. In addition, it is generally agreed that unitary states are more

⁴² Sorens, J., *op. cit.*, p. 110.

⁴³ On this point, see the study by Christophe Parent in this book.

rigid than federations with respect to territorial unity, since federations are both better prepared for the scenario of independence (having a complete and operational decentralized administration) and, in some cases, are built on the idea of consent (from the territorial units) that is generally absent in a unitary system. When the question of secession arises, it is indirectly the question of consent to being governed by the existing authorities that is being challenged.

We can set aside the historical examples (whose federal label also happens to be questionable) such as the former USSR, which recognized the right of secession of its territorial units while denying, *de facto*, the exercise of that right. We simply need to note the cases of secession that occurred unilaterally, and therefore illicitly under the reference legal framework, in the Eastern Bloc (in the former Soviet Union and Yugoslavia). With respect to compatibility between federalism and secession, it would be sufficient to observe one or more federative systems that have made the two concepts compatible to conclude on their compatibility. It could be considered that the two cases just mentioned are enough to demonstrate compatibility. However, we can try to delve deeper (doubts about the democratic label encourage this endeavour) and a little closer to home, by briefly reviewing some contemporary cases.

Saint Kitts and Nevis (two islands in the Caribbean) and Ethiopia are, to date, the only federations to have included a procedure for secession in their constitutions, and their federated units can therefore secede legally. Article 113 of the Constitution of Saint Kitts and Nevis provides for Nevis to separate from Saint Kitts: "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." It is important to note that the procedure set out in the following articles makes secession especially difficult (it has already been attempted once without success). In Ethiopia, the constitution states as follows (article 39.1): "Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession." In reality, repression of the Oromos (who make up between 20 % and 30 % of the federation's population) by the Ethiopian government in recent years creates some doubt about the conditional (or even unconditional) nature of the right of secession, but this cannot erase the existence of a constitutional clause providing for a right of unilateral secession.

As we have just seen, recognition of a right of secession is apparently not incompatible with the pursuit of the federation's initial objectives. However, we should note that these two cases are often presented in political and academic debates as examples that are not particularly relevant, since politicians and researchers from liberal democracies like to point out that both countries have a history and democratic label of questionable quality. We note the objection, but nevertheless observe that two systems with a questionable democratic label have been able to make federalism and secession compatible by including both terms in their constitution. The objection is noted, and since our main interest is the compatibility between federalism and secession in democratic systems, we must attempt to find something better elsewhere.

Looking at the Western democracies, the case that has received the most attention (and is probably the most interesting) in recent years is the case of Canada. The question of secession arose in the province of Québec for the first time in 1980, and for the second time in 1995. Both referendums on Québec's independence were won by the "No" side, the second time on a slim majority.⁴⁴ The Canadian constitution is silent on the question of secession. Developments in the areas of doctrine and jurisprudence tend to consider Canada as an indivisible political unit, like its neighbour to the south ("indestructible"). Given that Québec (like the other provinces) can ask its citizens to give their opinion on the question of secession in a legal referendum (this is a provincial power), the silence of the constitution, even when interpreted as indicated, could be a problem if the "Yes" side won a third referendum (which has not yet taken place). After the extremely close referendum result of 1995, the Canadian government became involved and asked the Supreme Court of Canada to rule on the constitutionality of a possible Québec secession.

The Supreme Court was asked to examine the question from the standpoint of Canadian constitutional law and international public law. The questions were worded as follows:

- “1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec

⁴⁴ 50.58 % for “No” and 49.42 % for “Yes”, with a participation rate of 93.5 %.

from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?”⁴⁵

The Supreme Court concluded that a unilateral secession was unconstitutional and that there was no legal framework in international law that would make it legal. It noted, however, that its review of Canadian constitutional law clearly revealed the existence of four principles (federalism, democracy, constitutionalism and the rule of law, respect for minorities) that underlie the Canadian constitutional order and which, correctly interpreted and balanced, require the Canadian government not to ignore a clear referendum vote in favour of secession and therefore to negotiate a solution in good faith with the Québec government: “The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada.”⁴⁶

The solution indicated by the Supreme Court would involve negotiations to amend the constitution to respond to the legitimate claims of the secessionist territory.⁴⁷ If the two parties disagreed and the negotiations failed, whether in good or bad faith, secession would fall outside the legal framework, which does not necessarily mean, in the view of the Supreme Court, that it would have no democratic legitimacy.⁴⁸ The Supreme Court’s *Advisory Opinion* was followed immediately by an Act of the Canadian parliament, the so-called Clarity Act, in 2000,⁴⁹ which can be seen as constitutionalizing the right of secession by providing for a procedure which, although not entirely in the spirit of the Supreme

⁴⁵ *Reference re Secession of Québec, op. cit.*, par. 2.

⁴⁶ *Ibid.*, par. 92.

⁴⁷ *Ibid.*, par. 94 ff.

⁴⁸ *Ibid.*

⁴⁹ *An Act to Give Effect to the Requirement for Clarity as Set out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference*, S.C. 2000, c. 26.

Court's *Advisory Opinion*,⁵⁰ lays the foundations for a right of withdrawal from the Canadian federation. The Québec parliament responded to the Canadian Act with its own Act in the same year (2000),⁵¹ in which it expresses its disagreement with the federal government's interpretation of the Supreme Court's *Advisory Opinion* of 1998.⁵²

Whatever happens in connection with Québec secession in the future, the Canadian federation now has a procedure and tools that confirm the possibility of secession in a federative system. In Canada, one of the world's most dynamic federations that is also one of the most closely studied, federalism and secession do not appear to be considered to be incompatible.

Recognition of secession is not just a stop-gap solution or an anomaly found in poorly-integrated democratic contexts, which are more exposed to the risk of separatism, like *Brexit* in the EU⁵³ or – as some might say – the case of Québec in Canada. The proof of this is that it is even possible to find unitary states (whether centralized or decentralized) that have agreed to recognize the right of secession. Examples include the centralized states of Uzbekistan, Denmark and France, which have constitutional provisions in this area. Uzbekistan has recognized the right of secession of the Republic of Karakalpakstan (article 74): “The

⁵⁰ The Supreme Court emphasizes, for example, the obligation on both parties to negotiate in good faith, which seems to be an invitation to look for negotiated solutions. However, the Canadian parliament has reserved a unilateral right to decide whether a clear majority has voted for independence. A situation could, therefore, arise in which 52 % of Québec's population votes for independence and at a later date the House of Commons considers that this is not a clear majority for the purposes of secession, which would block the negotiation process and secession itself.

⁵¹ *An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec State*, CQLR, c. E-20.2.

⁵² Section 4, for example, contradicts the *Clarity Act* in terms of the majority needed for a referendum victory: “When the Québec people is consulted by way of a referendum under the Referendum Act (chapter C-64.1), the winning option is the option that obtains a majority of the valid votes cast, namely 50 % of the valid votes cast plus one.”

⁵³ It is important to remember that the EU faced the same questions as far more integrated political contexts concerning the possible withdrawal of a member state. Some of the doctrine suggested that there was no right of withdrawal before it was explicitly recognized in article 50 of the Lisbon Treaty in 2009. This recognition did not prevent some observers from expressing doubts and regrets during the *Brexit* debate.

Republic of Karakalpakstan shall have the right to secede from the Republic of Uzbekistan on the basis of a nation-wide referendum held by the people of Karakalpakstan.”⁵⁴ Denmark, in turn, supported the process that allowed Greenland to gain greater autonomy, which culminated in a victorious referendum in 2008 (a 75 % vote in favour in Greenland) and the Act on Greenland Self-Government (2009)⁵⁵ that provided for the possibility of accession to independence in the following terms (article 21): “Decision regarding Greenland’s independence shall be taken by the people of Greenland.” France, which experienced secessionist events in the past (Algeria, Comoros),⁵⁶ has enshrined a right of secession (self-determination) for New Caledonia in the constitution of the Fifth Republic (articles 76 and 77). The objection could be made that the right to self-determination exists in international law for colonies, and that France has merely recognized and integrated this international right in its constitution to allow colonized peoples (as in the cases mentioned previously) to achieve self-determination. This is accurate, but we fail to see what difference it makes, given that our focus is on the compatibility between the unity of a political body (article 1) and the secession of one of its parts, provided for New Caledonia in articles 76 and 77 and for all other territories in article 53.⁵⁷ Neither the specific historical context (colonization and then decolonization) nor the legal source (in this case, international law transposed into domestic law) have a significant impact on our conclusion. They simply explain the reasons for which a system agrees to make unity and secession compatible: an occupation felt to be unjust, a higher international norm that a country agrees (with emphasis on “agrees”) to follow, and so on. The conclusion remains the same: the indivisible unity enshrined in the constitution does not appear to be incompatible with the possibility of secession in constitutional law.

⁵⁴ Constitution of the Republic of Uzbekistan.

⁵⁵ *Act on Greenland Self-Government*.

⁵⁶ On this point, see the explanation of Christophe Parent in this book.

⁵⁷ “Peace treaties, trade agreements, treaties or agreements relating to international organization, those committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory, may be ratified or approved only by an Act of Parliament.

They shall not take effect until such ratification or approval has been secured.

No ceding, exchanging or acquiring of territory shall be valid without the consent of the population concerned.”

To conclude this section, with regard to decentralized states, we have the example of the referendum on independence for Scotland in 2014. The British constitutional system is not thought of as being less united or consolidated than others, but the British government was able to find a negotiated outcome with the government of Scotland when, faced with the same problem, the government of Spain (another decentralized state) did not consider it advisable to grant the request of the Catalan secessionist movement, which wanted to organize a referendum on independence based on the model of Scotland or Québec.⁵⁸ Once again we have two examples that show that the law can make unity and secession either compatible or incompatible, depending on the wishes of the authorities or stakeholders making the decision.

All of the above tends to confirm that there is not necessarily any incompatibility between federalism and secession in positive law. Constitutional law can, of course, exclude a territory's right of withdrawal, but nothing seems to stop a federation or state from recognizing such a right, as the examples in this section show.

4. Secession and “legal logic”

As mentioned previously, a recurrent argument in the debate about secession highlights its incompatibility with the unity of the state or nation, if unity is explicitly mentioned in the constitution.⁵⁹ Examples include article 1 of the constitution of the Fifth Republic in France (which is “indivisible”) and article 2 of the Spanish constitution (“the Constitution is based on the indissoluble unity of the Spanish nation”). A similar observation could be made about any state or federation that

⁵⁸ The lack of a written constitution was suggested to explain the flexibility available to the British government when compared to the Spanish government. However, Canada has a written constitution, as do France and Denmark.

⁵⁹ Spain's problem in Catalonia since 2012 has given observers an opportunity to view a range of positions: sometimes national unity (art. 2) and sometimes the sovereignty of the Spanish People (art. 1) pose, in the doctrine, an insurmountable legal obstacle not only to the organization of a (consultative) referendum on independence, or independence declared without a referendum, but also to the introduction into the Spanish constitution of concepts or expressions (“nation of nations”, “plurinationality”) proposed by the political parties that support a federal reform of the central state (on the centre-left and left, respectively the PSOE and Podemos).

is considered to have been established in perpetuity. This applies, as outlined above, to way in which the dominant doctrine in the United States interpreted the constitutional pact of 1787 almost unanimously after the Civil War. In law, apparently, this type of constitutional provision has the effect of making it almost impossible for the legal system to deal with secession.

However, we should note that this reasoning appears to abandon the method of legal positivism in favour of another form of positivism characteristic of legal systems,⁶⁰ which tend to present the legal order as a perfectly coherent entity, based on a certain number of concepts or principles that, provided one uses the spectacles offered by the system, reveal the completeness of the legal order, the normative hierarchy, legal security, the separation of powers, etc.⁶¹ According to the positivist discourse (approach) of legal systems (the second meaning proposed by Bobbio: “a theory”),⁶² legal orders are “coherent systems”.⁶³ Based on this specific logic, the contradiction between secession and unity is clear and, of course, must be denounced.

There are two things that need to be highlighted about this approach and (self-proclaimed) description of the law. First, it is important to note that by adopting the discourse and logic of the legal system, researchers intervening in the debate also adopt the point of view and language of the legal order (its authorities and players). And this, as we have mentioned, is the language of “ought”, of what ought or ought not to be.⁶⁴ When the law prohibits an action or omission, and prescribes the related penalty,

⁶⁰ Bobbio, N., *Essai de théorie du droit*, Paris, Bruylant-L.G.D.J., 1998, p. 24.

⁶¹ See Troper, M., *op. cit.*; Bobbio, N., *ibid.*

⁶² Bobbio, N., *ibid.*, p. 24.

⁶³ *Ibid.*

⁶⁴ See Kelsen, H., *Théorie générale des normes*, Paris, Presses universitaires de France, 1996. One of the key questions is whether this intention can be known, a point that divides legal specialists *grosso modo* into two groups: cognitivists and non-cognitivists. For the cognitivists, the intention hidden in a legal statement or norm can be known (by a judge or by a legal professor), while the non-cognitivists defend the opposing thesis: it is impossible to know the intention (meaning) enclosed in a normative statement by the organ that created it. This leads to an equally differing conception of legal interpretation: for the first group, interpretation is a function of knowledge, and the law always expresses the intention of the legislator (the organ that created the norm being interpreted); for the second group, interpretation is an act of will and it is the will of the judge, rather than the legislator, that counts. See Troper, M., *Le droit...*, *op. cit.*, p. 155 ff.

it is not describing an actual fact, but ordering a course of conduct (to do, or not to do, as the case may be; to punish a person who does what is prohibited, or fails to do what is prescribed). Next, if the legal system wants certain rights or values to have special protection or be strengthened (for example, unity of the state or fundamental rights), it may find it useful to consider that this duty will be better protected from non-compliance if citizens no longer view the norms through which the legal system expresses and enacts its will as an intention (what “ought” to be), but rather as what already “is”. That which can only be expressed legally as an “ought” is presented by the system as if it were an observable empirical fact. The unity of the state, for example, mentioned in some constitutions, is seen, in this special legal view, not as an intention or something that “ought” to be, but as the observation or reporting of a natural fact, such as falling rain or the sun setting in the west. In this approach, the law simply “observes” a fact (seen as being independent of law), allowing a shift towards a form of reasoning in which the players make statements with the same assurance as if talking about the empirical world. For example, a statement (legal, in this instance), can be described as true or false in the same way as the statement “Peter is in the room” is false (if he is not there) or true (if he is). In this representation, the unity of the state or federation is “ontological”, something that “is”. When the French republic is described as being indivisible, the statement does not express an intention or duty to protect the unity of the political body, or an objective assigned to the instituted authorities by the constituent power, but describes an observable empirical fact: the political body is singular and indivisible. And legal specialists discussing the norm, as legal specialists, can say: it is true, the republic is indivisible, with the same assurance as if they were saying that Peter is in the room (if he is).

It is not hard to understand that this thesis affirms something that is false and almost absurd: the republic may be united when the constitution is created, and there may be a wish for it to be protected from attempts to disunite it or cause it to collapse, without it being possible to reach a conclusion as to its effective or real indivisibility. In fact, the opposite is true: the republic can be divided, into as many parts as can be imagined. This is shown by the examples above. The legal discourse, a discourse of what “ought” to be, has no power to change anything in the world of what “is”: something that is naturally divisible remains divisible whatever the law says (a territory – a space, and the power that is deployed over that space – is always divisible).

Based on this explanation, we can better understand the need for researchers to abandon the approach of legal positivism, specific to legal systems, and to adopt positivism as the approach used to focus on its object of study (Bobbio). This attitude or gaze, when directed at the law, shows that the legal discourse is actually a normative discourse that expresses a will, or what “ought” to be, and is not a description or explanation of reality. Using this first observation (the law is expressed in the form of “ought”), we can ask if a legal order can accept two intentions or “oughts” that are contradictory in appearance, such as indivisible unity and secession. This is a question that, at first glance, we are probably inclined to answer with a “No”. A and non-A cannot exist at the same time, we might think. The situation is, however, a little more complex. First, because although it is true that one cannot be at the oven and at the mill at the same time (an empirical evidence), it is also true that a legal system (or natural person) can want two things at the same time: for example, to protect its territorial unity and to recognize the right of secession of its constituent territories. It is even possible, as we saw above, to find a coherent explanation for this combination: we want unity *to be*, but also *to be wanted* by the various territorial entities; those that do not want unity can then be asked to constitute themselves separately. Secondly, because the two intentions or rights (because the same thing can be expressed in terms of rights) are not held by the same parties: the state (or the people) holds the right to territorial integrity, while a part of the state’s territory holds the right to constitute a separate state. In fact, the same applies to other rights: our right to express our opinions freely must not conflict with the right of others to see their honour protected, for example. The rights are different, and so are the holders. But they may still conflict. For unity and secession, the situation is the same: the right of the state to protect its unity or territorial integrity can be accommodated with a recognized right for the populations inhabiting the constituent territories to leave. We have identified examples in the field of comparative public law that confirm this is possible.

Last, we can follow another path, which we could call the Kelsenian path, to see the incompatibility we are investigating as a conflict of norms⁶⁵ rather than rights. The norm of “indivisible unity” and the

⁶⁵ Kelsen, H., *op. cit.*, p. 288.

norm of “secession” conflict with each other; and Kelsen states that “A conflict exists between two norms when that which one of them decrees to be obligatory is incompatible with that which the other decrees to be obligatory”.⁶⁶ The conflict must be viewed dynamically (as a conflict of norms, when the exercise of the right of withdrawal is opposed by the norm that affirms indivisible unity) and not statically or in the abstract (based on the two “contradictory” norms in the constitution) since, in the latter case, there is no actual conflict.⁶⁷ However, we can still explore this avenue quickly. As Kelsen explains, the conflict of norms occurs only between valid legal norms, and the resolution of the conflict by the competent authority does not suppress the validity of the norm that is set aside: “the situation created by a conflict of norms is that one of the two conflicting norms is being observed and the other violated, not that only one of the two may be valid.”⁶⁸ The two norms are therefore both still valid, including the norm that cannot be observed in the specific case that led to the conflict. This means, for example, that if a territory secedes from a state or federation, the norm that affirms the indivisible unity of the state or federation is still valid and still has effect within its territory. If, on the other hand, secession is prevented by the state or federation on the basis of the “unity” norm, the “secession” norm remains valid and may be applied successfully at a later date. This leads to the conclusion that the legal contradiction or incompatibility exists in appearance only, if the system provides for mechanisms to ensure that two apparently contradictory norms cannot both apply at the same time; instead, one may apply in some cases while the other applies in other cases.

In fact, even if this specific relation (the simultaneous presence of unity, presented as indestructible, and of a recognized right of secession) is seen as a clear contradiction, we still need to recognize that legal systems contain this type of contradiction and have the mechanisms needed to ensure that something that appears incompatible or contradictory becomes legally compatible and coherent within the system and in the eyes of the public. There are two possibilities: either there is no contradiction

⁶⁶ Kelsen, H., *General Theory of Norms*, Oxford Scholarship Online, 2012, chapter 29. DOI:10.1093/acprof:oso/9780198252177.003.0029.

⁶⁷ There is no conflict because the absence of a demand for a right of withdrawal from a federation indicates indirectly that the norm to be followed is the norm that says that unity must be.

⁶⁸ Kelsen, H., *op. cit.*, p. 289 (our translation).

between unity and secession in the cases presented above, or there is a contradiction, but the systems accommodate the contradiction by denying that it occurs, which is a double contradiction. In both cases, cohabitation between unity and secession is possible.

Although incompatibility must be identified between the obligations, rights and norms (or rather legal statements) that appear to contradict each other, legal logic or linguistics – the way in which the law expresses itself – appears to indicate that no incompatibility exists. If, as pointed out by Kelsen, the sign of a logical contradiction is that it exists between statements or judgements that are true or false, but not between norms, because norms are not true or false but only valid or invalid. However, the contradiction in our case arises between two norms (legal statements) or rights (a right takes the form of a legal statement) that are valid, in other words belong to the same legal system. From this point of view, there simply cannot be a contradiction or incompatibility.

We still need to examine another objection that is sometimes raised against the idea that federalism (unity) and secession can be compatible. This time, it is not the right of secession that is targeted and defined as being incompatible with the right to unity of the federal political body, but actual secession (the fact of secession). According to various authors, secession destroys federal (or state) unity, and therefore destroys the federation itself. Under this argument, when actual secession is illegal (this argument has re-emerged lately in the unionist camp in Spain), it also destroys democracy and the state of law. We will focus on the first of these objections, clearly the most serious: that secession destroys the federation (or state). First, we must examine a technical argument that is nevertheless important: if unity is expressed as an “ought”, as we saw above, then it cannot be harmed by an “is”, an empirical fact such as secession. We can consider the following example: a thief enters a jewellery store and leaves with an impressive haul. Neither the police nor the justice system reacts. Is it the theft that violates the penal norm, or the fact that the offence is not punished?⁶⁹ We could say both, because an offence is needed (the condition) for there to be a penalty, but this answer is not completely satisfactory. Or, we could take another approach and ask if the violated norm is still valid, if it continues to play its role in the legal

⁶⁹ Kelsen states that only the absence of a sanction actually represents an infringement of the legal norm. See Kelsen, H., *Théorie générale...*, *op. cit.*, p. 175–176.

system. The answer, if it has not been repealed (and it is clearly not the theft that can repeal the penal norm), is clearly “Yes”. The same answer applies for the norm that states the requirement of state unity. Unity is required, but a territory has decided to leave the federation. Will the norm still be valid for the remaining territories in the federation? Nothing allows us to believe that it will not apply. The only case, we believe, where it is possible to consider that actual secession may be incompatible with federalism, or rather with the existence of the federation or state, is the case in which the federation loses most of its member territories (such as the former Yugoslavia) or has only two territories (such as Belgium). In the latter case, the departure of one of the two partners in the federation or state would automatically lead to the end of the federal relationship. Actual secession would apparently end the federation, which could be seen as a factual (but not legal) incompatibility: the existence of secession means the inexistence of the federation, and vice versa. The question of whether, in the specific case of a two-party federation that ceases to exist because one of the parties secedes, federalism (the idea) and secession are also incompatible may, however, lead to a different answer.

Conclusion

The goal of this article was to examine the question of whether federalism and secession are compatible, by highlighting the experiences and facts (including linguistic facts) that can be used to answer the question objectively.

Our investigation leads to the conviction that nothing supports the conclusion that the two terms are logically incompatible. Clearly, a federation (or state) can refuse to enshrine a right of secession in its constitution for its member territories, or may decide not to grant that right if the constitution remains silent on the question. This attitude is not necessarily incompatible with federalism (or at least a certain kind of federalism) or the existence of a federation, as shown by the numerous authors who have viewed federalism as a perpetual union, as well as the numerous legal systems built and developed on the same foundation and dynamic. However, the opposite solution, for the same reasons, leads to the same conclusion. The federal idea has been supported by theoreticians respected and esteemed for their strong and original contribution to federal thought, while at the same time defending the fundamental need to include a right of withdrawal. And although we

have seen that it is common for federative systems under public law to refuse of a right of secession, we have also observed that secession remains a legally-considered solution in some federations (Ethiopia, Canada) and even some unitary or decentralized states (Denmark, France, UK). It is not even clear that federations can be distinguished from unitary states on this point, since everything supports the conclusion that secession is possible in both types of state.

Last, “legal logic”, using the approach we have applied in this chapter, shows that the contradiction or incompatibility that the doctrine identifies between federalism (the unity of the federation) and secession is far from clear. Of course, from the point of view of the system (what we have called the “discourse of the law”), it is clear that positive law follows a logic of self-preservation that is hostile to secession. But, if as researchers we agree to take a step back to view the system from an “exterior” point of view (this is the scientific approach, which produces a “discourse about the law”), things appear differently, and the compatibility between federalism and secession appears to depend on political will and the harmonization between two “oughts” (the normative dimension) that can never exist at the same time (the empirical dimension). This involves a manoeuvre or choice that is legally simple and possible, as we have shown.

And what about federalism, or the federal idea? Do the principles of federalism provide, unlike the theory of the classical state, any arguments that support secession? Here, we must clearly distinguish between two ways of conceiving of federalism: as a (decentralized) territorial articulation of power within a single people; or as a special (non-centralized) territorial articulation of power among several different peoples. In other words, we face the well-known *distinguo* between territorial federalism and pluralist, or pluri-nation, federalism. We must note, in passing, that Carl Schmitt has already pointed to the need for existential homogeneity in a federal-type democracy,⁷⁰ which he does not hesitate to describe, significantly, as “a federal state without a federal foundation”.⁷¹ This type of federalism generally takes a poor view of secession, but this is not true for pluralist or pluri-nation federalism, in which existential pluralism (or

⁷⁰ Cagiao y Conde, J., “L’intégration fédérale dans l’UE et les leçons de l’histoire: Madison, C. Schmitt et Proudhon”, *Revue d’études proudhoniennes*, 2, 2016, p. 71 ff.

⁷¹ Schmitt, C., *op. cit.*, p. 537.

multiple peoples), which underlies and gives meaning (at least at first) to the federal relationship, inclines the players to accept that the founding freedom of the peoples, without which the federation would not exist, remains a fundamental principle once the federation has been created. A failure to recognize the right of withdrawal of the federated parties could be seen as a derogation from the federative pact, as mentioned by Proudhon, which the founding peoples would possibly not have signed if they had thought, even for an instant, that the federation would one day become a prison.

From referendum to secession – Québec’s self-determination process and its lessons^{*}

DAVE GUÉNETTE AND ALAIN-G. GAGNON^{**}

Introduction

Over the past 50 years, the debate on Québec’s ability to declare its independence from the rest of Canada has shaped the political and constitutional life of the country. From the election of René Lévesque’s Parti Québécois in 1976, to the referendums of 1980 and 1995, not to mention the *Reference re Secession of Québec*¹ and the federal parliament’s *Clarity Act*,² the constitutional question of Québec’s sovereignty has been part of the Canadian political landscape.

Québec is thus a kind of figurehead among western democracies. It is a modern and developed state that is trying to obtain its national independence, not in time of war or because of severe political oppression, not to put an end to a colonial grip on its land or to free itself

* This chapter is a slightly modified version of Guénette, D., Gagnon, A.-G., “Del referèndum a la secessió – El procés quebequès d’accés a la sobirania i les seves lliçons en matèria d’autodeterminació” – “Du référendum à la sécession: le processus québécois d’accession à la souveraineté et ses enseignements en matière d’autodétermination”, *Revista Catalana de Dret Públic*, n°54, 2017, p. 100–117.

** The authors are respectively postdoctoral fellow at McGill University and professor of political science at Université du Québec à Montréal.

¹ *Reference re Secession of Québec*, [1998] 2 S.C.R. 217.

² *An Act to Give Effect to the Requirement for Clarity as Set out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference*, S.C. 2000, c. 26.

of an antidemocratic political system, but for reasons that are first and foremost cultural, identity-based, linguistic and economic. In this sense, and despite the *lack of success* of its two referendum attempts, the Québec nation still has to be acknowledged as playing a pioneering role with respect to minority nations' recognition to external self-determination right, from both academic and practical points of view.

On one hand, from the academic perspective, a great deal has been written on minority nations' right to secede. That literature not only refers to Québec's experience, but is also intended to be applicable across the board. Those writings can be divided into two categories, depending on whether the right to independence in multinational states is approached head on,³ or whether the right to self-determination is made into a formal stake to be taken into account when analysing ways of living together (*vivre-ensemble*) in multinational societies.⁴ While we are not claiming that the case of Québec is the source of all of this literature, it is nonetheless an inescapable point of reference, providing food for thought in many respects.

On the other hand, from a practical point of view, since the Québec referendums on sovereignty-association in 1980 and sovereignty-partnership in 1995, other minority nations in political contexts that are, all in all, similar to that of Québec, have also taken secessionist steps. Naturally, Scotland springs to mind, where a referendum on

³ Patten, A., "Democratic Secession from a Multinational State", *Ethics*, vol. 112, n° 3, 2002, p. 558; Weinstock, D., "Constitutionalizing the Right to Secede", *Journal of Political Philosophy*, vol. 9, n°2, 2001, p. 182; Dumont, H., El Behroumi, M., "La reconnaissance constitutionnelle du droit de demander la sécession dans les États plurinationaux", in Gagnon, A.-G., Noreau, P. (eds.), *Constitutionnalisme, droits et diversité. Mélanges en l'honneur de José Woehrling*, Montreal, Thémis, 2017, p. 461; Cagiao y Conde, J., "Pluralisme national et autogouvernement: vers une constitutionnalisation du droit d'autodétermination?", CRIDAQ Conference, Université Laval, October 3rd, 2016; Beaud, O., "La sécession dans une fédération et son rapport avec le pacte", CREQC Conference, Université du Québec à Montréal, January 17th, 2017.

⁴ See, for example, the research institute: *Politics in Fragmented Politics: Cohesion, Recognition, Redistribution and Secession*, Bolzano, June 14th-27th, 2015; see also Mathieu, F., Guénette, D., "Empowering Minorities' Societal Culture Within Multinational Federations", in Steytler, N., Arora, B., Saxena, R. (eds.), *The Value of Comparative Federalism. The Legacy of Ronald L. Watts*, London, Routledge, 2020, p. 102, in which the authors make the right to external self-determination one of the six pillars of their societal culture index.

self-determination was held in 2014, as does Catalonia, which also held a referendum on independence in 2014, followed by an “election-referendum” on the same question in 2015, and by another referendum on self-determination in 2017. In their long marches toward sovereignty, both the Scots and the Catalans have been inspired by the Québec process, what can be learned from it, and the obstacles it has brought to light.⁵

For these reasons, the Québec experience and its process – although incomplete – of accession to sovereignty have to be taken into account. Yet, while the secessionist movements in Scotland and Catalonia today are inevitably inspired by that experience, they also inform the debates more broadly with respect to minority nations’ right to self-determination within multinational democratic societies.

It is clear that the lessons from Québec, Scotland and Catalonia – and also possibly those of the Flemish and the South Tyrolians, for instance – share strong similarities and contribute to a more representative *sampling* of self-determination process experiences for minority nations in multinational contexts. They certainly participate in some sort of dialogue in which the practical experience of one specific case can be shown to have concrete influence on the debates within other independentist movements.

Based on this observation, Québec’s self-determination process is both chronologically and substantially an essential reference with respect to *two* distinct, but complementary, dimensions. Indeed, in light of the Scottish and Catalan experiences, we believe it is useful to divide the lessons of the Québec case according to whether they are related to (1) the constitutional capacity of Québec’s institutions to hold a referendum or to (2) Québec’s ability to declare its independence from the rest of Canada. These two dimensions will be the subjects of this chapter.

⁵ Bérard, F., Beaulac, S., *Droit à l’indépendance. Québec, Monténégro, Kosovo, Écosse, Catalogne*, Montreal, XYZ, 2015; Rocher, F., Casanas Adams, E., “L’encadrement juridique du droit de décider: la politique du confinement judiciaire en Catalogne et au Québec”, in Taillon, P., Brouillet, E., Binette, A. (eds.), *Un regard québécois sur le droit constitutionnel. Mélanges en l’honneur d’Henri Brun et de Guy Tremblay*, Cowansville, Éditions Yvon Blais, 2015, p. 877; Beauséjour, A., “Les référendums sur la souveraineté de l’Écosse et de la Catalogne. Le *Renvoi relatif à la sécession du Québec* en comparaison”, Master’s thesis, Université de Montréal, 2015.

1 The constitutional capacity of Qu  bec's institutions to hold a referendum – A stake little debated or opposed

As has been shown by the Scottish and Catalan independentist processes, the constitutional capacity of a minority nation to hold a referendum within its borders should not be taken for granted. While, in Scotland, the holding of a referendum had first to be approved by the British government through the *Edinburgh Agreement*,⁶ in Catalonia, both the Spanish government and the Constitutional Court firmly decline to grant that prerogative to the autonomous community.⁷ Thus, it seems essential to discuss the constitutional capacity of Qu  bec's institutions to hold a referendum. For this, we will look at (1.1) the historical and (1.2) legal dimensions authorizing self-determination referendums in Canada.

1.1 The historical dimensions leading to referendums on the sovereignty of Qu  bec

In order to understand the context surrounding the referendums on the independence of Qu  bec, as well as their legal foundations, we first have to examine (1.1.1) the history of referendum practices in Qu  bec and Canada prior to the debates on secession, and then focus on (1.1.2) the 1980 and 1995 referendums on the sovereignty of Qu  bec.

1.1.1 Referendum practices in Qu  bec and Canada prior to the debates on secession

The primary pillars of Qu  bec's ability to hold referendums within its borders find their roots in practices that date from 1867 in the province, and in the rest of Canada. Indeed, "for historical and contextual reasons, referendums, in general, and the Qu  b  cois' right to choose their political status, in particular, have been exercised, *de facto*, in a manner freed, in many respects, from the institutional mechanism set out in the formal

⁶ *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*, October 15, 2012: www.gov.scot/Resource/0040/00404789.pdf.

⁷ See for example: S.T.C. 31/2015, BOE n  64, p. 190 and S.T.C. 32/2015, BOE n  64, p. 213.

Constitution”.⁸ It can thus be noticed that long before there was any question of holding a referendum to consult the population of Québec on the province’s independence, direct democracy practices took place in Canada. Those had for consequence to establish, both legally and politically, the foundations of Québec’s capacity to hold referendums.

That being said, we should note that referendums have been relatively rare, at both the federal and provincial levels. As jurists Henri Brun, Guy Tremblay and Eugénie Brouillet have said: “Constitutional regimes inspired by the British model are generally not very familiar with operating techniques derived from direct democracy.”⁹ Since referendum practices have not been used very often in the Canadian political system, they are not very institutionalized or subject to precise rules, unlike, for example, in Switzerland.

Historically, referendums were held in Canada in 1898 – on prohibition¹⁰ – and in 1942 – on conscription.¹¹ A third pan-Canadian referendum also took place in 1992 to consult the population on the *Charlottetown Accord*.¹² Thus, a total of only three pan-Canadian referendums were held in the first 150 years of Canada. Even today, the country has only a “limited referendum Act”,¹³ namely, *An Act to Provide for Referendums on the Constitution of Canada*.¹⁴ This shows the low degree of institutionalization of its referendum practices. Consequently,

⁸ Taillon, P., “Le référendum comme instrument de réforme paraconstitutionnelle au Québec et au Canada”, in Seymour, M. (ed.), *Repenser l'autodétermination interne*, Montreal, Thémis, 2016, p. 269–270 (our translation).

⁹ Brun, H., Tremblay, G., Brouillet, E., *Droit constitutionnel*, 6th ed., Cowansville, Éditions Yvon Blais, 2014, p. 98 (our translation).

¹⁰ Directeur général des élections du Québec, *La consultation populaire au Canada et au Québec*, 3rd ed., p. 14: www.electionsquebec.qc.ca/documents/pdf/dge_6350.3_v.f.pdf.

¹¹ *Ibid.*, p. 15.

¹² We will come back to this referendum in sections 1.1.2 and 1.2.2 to explore in greater detail what it contributed regarding Québec’s constitutional capacity regarding referendums.

¹³ Marquis, P., “Referendums in Canada: The effect of populist decision-making on representative democracy”, 1993: publications.gc.ca/Collection-R/LoPBdP/BP/bp328-e.htm.

¹⁴ *An Act to Provide for Referendums on the Constitution of Canada*, S.C. 1992, c. 30. As its name indicates, this act can be used only to provide a framework for a referendum on the Constitution; its vocation is therefore not to govern all direct democracy practices in Canada.

some ambiguity hangs over the referendum process in Canada, with respect to both its legal foundations and organization, and also regarding the interpretation of the results.¹⁵

A similar phenomenon can be observed at the provincial level, even though referendum practices have been a little more frequent there.¹⁶ For example, “Saskatchewan, Manitoba and Alberta adopted referendum legislation at the beginning of the twentieth century”¹⁷ to provide a framework for direct democracy practices, and some provinces now make their approval of amendments to the Constitution subject to the prior holding of a provincial referendum.¹⁸ Moreover, the great majority of provinces now “have a provision for the enactment of a plebiscite”.¹⁹

In the case of Qu  bec, four *provincial* referendums have been held up to now.²⁰ The first, which was in 1919 and concerned prohibition, was made possible “because of a special legislation”.²¹ It thus established an important precedent, even though, at the time, Qu  bec did not have a specific legislative framework governing its own direct democracy practices. It was only 50 years later that a bill by the Union nationale, which was then the party in power in the Qu  bec National Assembly, proposed instituting a formal legislative framework on referendums.²² Abandoned by the Liberal government that succeeded the Union nationale, such a law was not adopted until 1978, under the government of the independentist Parti qu  b  cois.²³ This was the legal framework for

¹⁵ Gu  nette, D., “Le r  f  rendum constitutionnel dans les soci  t  s fragment  es – L’exp  rience canadienne, son ambig  it   et ses cons  quences”, in Binette, A., Taillon, P. (eds.), *La d  mocratie r  f  rendaire dans les ensembles plurinationaux*, Qu  bec, Presses de l’Universit   Laval, 2018, p. 181.

¹⁶ Marquis, P., *op. cit.*

¹⁷ Brun, H., Tremblay, G., Brouillet, E., *op. cit.*, p. 98 (our translation).

¹⁸ *Constitutional Amendment Approval Act*, R.S.B.C. 1996, c. 67; *Constitutional Referendum Act*, R.S.A. c. 25.

¹⁹ Marquis, P., *op. cit.*

²⁰ Directeur g  n  ral des   lections du Qu  bec, “R  f  rendums”: www.electionsquebec.qc.ca/francais/provincial/resultats-electoraux/referendums.php (our translation).

²¹ Brun, H., Tremblay, G., Brouillet, E., *op. cit.*, p. 98.

²² *Ibid.*, p. 98.

²³ *Ibid.*, p. 99.

three successive referendums in Québec, including those of 1980 and 1995 on the province's sovereignty.²⁴

What can be learned from referendum practices in Québec and Canada, even before the debates on secession, is that, despite their relative rarity, and even though there has been a lack of a formal legal and constitutional framework for holding them, recourse to this democratic tool remains possible for political actors both at the provincial level and in the central government. We can now turn our attention to the study of Québec's referendums on independence.

1.1.2 The 1980 and 1995 referendums on Québec sovereignty

At the turn of the 1970s, the Québécois had been called upon to make their opinion known through referendums only three times in their entire history, namely, in 1898, 1919 and 1942. Nonetheless, from 1966 to 1977, the idea of "using a referendum to resolve the eternal constitutional debate surfaced from time to time".²⁵ That political project of external self-determination, inspired by the coming to power of René Lévesque's government in 1976, was embodied through the adoption of the *Referendum Act* on June 23rd, 1978,²⁶ which led to the holding of the first referendum on Québec sovereignty on May 20th, 1980.

Québec thus voted on its government's "sovereignty-association" proposal. The outcome, while it was not what the independentist forces hoped, had the merit of allowing the Québécois to express themselves on their constitutional and political future. At the end of a 35-day referendum campaign, 59.56 % of Québécois voted against independence, while 40.44 % endorsed the independentist proposal, in a vote in which the participation rate was 85.61 %.²⁷

However, beyond these results, it is more specifically the *process* that retains our attention, notably since the Québec government was able to take action alone and autonomously, requiring neither *consultation with*

²⁴ The third Québec referendum to be held since 1980 is the one on the Charlottetown Accord. Even though it was a pan-Canadian consultation, the Québec government insisted on (and obtained that) it be held under the *Referendum Act*, CQLR c. C-64.1. In formal terms, therefore, two referendums were held on the same date.

²⁵ Directeur général des élections du Québec, *La consultation populaire, op. cit.*, p. 26.

²⁶ *Ibid.*, p. 27.

²⁷ Brun, H., Tremblay, G., Brouillet, E., *op. cit.*, p. 113.

nor *authorization from* Ottawa. Formally, the process was carried out within Québec's institutions. It began with a debate that lasted over 36 hours, spread over 17 days, in the National Assembly, during which all of the representatives from all political inclinations had the opportunity to express their opinions.²⁸ In the referendum campaign that followed, the leader of the "Yes" camp was René Lévesque, Premier of Québec, and the head of the "No" camp was Claude Ryan, leader of the Official Opposition in the province.²⁹

One of the consequences of the debate taking place exclusively among Québec political actors was that the central government, while it did not contest Québec's ability to hold the referendum, nonetheless refused "to bend to the system of national committees established by the *Referendum Act*".³⁰ The Superior Court of Québec³¹ and the Council of the referendum³² finally ruled in its favour, allowing actors from Ottawa to intervene in the referendum campaign without observing the conditions set out in the legislation adopted by the National Assembly.

A significant precedent was thus established, according to which the Québec government can, in an autonomous manner, hold a referendum on the province's sovereignty within its institutions and without prior agreement from Ottawa. However, the central government can embrace the referendum strategy that it wishes and act as it likes, without concern for Québec's legislative framework.

In line with this precedent, from a procedural point of view, the 1995 referendum on sovereignty had a lot in common with that of 1980. Formally, it took place between Québec's political actors – it included a 35-hour debate in the National Assembly and the formation of a "Yes" camp led by the Premier (Jacques Parizeau) and a "No" camp headed by the leader of Québec's Official Opposition (Daniel Johnson).³³ Once again, the central government refused to bend to Québec's legal norms, but did not try to block the holding of the referendum.

²⁸ Directeur général des élections du Québec, *La consultation populaire, op. cit.*, p. 37–38.

²⁹ *Ibid.*, p. 39.

³⁰ Brun, H., Tremblay, G., Brouillet, E., *op. cit.*, p. 112 (our translation).

³¹ *Boucher v. Mediacom*, [1980] S.C. 481.

³² *Boucher v. Mediacom*, Council of the referendum, May 16th, 1980.

³³ Directeur général des élections du Québec, *La consultation populaire, op. cit.*, p. 51.

It is, however, with respect to the outcome that the 1995 referendum proved to be very different from that of 1980. In 1995, the “No” option barely won, with 50.58 % of the votes, against 49.42 % for the “Yes”, with a higher participation rate of 93.52 %.³⁴ The effect of that result was to encourage the federal authorities to change strategies in response to the Québécois’ self-determination process.³⁵

At the end of this brief historical examination of Québec’s ability to hold a referendum on its constitutional and political future, a few conclusions have to be drawn. To begin with, despite the scarcity of direct democracy practices in Canada, referendums have been held a number of times on a wide range of questions at both the federal and provincial levels since the 1867 constitutional pact was signed. Thus, when Québec decided to give itself a formal legal framework regarding direct democracy, in order to eventually declare its independence, it seemed difficult if not impossible to try to deny it that prerogative. Consequently, the 1980 and 1995 referendums, as well as the formal debates, took place strictly within Québec’s institutions. Yet, the central government intervened in its own manner in those referendum campaigns, without complying with the provincial laws on the matter.

1.2 The legal aspects allowing self-determination referendums in Canada

At a time when Québec’s self-determination process was picking up pace, not only did historical precedents seem to make it possible to hold a referendum in the province, but the legal framework in which it was evolving also seemed to be leaning in that direction. Indeed, Canadian constitutional law and its written, customary and conventional sources, as well as its sometimes obsolete and silent nature, were to have consequences on Québec’s self-determination process. It is thus within that context specific to Canada that we have to define the scope of political authorities with respect to referendum practices. The special nature of Canadian constitutional law requires that we look at what is formally provided for in the *texts*, but also what the *unwritten sources* of the Constitution say. To this end, we will discuss (1.2.1) the absence of

³⁴ *Ibid.*, p. 56.

³⁵ We will come back to this in section 2.1.

constitutional restrictions on holding a referendum and (1.2.2) practices regarding direct democracy.

1.2.1 *The absence of constitutional restrictions on holding referendums*

In the written Constitution, tools of direct democracy are not mentioned. As jurist Patrick Taillon says, “[f]rom the origin of the Canadian federation in 1867 to today, the texts of the Canadian Constitution have always been silent on the possibility of holding referendums: both with respect to amending the Constitution and with respect to the adoption of federal and provincial legislation, the texts are based on a strictly representative conception of democracy.”³⁶ While this silence of the texts is in no way an isolated case in Canadian constitutional law,³⁷ it also in no way prohibits or makes it more legally difficult to use referendum tools. In this respect, to assess the legality of referendums under Canadian law, we have to take into account not only the constitutional provisions that could inform us on this matter, but also the case law on this issue that has been produced by highest Canadian courts over the years.

First, with respect to the constitutional provisions that may not directly concern the possibility of holding a referendum, but that can be interpreted in that way, there are three sections that are especially relevant. According to Patrick Taillon’s reasoning, section 45 of the *Constitution Act, 1982*³⁸ – which concerns the ability of each province to unilaterally amend its own constitution – section 92 (16) of the *Constitution Act, 1867* – concerning the legislative power of the provinces in “all Matters of a merely local or private Nature in the Province” – and section 129 of the same Act – dealing with the continuity of the legislative norms in effect prior to the 1867 Confederation – all probably can be seen as granting provinces the constitutional capacity to hold referendums.³⁹ Together,

³⁶ Taillon, P., “Le r ef erendum comme instrument”, *op. cit.*, p. 270–271 (our translation).

³⁷ Gu enette, D., “Le silence des textes constitutionnels canadiens – Expression d’une Constitution encore inachev ee”, *Les Cahiers de droit*, vol. 56, n o 3–4, 2015, p. 411.

³⁸ *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. That section replaced section 92.1 of the *Constitution Act, 1867*, (U.K.) Vict. 30 & 31, c. 3, but is nonetheless in legal continuity with it.

³⁹ Taillon, P., “Le r ef erendum comme instrument”, *op. cit.*, p. 274–275.

these provisions constitute a solid juridical foundation establishing the legality of referendums by Québec's government.

Regarding case law, the Judicial Committee of the Privy Council in London and the Supreme Court of Canada – which took over in 1949 as court of last resort in Canadian law – both rendered decisions in which they approved, to a certain extent, recourse to referendums. To begin with, in 1919⁴⁰ and 1922,⁴¹ the Judicial Committee rendered important decisions, the outcome of which is that it is possible for the provinces to “add certain special features of direct democracy to their parliamentary regime”.⁴² Later, the Supreme Court of Canada confirmed this interpretation, notably in the *Haig*⁴³ and *Libman*⁴⁴ decisions, and then even more explicitly, in 1998, in its *Reference re Secession of Québec*. Upholding once again the validity of the Québec's *Referendum Act*, as well as “the authority of the provinces to consult their own electors as they saw fit”,⁴⁵ it not only sealed the debate on the capacity of political actors to hold referendums, but also reiterated the democratic legitimacy of such processes. In this matter, constitutional *practices* also support this argument.

1.2.2 Constitutional practices with respect to referendums

In parallel with the text of the Constitution and constitutional case law, *practices* also lead to the conclusion that it must be possible, under Canadian law, to hold referendums. Indeed, “[a]lthough it was neither intended nor anticipated by the framers of the Constitution, referendums have developed – alongside the Constitution – thanks to an evolution in political practices and have been consolidated by acknowledgement of the courts”.⁴⁶ These precedents, which date from before the debates on Québec's secession, also contributed to establishing the foundations for the legality of referendums on sovereignty in 1980 and 1995.

⁴⁰ In *Re the Initiative and Referendum Act*, [1919] A.C. 935.

⁴¹ *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128.

⁴² Pelletier, B., *La Modification Constitutionnelle au Canada*, Scarborough, Carswell, 1996, p. 167 (our translation).

⁴³ *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995.

⁴⁴ *Libman v. Québec (Attorney General)*, [1997] 3 S.C.R. 569.

⁴⁵ *Haig v. Canada (Chief Electoral Officer)*, *op. cit.*, 1006.

⁴⁶ Taillon, P., “Le référendum comme instrument”, *op. cit.*, p. 290 (our translation).

As we argued in 1.1.1, prior to the debates on the secession of Qu  bec, referendums had taken place in Canada, Qu  bec and other Canadian provinces, and referendum legislation had been adopted in some provinces to provide a framework for direct democracy. Together, these *practices* and *legislative mechanisms* formed a collection of precedents that, although apart from the Constitution, formed the first embryos of direct democracy in Canada. They are now part of Canada's constitutional culture, and their legality was not open to debate when Qu  bec's government announces its intention to hold a referendum on sovereignty.

These precedents are thus highly significant. One of the consequences of the composite, heteroclitic and dispersed nature of Canadian constitutional law is that simple precedents can have real, tangible impact. As jurist Allan C. Hutchinson says, the Canadian constitution is a "baffling mish-mash of texts, customs, conventions, ideals, and cases".⁴⁷ In this sense, given the nature of Canadian constitutionalism, it is very likely that if Qu  bec's ability to hold a referendum had been challenged, the legislative precedents and past practices regarding direct democracy, on both the federal and provincial levels, would have contributed to the acknowledgement of this prerogative for Qu  bec.

In summary, the study of these historical and legal dimensions shows that there is no ambiguity concerning Qu  bec's proven capacity to hold self-determination referendums within its borders. The *historical practices* regarding referendums in Canada, their status as *constitutional precedents*, the *tacit recognition of this capacity* by the central government when the 1980 and 1995 referendums were held and the *overall constitutional framework* all point in favour of this interpretation. This is why we say that it is an issue that does not give rise to any debate or opposition in Canada. However, the situation is quite different when we turn to the possibility that Qu  bec could declare its independence.

⁴⁷ Hutchinson, A. C., "Constitutional Change and Constitutional Amendment. A Canadian Conundrum", in Contiades, X. (ed.), *Engineering Constitutional Change. A Comparative Perspective on Europe, Canada and the USA*, New York, Routledge, 2013, p. 51, 53.

2 Québec's constitutional ability to declare its independence – An issue far less consensual

Since there has never really been a question of challenging the possibility that Québec could consult its population by referendum, the debates in Canada have been more around the Québec nation's ability to declare independence. At least since the very close results of the 1995 referendum, (2.1) federal institutions have demonstrated a degree of activism in response to Québec's self-determination process. One of the notable effects of that activism has been (2.2) to transform the constitutional debate and to give rise to new questions about the requirements to be met and procedures to be complied with during such a process.

2.1 The activism of federal institutions

Right after the 1995 referendum, in which the independentist movement was only 50,000 votes from obtaining an absolute majority, the Canadian government reacted on a number of fronts. As Henri Brun, Guy Tremblay and Eugénie Brouillet put it, “[t]he fact that the sovereigntist option came so close to victory incited the federal authorities to review their strategic positions”.⁴⁸ While it is true that the federal government demonstrated some *openness* by recommending that Parliament adopt a motion in the House acknowledging Québec as a “distinct society”,⁴⁹ and by giving the province's legislative assembly a veto over certain constitutional amendments,⁵⁰ it also hardened the tone with respect to Québec's independentist project. As part of its action, (2.1.1) it began by asking the Supreme Court of Canada to rule on the constitutionality of a secession declaration by Québec. After receiving an answer from the Court that was, all in all, highly nuanced, (2.1.2) it turned to the Parliament of Canada, where it got the *Clarity Act* adopted.

⁴⁸ Brun, H., Tremblay, G., Brouillet, E., *op. cit.*, p. 116 (our translation).

⁴⁹ Canada, House of Commons, *Statements by Members*, November 29th, 1995, p. 16971.

⁵⁰ *An Act respecting Constitutional Amendments*, S.C. 1996, c. 1.

2.1.1 *The Reference re Secession of Qu  bec and the conciliation of strongly diverging interests by the Supreme Court of Canada*

In Canadian law, there is a procedure that allows the executive power to consult the judicial power to obtain its *opinion* on legal and constitutional issues. At the federal level, section 53 of the *Supreme Court Act*⁵¹ enables the central government to ask such questions to the highest court in the land. Although the opinions of the Supreme Court – its references – are formally consultative, they nonetheless have a significant degree of normative force and political authorities do act accordingly with them.

It is therefore in virtue of this procedure that “in September 1996, the federal government turned to the Supreme Court of Canada”⁵² to ask it whether, under Canadian constitutional law and international law, Qu  bec could proceed unilaterally with secession from the rest of Canada. The Qu  bec government, wishing to avoid giving any legitimacy to a process in which a federal institution would rule on Qu  bec’s right to declare independence, decided not to take part in the debate before the Supreme Court: “The Quebec government refused to participate in what it saw as nine federally appointed people deciding on the right to self-determination of the Quebec people.”⁵³

Two years later, on August 20th, 1998, the Supreme Court of Canada released its decision through the *Reference re Secession of Qu  bec*. Of great legal and instructive value, that reference by the Supreme Court was – and continues to be – the subject of significant research and analysis, and has had clear international impact.⁵⁴ In order to study and summarize the lessons of that reference, we need to look, first, at the underlying principles of the Constitution on which the Court bases its reasoning, and

⁵¹ *Supreme Court Act*, S.C.R. 1985, c. S-26.

⁵² Rocher, F., Casanas Adams, E., *op. cit.*, p. 899 (our translation).

⁵³ Des Rosiers, N., “From Quebec Veto to Quebec Secession: The Evolution of the Supreme Court of Canada on Quebec-Canada Disputes”, *Canadian Journal of Law & Jurisprudence*, vol. 13, n  2, 2000, p. 171, 172.

⁵⁴ See Mathieu, F., Gu  nette, D. (eds.), *R  -imaginer le Canada – Vers un   tat multinational?*, Qu  bec, Presses de l’Universit   Laval, 2019; B  rard, F., “De la r  ceptivit   des enseignements de la Cour supr  me    l’  chelle internationale: impacts et r  percussions du *Renvoi sur la s  cession du Qu  bec*”, in Binette, A., Taillon, P. (eds.), *op. cit.*

then, second, at their application in the context of a province wanting to secede.

Since it found itself facing absolute silence from the constitutional texts regarding the stakes involved in secession,⁵⁵ the Court had to construct its argumentation on unwritten sources of the Constitution. It asserted that “[b]ehind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based.”⁵⁶ The Court continued, indicating that *federalism, democracy, constitutionalism and the rule of law*, and the *protection of minorities* are four of the most fundamental constitutional principles in Canada, adding that they “function in symbiosis” and that “[n]o single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other”.⁵⁷ We are thus facing norms of equal weight in that they embody the over-determining principle of equi-primacy, establishing that no actor can discard any of those principles in order to give its position an advantage.

After a detailed examination of each of those four principles,⁵⁸ the Court applied them to Québec’s self-determination process. Its reasoning can be summed up as follows: “The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire.”⁵⁹ When comes time to define what would constitute a *clear question*, a *clear answer* and *negotiations in good faith*,⁶⁰ the Court refuses to give its opinion since it calls such issues

⁵⁵ Brouillet, E., “Le fédéralisme et la Cour suprême du Canada: quelques réflexions sur le principe d’exclusivité des pouvoirs”, *Revue québécoise de droit constitutionnel*, vol. 3, 2010, p. 60, 61.

⁵⁶ *Reference re Secession of Québec*, *op. cit.*, par. 49.

⁵⁷ *Ibid.*, par. 49.

⁵⁸ *Ibid.*, par. 49–82.

⁵⁹ *Ibid.*, par. 88.

⁶⁰ Taillon, P., Deschênes, A., “Une voie inexplorée de renouvellement du fédéralisme canadien: l’obligation constitutionnelle de négocier des changements constitutionnels”, *Les Cahiers de droit*, vol. 53, n°3, 2012, p. 461.

political: “The Court has no supervisory role over the political aspects of constitutional negotiations. Equally, the initial impetus for negotiation, namely a clear majority on a clear question in favour of secession, is subject only to political evaluation, and properly so.”⁶¹

Political scientist Fran  ois Rocher thus draws essentially three lessons from this Supreme Court opinion: (1) “a plan to secede – or to amend the Canadian constitutional order – is legitimate if it is the fruit of the popular will expressed in a referendum free of ambiguities with respect to both the question asked and the outcome obtained through a referendum”, (2) “the democratic legitimacy of the secessionist plan requires, in exchange, a constitutional duty for Canada to negotiate” and (3) “the Court does not intend to give a further opinion on these questions and places in the hands of the political actors the responsibility of judging whether ambiguities have been eliminated in accordance with their assessment of the circumstances”.⁶² In summary, therefore, if a referendum on the sovereignty of Qu  bec obtains the clear support of the population, in response to a clear question, the political authorities of Qu  bec and Canada will have the constitutional duty to negotiate in good faith.

With that decision, the Supreme Court thus truly reconciled extremely diverging interests. Its highly nuanced argument has generally been well received, both in Qu  bec and in the rest of Canada. There is also every indication that it resulted from a conscious effort on the part of the Court: “After the *Reference re Secession of Qu  bec*, a number of authors pointed out the care taken by the Supreme Court to make its argument acceptable to legal stakeholders in Qu  bec”.⁶³ For example, according to jurist Fr  d  ric B  rard:

The *Reference re Secession of Qu  bec* is, in the eyes of many, a nuanced and meticulously shaded response to the complex stakes involved in the secessionist dynamic. By confirming the symbiosis between democracy, rule of law, constitutionalism, protection for minorities and federalism, many

⁶¹ *Reference re Secession of Qu  bec*, *op. cit.*, par. 100.

⁶² Rocher, F., “Les incidences d  mocratiques de la n  buleuse obligation de clart   du *Renvoi relatif    la s  cession du Qu  bec*”, in Binette, A., Taillon, P. (eds.), *op. cit.* (our translation).

⁶³ Mathieu, C., Taillon, P., “Le f  d  ralisme comme principe matriciel dans l’interpr  tation de la proc  dure de modification constitutionnelle”, *McGill Law Journal*, vol. 60, n  4, 2015, p. 763, 786 (our translation).

could argue that, in some respects, the Supreme Court of Canada succeeded in slicing through a Gordian knot that had until then been impossible to untie.⁶⁴

Political scientist François Rocher and jurist Elisenda Casanas Adam focus, on their part, on the reception of the Supreme Court's arguments, both in Québec and in English Canada, as well as on the maintenance of its neutrality as constitutional arbiter:

Thus, the Reference appeared as the fruit of balanced reasoning, while preserving the legitimacy of the judicial power. The Supreme Court succeeded the considerable feat of declaring that unilateral secession by Québec was illegal while opening the door to a process that could, theoretically, translate into its departure following negotiations conducted in good faith. Both audiences targeted by the Reference could draw from its arguments strengthening their positions. The Court's status as arbiter was not brought into question.⁶⁵

2.1.2 *The Clarity Act and the federal parliament's declaration that it was both party and judge in the constitutional dispute*

Faced with the subtlety and openness of the Supreme Court's reference, the Government of Canada turned to the federal parliament to *give effect to* that decision. In Patrick Taillon's words: "Not having completely persuaded the Supreme Court of the appropriateness of their claims based on the rule of law, the federal authorities reacted to the Court's opinion by enacting legislation."⁶⁶ Through that act,⁶⁷ the federal parliament declared that it was both *party to* and *arbiter of* that constitutional dispute. Considering that "the House of Commons, as the only political institution elected to represent all Canadians, has an important role in identifying what constitutes a clear question and a clear majority sufficient for the Government of Canada to enter into negotiations in relation to the secession of a province from Canada",⁶⁸ the

⁶⁴ Bérard, F., "De la réceptivité", *op. cit.* (our translation).

⁶⁵ Rocher, F., Casanas Adams, E., *op. cit.*, p. 906 (our translation).

⁶⁶ Taillon, P., "De la clarté à l'arbitraire: Le contrôle de la question et des résultats référendaires par le Parlement canadien", *Revista d'estudis autonòmics i federals*, n°20, 2014, p. 13, 15 and 16 (our translation).

⁶⁷ *An Act to Give Effect to the Requirement for Clarity as Set out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference*, *op. cit.*

⁶⁸ *Id.*, Preamble.

federal parliament adopted a law giving the House the power to determine, prior to a referendum, whether the question is clear,⁶⁹ and, following the referendum, whether a clear majority was attained.⁷⁰

Two major problems – at least – arise from this piece of legislation: (1) the House of Commons’ role as arbiter, when considering that its neutrality can be challenged, and (2) the *a posteriori* verification of the clarity of the outcome of the referendum. First, with respect to the *schizophrenic* role of the House of Commons, it is highly problematic to grant wholly and solely to a federal political institution the absolute, discretionary right to judge the clarity of the referendum question and results. As jurist Stephen Tierney says, “the Supreme Court of Canada confirmed that the determination of the question’s clarity was to be left to the ‘political actors’. The court did not, however, suggest that this issue should be resolved exclusively by actors at federal level.”⁷¹ In this sense, we share the position that “[w]hile the House of Commons can, undoubtedly, express a given political opinion, it certainly does not have the constitutional competency to make a unilateral decision or ruling on that question.”⁷²

Second, the *a posteriori* assessment of the clarity of the referendum outcome is problematic because of the ambiguity that it entails,⁷³ but also and above all for its dubiousness with respect to the democratic principle. With that *a posteriori* verification mechanism, “federal political authorities manage both to change the rules of the democratic game in the midst of playing, owing to a break with the conventional rule of 50 % plus one, and to grant themselves, at the same time, an extraordinary ability to rewrite, or at least clarify, the rules of the game once the referendum has been completed.”⁷⁴ Thus, through that law, which was supposed to “give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Qu  bec Secession Reference”,⁷⁵ the federal parliament instead set up a legislative

⁶⁹ *Ibid.*, art. 1.

⁷⁰ *Ibid.*, art. 2.

⁷¹ Tierney, S., *Constitutional Referendums*, London, Oxford University Press, 2012.

⁷² Taillon, P., “De la clart      l’arbitraire”, *op. cit.*, p. 22 (our translation).

⁷³ *Ibid.*, p. 36.

⁷⁴ *Ibid.*, p. 37–38 (our translation).

⁷⁵ This is the official title of the *Clarity Act*.

mechanism claiming to allow it to decree – unilaterally and arbitrarily – *a priori* the clarity of the referendum question and *a posteriori* the clarity of the outcome. In this sense, the *Clarity Act* “is notable for bad faith that is obviously in contradiction with the lessons of the Court”⁷⁶ and the underlying constitutional principles.

For these reasons, we agree with Patrick Taillon when he uses the expression *from clarity to arbitrariness* to describe the effects of the federal *Clarity Act*. Moreover, in response to that law – of which the democratic purposes seem to be more than questionable – the Québec National Assembly adopted the *Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec State*.⁷⁷ That act acknowledges the political importance of the *Reference re Secession of Québec*, and then denounces the “policy of the federal government designed to call into question the legitimacy, integrity and efficient operation of its national democratic institutions”, in particular, through the adoption of the *Clarity Act*.⁷⁸ Québec’s political authorities thus preferred to respond in a political manner to the *Clarity Act* by enacting a Québec law, rather than by challenging the federal law in court.

Nonetheless, that Québec law has not been spared from criticism. Adopted by the Québec National Assembly, it asserts that “[t]he Québec people, acting through its own political institutions, shall determine alone the mode of exercise of its right to choose the political regime and legal status of Québec”,⁷⁹ without referring to the constitutional duty to negotiate. The law also establishes that, when a referendum is held, “the winning option is the option that obtains a majority of the valid votes cast, namely 50 % of the valid votes cast plus one”,⁸⁰ that percentage being seen as sufficient to meet the clarity requirement applying to the result.

Thus, while it is true that both the federal and the Québec political authorities received the *Reference re Secession of Québec* favourably, they

⁷⁶ Bérard, F., “Du caractère lénifiant de la règle de droit interne en matière d’accession à l’indépendance: les impacts du renvoi relatif à la sécession du Québec”, in Seymour, M. (ed.), *op. cit.*, p. 245, 262 (our translation).

⁷⁷ *An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec State*, CQLR, c. E-20.2.

⁷⁸ *Ibid.*, Preamble.

⁷⁹ *Ibid.*, art. 3.

⁸⁰ *Ibid.*, art. 4.

also both adopted legislation designed to *give effect to it* in which they offer very different interpretations, thus marking the lack of consensus on the requirements that have to be met for Qu  bec to be able to eventually declare sovereignty. In this sense, the activism of federal institutions that followed the 1995 referendum moved the constitutional debate forward and gave rise to new questions.

2.2 The contemporary evolution of the debate and some unanswered questions

The *Reference re Secession of Qu  bec* was unquestionably a turning point in Qu  bec's self-determination process. To begin with, it resolved a few issues of great importance, in particular, that of Qu  bec's ability to secede from the rest of Canada so long as certain conditions are met – clear question, clear response and prior negotiations. However, the Reference also caused new issues to emerge, including the one (2.2.1) concerning the threshold of the popular majority required for Qu  bec to declare independence, and the one related to (2.2.2) the ambiguity surrounding the duty to negotiate and the applicable constitutional amendment process.

2.2.1 The threshold of the popular majority required for Qu  bec to declare independence

The Supreme Court discusses the concept of *clear majority* at length in its reference, the expression of that majority being supposed to constitute the effective point of departure for a self-determination process: “a clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize”.⁸¹ By refusing to state explicitly what form such a clear majority should take,⁸² the Court leaves this fundamental element floating. Consequently, the political powers in Ottawa⁸³ and

⁸¹ *Reference re Secession of Qu  bec, op. cit.*, par. 150.

⁸² *Ibid.*, par. 100.

⁸³ *An Act to Give Effect to the Requirement for Clarity as Set out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference, op. cit.*, art. 2.

Québec⁸⁴ rushed to intercept the ball and adopt – contradictory – legislation on referendum clarity.

Thus, from the uncertainty of whether Québec had the ability to declare independence, the debate evolved towards *what would constitute a clear majority allowing it to do so*. The Supreme Court decision makes it difficult to know whether it gives precedence to *a clear majority in the quantitative sense* – in other words, a qualified majority – or whether the clarity has to be interpreted with a *more qualitative criteria*. Nonetheless, despite this ambiguity, the Court provided a significant element of the answer in its reference when it noted: “we refer to a ‘clear’ majority as a qualitative evaluation. The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves.”⁸⁵

In this way, the Court states the principle according to which, to be *clear*, the majority must not leave any doubt as to the *expression of the democratic will*. According to some, to be free of ambiguity, “[t]he qualitative and quantitative dimensions would therefore be, in a way, symbiotic”⁸⁶ in the analysis of the clarity of referendum results. While this point of view is defensible, we have to observe that, in its reference, the Supreme Court never mentions a clear majority in the *quantitative* sense of the term.

Yet, the justices consciously chose to use the term *clear* and not *qualified*, to refer to the required majority.⁸⁷ For this reason, therefore, while the terms and formulation used by the Supreme Court do not have the effect of expressly setting aside the possibility of a clear majority in the sense that it should be *qualified*, a literal interpretation points in another direction. A clear majority should therefore be one that is supported by 50 % + 1 of the population and that is obtained in a context in which the free expression of the democratic will of the people was possible. The

⁸⁴ *An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec State*, *op. cit.*, art. 4.

⁸⁵ *Reference re Secession of Québec*, *op. cit.*, par. 87.

⁸⁶ Bérard, F., “Du caractère lénifiant”, *op. cit.*, p. 255 (our translation).

⁸⁷ Rocher, F., “Les incidences démocratiques”, *op. cit.*: “[t]he reference gives precedence to obtaining a clear majority ‘in the qualitative sense’, but it does not define the meaning to be given to that passage. It does not use the term ‘qualified’ majority, even though it is widely employed, which would have had the effect of setting a threshold that would go beyond the 50 percent of votes plus one” (our translation).

clarity of the results – in other words, their lack of ambiguity – would therefore more depend upon the social, political and legal context in which the majority is obtained.

The clear majority in the qualitative sense that the Supreme Court refers to could very well be on a continuum encompassing a *simple majority*, an *absolute majority* and a *qualified majority*. While a simple majority requires only obtaining the *most votes* (for instance, if there are more than two options on the ballot), an absolute majority requires obtaining 50 % + 1 of the votes. Finally, a qualified majority requires support that is higher than 50 % + 1 of the votes. For example, 55 or 60 % of the votes could be required for an option to be considered having won.

In that sense, a clear majority is more demanding than a simple majority or an absolute majority because it is accompanied by additional *qualitative* criteria, but remains quantitatively easier to attain than a qualified majority. The additional requirements allegedly making it possible to ensure the clarity of the referendum results thus act as *guardians* of the legitimacy of the expression of the popular will. We could therefore think that a *high rate of voter turn-out* during a *referendum free of irregularities* in which the population has to answer a *clear question* and in which *the governments agreed ahead of time* on the basic rules of the process, coupled with an absolute majority of 50 % + 1, would constitute a clear majority. Only this kind of majority would be likely to comply with the constitutional principles of federalism, rule of law and democracy.

Therefore, since it is the expression of that *clear majority* of Qu  b  cois in favour of independence that would lead to the duty to negotiate between the “two legitimate majorities”⁸⁸ in Canada, it seems indispensable that those two *agree* on the meaning to be given to *referendum clarity*. In other words, the unilateralism that has until now characterized the actions of the provincial and federal political actors with respect to Qu  bec self-determination process no longer seems realistic. It also appears that the process adopted in Scotland should guide the behaviour of the stakeholders during a new referendum on sovereignty: “the recent Scottish adventure reveals, surely ironically, the degree to which London

⁸⁸ *Reference re Secession of Qu  bec, op. cit.*, par. 93.

and Edinburg seem, at least implicitly, to have followed *in extenso* the teachings of the highest court in Canada.⁸⁹

Consequently, the elements constituting the clear majority required by the Supreme Court should, in an ideal scenario, be established in a consensual manner by Québec and Ottawa, just as they should also be determined and known prior to the referendum. Only if these conditions are met will it be possible for a clear majority of Québécois to express their will freely, while complying with the underlying principles of federalism and democracy, thereby giving rise to a duty to negotiate.

2.2.2 *The ambiguity surrounding the duty to negotiate and the process of constitutional amendment*

As soon as a clear majority of Québécois express themselves in favour of independence, thereby triggering the secession process, there is procedural ambiguity related to the steps involved in that process. Once again, following the Supreme Court's reasoning, we can identify at least two major stages in that process: *negotiation*, by the political actors, of the terms of secession; and then ratification of a secession agreement through the *amendment* of the Constitution of Canada.

With regard to the negotiation stage, the Court leaves no ambiguity as to its compulsory nature. While it rejects the possibility that Québec could declare its independence unilaterally, at the same time, it provides for the obligation that the rest of Canada negotiate if there is a “winning” referendum. In the words of the Court, such a referendum “would give rise to a *reciprocal* obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire”.⁹⁰

It is not so much the *content* of the negotiations that is important here,⁹¹ but rather the procedural stakes that are entailed, that is, which parties are required to participate and the framework for the negotiations. Regarding the actors participating in the negotiations, there is major debate over whether the process should be *bilateral* or *multilateral*. In other

⁸⁹ Bérard, F., “Du caractère lénifiant”, *op. cit.*, p. 263 (our translation).

⁹⁰ *Reference re Secession of Québec*, *op. cit.*, par. 88 (our emphasis).

⁹¹ In other words, for example, the stakes pertaining to “economic issues, the debt, minority rights, Aboriginal peoples and territorial borders”: Dion, S., “Le Renvoi relatif à la sécession du Québec: des suites positives pour tous”, *Revue québécoise de droit constitutionnel*, vol. 6, 2016, p. 3, 8 (our translation).

words, should the negotiations be exclusively between the governments of Qu  bec and Canada, or should they also include the nine other provinces? The Court does not say. Indeed, the Court first mentions that a winning referendum in Qu  bec would “place an obligation *on the other provinces and the federal government* to acknowledge and respect that expression of democratic will by entering into negotiations”,⁹² but then adds that the discussions should take place between “the representatives of *two legitimate majorities*, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be”.⁹³ It is therefore impossible to determine with certainty whether the Court opts for bilateralism or multilateralism in the negotiations intended to lead to an agreement on the terms of secession. Jurist Fr  d  ric B  rard raises, however, an interesting point by asserting that the other provinces could delegate their roles in the negotiations to the federal government so as to facilitate that stage of the process.⁹⁴

It remains difficult to predict or structure the way the negotiations would be conducted. Despite the fact that they have been held on a number of times over the years, “constitutional conferences are a kind of unidentified legal object in Canadian law. Their initiation, conduct, participants and binding nature remain the matters of many questions”.⁹⁵ Nonetheless, without going too deeply into this topic, the Supreme Court has established that “[t]he negotiation process must be conducted with an eye to the constitutional principles we have outlined, which must inform the actions of *all* the participants in the negotiation process”.⁹⁶

If those political actors were to come to an agreement on the terms for the secession of Qu  bec,⁹⁷ that agreement would have to be ratified as a formal amendment of the Constitution in order to come into effect and thereby comply with domestic law.⁹⁸ The question that then arises is

⁹² *Reference re Secession of Qu  bec*, *op. cit.*, par. 88 (our emphasis).

⁹³ *Ibid.*, par. 93 (our emphasis).

⁹⁴ B  rard, F., “Du caract  re l  nifiant”, *op. cit.*, p. 257–258.

⁹⁵ Gu  nette, D., “La modification constitutionnelle au Canada – Quelle proc  dure pour quelle Constitution?”, *Revue belge de droit constitutionnel*, vol. 21, n  4, 2015, p. 417, 448 (our translation).

⁹⁶ *Reference re Secession of Qu  bec*, *op. cit.*, par. 94.

⁹⁷ Such an agreement would have to be of a form similar to that of the *Meech Lake Accord* or the *Charlottetown Accord*.

⁹⁸ Dion, S., “L’originalit   canadienne en mati  re de r  f  rendums: l’exp  rience des r  f  rendums nationaux et d’autod  termination”, in Binette, A., Taillon, P. (eds.),

simple: what constitutional amendment procedure would make it possible to officialise the secession of Québec? Since the Canadian constituent process is extremely diversified, there are a number of competing theses that merit our attention.

Because the Court has already rejected unilateralism with respect to secession, the procedures for amendment by an ordinary law of the federal government⁹⁹ or the provinces¹⁰⁰ must be excluded. The bilateral amendment procedure¹⁰¹ seems useful in that it would echo the expression “representatives of two legitimate majorities”¹⁰² that the Court uses in the *Reference re Secession of Québec*. However, it seems unlikely that the federal government and the governments of the English-speaking provinces would decide to take that path. The “normal” procedure, known as 7/50,¹⁰³ requiring the agreement of the federal parliament and of seven provinces accounting for at least 50 % of the population of Canada, could then apply¹⁰⁴, since it represents the *residual* procedure for constitutional amendment. It has even been defended that there could be an *implicit, sui generis* amendment procedure uniquely and specifically for settling the case of secession.¹⁰⁵

In light of the Supreme Court’s lessons in *Reference re Senate Reform*,¹⁰⁶ there are nonetheless good reasons to believe that the preferred amendment procedure would be unanimity.¹⁰⁷ Even though the secession of a province is not a matter directly targeted by section 41 of the *Constitution Act, 1982*, such a secession would have major structural consequences on the topics listed in that section. “It seems obvious that the secession of the province of Québec would lead to a

op. cit.: “According to the Court, the Constitution of Canada must be amended for secession to be in compliance with the law” (our translation).

⁹⁹ *Constitution Act, 1982, op. cit.*, art. 44.

¹⁰⁰ *Ibid.*, art. 45.

¹⁰¹ *Ibid.*, art. 43.

¹⁰² *Reference re Secession of Québec, op. cit.*, par. 93.

¹⁰³ *Constitution Act, 1982, op. cit.*, art. 42.

¹⁰⁴ Woehrling, J., “Les aspects juridiques d’une éventuelle sécession du Québec”, *Canadian Bar Review*, vol. 74, n°2, 1995, p. 294.

¹⁰⁵ Tremblay, G., “La procédure implicite de modification de la Constitution du Canada pour le cas de la sécession du Québec”, *Revue du Barreau*, vol. 58, 1998, p. 423.

¹⁰⁶ *Reference re Senate Reform*, [2014] 1 S.C.R. 704.

¹⁰⁷ *Constitution Act, 1982, op. cit.*, art. 41.

change in the composition of the Supreme Court, on which a minimum of three justices from Qu  bec must sit. Next, by definition, the secession of any province would have an impact on the duties of the Lieutenant Governor. The same goes for the amending formulas provided in the *Constitution Act, 1982*.¹⁰⁸ In this sense, even in the absence of political consensus or confirmation by the Supreme Court, we think that the amendment procedure requiring the unanimity of the federal parliament and the ten provinces would probably be the one most applicable to the Qu  bec secession scenario under Canadian law.

In short, in the second part of this chapter, we have seen that the debate over Qu  bec's ability to declare independence is an issue on which there is no consensus in Canadian constitutional law. In the end, it was the Supreme Court that put an end to these polemics, affirming that the expression of a clear majority of the people of Qu  bec, in response to an equally clear referendum question, would provide the legitimacy needed by Qu  bec's political actors to start down the path to secession. Despite that confirmation of the ability of the Qu  bec nation to secede under certain conditions, a number of questions regarding the self-determination process still remain with no clear answers. In particular, there is the meaning to be given to the concept of *clear majority*, how the *negotiation* process should be conducted, and what constitutional *amendment* procedure would make Qu  bec's sovereignty effective.

Conclusion

We sought here to highlight the various components of Quebec's self-determination process. To do this, we divided our demonstration into two parts, a first on the ability of Quebec to hold a referendum on its territory, then a second on its ability to declare its sovereignty from the rest of Canada. This two-part reasoning first allowed us to establish that never Quebec's jurisdiction to hold a referendum on self-determination has really been called into question, whereas the possibility of the Quebec people declaring their independence has given rise to many debates, just as it remains the subject of important questions today.

To this end, it is easy to see that the Quebec process stands out from those that took place in Catalonia and Scotland. With regard to

¹⁰⁸ B  rard, F., "Du caract  re l  nifiant", *op. cit.*, p. 258 (our translation).

the Catalan case, the central government relied on the constitutional framework in place, providing for the indissoluble unity of the Spanish nation, the “common and indivisible homeland of all Spaniards”¹⁰⁹, as well as on the exclusive competence of the Central state to set in motion a referendum process¹¹⁰, to thwart any attempt at secessionist steps by the Catalan people. In its case law, the Spanish Constitutional Court has so far ranked with the arguments of the central government¹¹¹, thus making the Catalan’s self-determination process ever more difficult.

In the meantime, the political elites in Scotland – another significant comparable case for the Québécois and Catalan nations – have mentioned the possibility to hold a second referendum on independence, in response to Brexit. Faced with this possibility, the Secretary of State for Scotland, who is also a member of the British government, said: “We know what the process is for a referendum. There would have to be the equivalent of the previous Edinburgh agreement¹¹²”, thus confirming the political and legal importance of the 2014 precedent on the matter.

This way, the United Kingdom gives the example, both in its legal foundations and in the actions of its political actors, with regards to the way to orchestrate good conciliation of the constitutional principles that a multinational democracy should embrace in relation to a minority nation’s desire for self-determination. It is only in such circumstances that the people of a minority nation will be fully able to make free political choices and to determine its constitutional future, within the limits of the principles of democracy and constitutionalism.

In contrast, when the existing constitutional order and the political actors participating in it opt for a dynamic and structure of domination with regard to a minority nation seeking emancipation, the conciliation of the principles of democracy, rule of law and federalism is impossible. In such contexts, the multinational state loses its legitimacy within the borders of the minority nation, and that nation then becomes free to

¹⁰⁹ *Spanish Constitution*, art. 2.

¹¹⁰ *Ibid.*, art. 149 (32).

¹¹¹ S.T.C. 31/2015, BOE n° 64, p. 190 et S.T.C. 32/2015, BOE n° 64, p. 213.

¹¹² Carrell, S., “Theresa May lays down independence vote challenge to Nicola Sturgeon”, *The Guardian*, March 3rd, 2017: www.theguardian.com/politics/2017/mar/03/theresa-may-lays-down-independence-vote-challenge-to-sturgeon?CMP=fb_gu.

reject the constitutional straightjacket¹¹³ that denies its inherent right to self-determination and political equality.

¹¹³ Tully, J., "Libert  et d voilement dans les soci t s multinationales", *Globe. Revue internationale d' tudes qu b coises*, vol. 2, n 2, 1999, p. 1.

Compromise or dislocation: federal alternatives to secessionist and centralizing temptations

LUCÍA PAYERO-LÓPEZ

Introduction

In recent years, Spain has experienced a constitutional crisis that affects the territorial organization of power. In 2010, a ruling by the Constitutional Court on Catalonia's Statute of Autonomy shattered the "territorial constitution". The 1978 constitution established that for each of the "historical nationalities"¹ the Statute of autonomy is drafted on the basis of the pact between the central state and the community concerned. Based on this pact, a vote on a provisional statute is held in the regional legislature. Next, the Congress and Senate, which are authorized to amend the text, must validate it. Last, the citizens of the autonomous community must ratify the proposed statute in a regional referendum before it comes into force.² In 2006, the revision of Catalonia's Statute of Autonomy followed the prescribed path and came into force after being

¹ The "historical nationalities" are the three regions that approved a draft Statute of Autonomy under the 2nd Republic (1931–1939): Catalonia, the Basque Country and Galicia. Each of these political communities has a strong national identity that distinguishes it from the Spanish national identity.

² The specific procedure used to amend the Catalan Statute in 2005–2006 is found in articles 147.3 and 152.2 of the Constitution, and in article 56 of Organic Law 4/1979 (dated December 18th, 1979) concerning the Statute of Autonomy of Catalonia (Statute of Sau).

validated by the Catalan population.³ However, the *Partido Popular* (PP, the Popular Party) – which had refused to take part in the discussions about the reform of the Statute – appealed to the Constitutional Court on the grounds of unconstitutionality. In its decision 31/2010 dated 28 June 2010, the Constitutional Court made its ruling: a number of articles in the Statute were invalidated, while others had to be interpreted as dictated by the Court.⁴

The consequence of this decision was to break the territorial pact between Catalonia and the central state.⁵ Many Catalans saw the decision as an attack on the autonomy of their community, and increasingly began to support the holding of a referendum on independence. Under the “territorial constitution”, the referendum was the last step in the revision of the Statute of Autonomy but now, since the Constitutional Court had unilaterally changed the procedure, the referendum became the first step in a new process to redefine the relationship between Catalonia and the rest of Spain. At this point, the exercise of the “right to decide”⁶ began

³ Organic Law 6/2006 (dated July 19th, 2006) concerning the amendment of the Statute of Autonomy of Catalonia.

⁴ The most fiercely discussed subjects were the financial system and recognition of Catalonia as a nation, although only the preamble refers to this: “In reflection of the feelings and the wishes of the citizens of Catalonia, the Parliament of Catalonia has defined Catalonia as a nation by an ample majority. The Spanish Constitution, in its second Article, recognises the national reality of Catalonia as a nationality.” The provision is similar to that contained in the preamble to the Statute of Andalusia, amended by Organic Law 2/2007 (dated March 19th, 2007) concerning the reform of the Autonomous State of Andalusia: “The Andalusian Manifesto of Córdoba described Andalusia as a national reality in 1919, the spirit of which Andalusians fully channelled through the process of self-government reflected in our Magna Carta. In 1978, the Andalusians came out in strong support for the constitutional consensus. Today, in its Article 2, the Constitution acknowledges Andalusia as a nationality within the framework of the indissoluble unity of the Spanish nation.” Despite the similarities between the two texts, the *PP* has not submitted the Statute of Andalusia for review by the Constitutional Court, which has been described as “an action as incoherent as it is unfortunate” (Ferrerres, V., “El impacto de la Sentencia sobre otros estatutos”, *Revista Catalana de Dret Públic*, extra 1, 2010, p. 471).

⁵ Pérez-Royo, J., “La STC 31/2010 y la contribución de la jurisprudencia constitucional a la configuración de un Estado compuesto en España: elementos de continuidad y ruptura, e incidencias en las perspectivas de evolución del Estado autonómico”, *Revista Catalana de Dret Públic*, 2011, p. 121–149.

⁶ Catalonia’s claim for more autonomy is based on the “right to decide”. According to its supporters, the right to decide is different from the right to self-determination.

to appear inevitable for many Catalans, whether or not they supported independence.

The situation was so critical that, unless a new arrangement with respect to territorial autonomy was found, the constitution would immediately come under short-term or medium-term threat.⁷ Although Catalonia did not have the necessary power to implement secession, the Catalan conflict was sufficiently serious to make Spain totally ungovernable.

It is important to note that a legal approach to the problem could not break the deadlock.⁸ The crisis gripping Spain was *political*, and only a solution of the same nature could provide a remedy and a high-level resolution. During discussions about various ways to reduce tension and redefine a “territorial constitution” that would achieve a consensus in Spain, the federal solution was often suggested. This chapter will

It is an individual right to organize a referendum, founded on the principles of the rule of law and the Constitution, in which freedom of expression and the right to political participation are recognized, and on the Constitutional Court decision 42/2014 dated March 25th, 2014. In contrast, the right to self-determination is a collective right that allows unilateral secession, founded on international law. However, the distinction as presented here does not appear to be clear to all. See Barceló, Corretja, M., González, A., López, J., Vilajosana, J. M., *El derecho a decidir. Teoría y práctica de un nuevo derecho*, Barcelona, Atelier, 2015.

⁷ The failure of the Spanish Constitution is the direct result of a failure to amend it. Although there are no explicit limits on amendments to the Constitution, only two minor amendments have been made (to articles 13 and 135), and only in response to constraints imposed by the European Union. Article 13 was amended in 1992 to provide for the implementation of the Maastricht Treaty. As a result, EU citizens gained the right to vote and stand as candidates in local elections in the state in which they resided. Article 135 was amended in 2011 to comply with the principle of budgetary stability established by the *Troika*. Under the new version, a public administration “may not incur a structural deficit that exceeds the limits established by the European Union”, namely 3 %. In addition, “Loans to meet payment on the interest and capital of the State’s Public Debt shall [...] have absolute priority”.

⁸ However, the legal approach remains relatively common among researchers looking at the Catalan situation. Many suggest that the Spanish Constitution can be entirely revised, since it contains no “perpetuity” clause. Because of this, Catalonia should target constitutional amendment via article 168 of the Constitution in order to exercise its “right to decide”. This position ignores – perhaps deliberately – the fact that article 168 was included in the final text of the Constitution to protect certain elements from any later amendment: the monarchy, the fundamental rights and freedoms, and the unity of the Spanish nation. See De Vega, P., *La reforma constitucional y la problemática del poder constituyente*, Madrid, Tecnos, 1985.

examine the various proposals made to revise the constitution, based on the adoption of a federal model. Each proposal will be analysed to determine if federalism would increase or decrease the incentive to secede and to vote for nationalist parties in peripheral regions, especially Catalonia.

1. Federalism in Spain

The term “federalism” refers to a form of territorial and legal organization in which political power is shared. It can be viewed in two different ways. First, *territorial federalism* can be understood as a way to organize political power within a single state or people (*demos*). Second, federalism can also be interpreted as a system to share political power among several states or peoples (*demoi*), commonly known as *pluralist federalism*.

It is clear that the federal idea is not seen as an attractive option in Spain, for several reasons. The first arises from Spanish constitutional history, which records only one federal experience: the First Republic of 1873 to 1874. In the Spanish national memory, this experience is associated with years of violence and political instability,⁹ and federalism is viewed negatively because of this unfortunate experience.¹⁰ Second, Francisco Pi i Margall was – and still is for many researchers¹¹ – the model proponent of pure federal theory in Spain.¹² This is why federalism

⁹ García-Escribano, J.-J., “Federalismo: el caso español”, *Daimon. Revista Internacional de Filosofía*, 27, 2002, p. 55–60.

¹⁰ Similarly, the republican idea is also criticized, and the two ideas are closely connected for most people in Spain. See Chust, M. (ed.), *Federalismo y cuestión federal en España*, Castelló de la Plana, Universitat Jaume I, 2004.

¹¹ See Trujillo, G., *Introducción al federalismo español*, Madrid, Cuadernos para el Diálogo, 1967; Jutglar, A., *Pi i Margall y el federalismo español*, 2 vol., Madrid, Taurus, 1975; Pérez-Tapias, J.-A., *Invitación al federalismo. España y las razones para un Estado plurinacional*, Madrid, Trotta, 2013.

¹² The book by Cagiao y Conde, J., *Tres maneras de entender el federalismo. Pi i Margall, Salmerón y Almirall. La teoría de la federación en la España del siglo XIX*, Madrid, Biblioteca Nueva, 2014, emphasizes that the theory of federation by Valentí Almirall is better and more strongly constructed than the theory of Pi i Margall. However, the history of federalism has consigned Almirall’s theory to oblivion. In Spain, he is considered more as a historian of confederation than of federation. According to dualist ideology, there is a difference between a federation and a confederation: a federal state is based on a constitution, and as a result the constitutional norm governs relations between the federation and its federated

is considered essentially in its *territorial* or monist version. However, since Spain is made up of a plurality of nations, their representatives have traditionally shown little faith in federal projects, finding more to support their interests in theories of nationhood.

However, the federal idea has re-emerged in the current context, as reflected in the November 2014 unofficial referendum on independence for Catalonia (9-N). Two questions were asked: “Do you want Catalonia to become a State?” and “Do you want this State to be independent?” The interpretation was that an elector who answered “Yes” to the first question and “No” to the second question would in fact have opted for a federal solution.¹³

In addition, intellectuals from various political horizons supported the federal option. Between 2012 and 2018, at least four manifestos were published in high-circulation newspapers.¹⁴ Last, several political parties in Spain and in the periphery proposed a revision of the constitution to move towards a federal state, seen as the best remedy against secessionism. This includes the projects presented by *Ciudadanos* (Cs, Citizens); *Partido Socialista Obrero Español* (PSOE, the Spanish Socialist Workers’ Party); *Partit dels Socialistes de Catalunya* (PSC, the Socialists’ Party of Catalonia); *Izquierda Unida* (IU, the United Left); *Iniciativa per Catalunya Verds* (ICV, Initiative for Catalonia Greens); and *Esquerra Unida i Alternativa* (EUiA, United and Alternative Left).

All these examples showed that the former hostility to federalism is gradually dissipating. However, it is reasonable to ask on what type of national conception the various federalist projects were based. As we will

states, while a confederation is an association of states under an international treaty; their relations are governed by international public law.

¹³ Colomer, J.-M., “Dos preguntas sin respuesta”, *El País*, Madrid, December 14th, 2013.

¹⁴ “Llamamiento a la Catalunya federalista y de izquierdas”, *El Diario*, Madrid, October 17th, 2012: www.eldiario.es/catalunya/opinions/Llamamiento-Catalunya-federalista-izquierdas_6_58854136.html; “Manifiesto federalista de los 300”, *El País*, Madrid, November 3rd, 2012: politica.elpais.com/politica/2012/11/03/actualidad/1351974095_330773.html; “Una España federal en una Europa federal”, *El Confidencial*, Madrid, July 16th, 2014: www.elconfidencial.com/espana/2014-07-16/50-intelectuales-lanzan-un-manifiesto-a-favor-de-la-reforma-federal-de-la-constitucion_162867/; “Renovar el pacto constitucional”, *El Diario*, Madrid, June 11th, 2018: www.eldiario.es/tribunaabierta/Renovar-pacto-constitucional_6_781181904.html.

show, only a federal proposal based on a pluralist conception can hope to attract the support of nationalists in the peripheral regions. In the next two subsections, the proposals to reform the State of Autonomies along federalist lines will be examined one by one. They can be divided into two groups, based on the political arena in which the parties operate: the central state, or the regions.

1.1 The federal projects of political parties in the central state

The political parties in the central state that have presented federal proposals are the Cs, PSOE and IU.

The Cs is a liberal party, in both economic and social terms. It was founded in 2006 in Barcelona as a response to Catalan nationalism. The objective was to form a political party to represent the Catalan citizens who defined themselves as “non-nationalist”.¹⁵ Until the regional and local elections in 2015, its presence outside Catalonia was purely symbolic. Its electoral success coincided with the electoral collapse of the *Unión Progreso y Democracia* (UPyD, Union, Progress and Democracy), a party with a similar program focused on three main issues: Spanish, anti-periphery nationalism, the fight against corruption, and economic liberalism. One additional factor explains the rise of Cs: the discourse of *Podemos*, a new party on the left that denounced the existence of a political “caste”, had a strong impact on public opinion, and the establishment noticed a political party that could reflect its interests. The Cs was seen as a safe option.

In terms of national issues, the Cs remains faithful to a constitutional conception of Spain as a unitary nation-state.¹⁶ Its position in favour of a federal reform of the constitution is based on a monist national

¹⁵ Nationalism is a term with extremely negative connotations in Spain, where it is associated with theories that defend illiberal, non-democratic values, and an organic attachment to the political community with no regard for the rights of minorities. As a result, the hegemonic discourse uses the term “nationalism” pejoratively and only to refer to the ideology driving “nationalities” (the groups fighting for self-determination). On the other hand, the people who describe themselves as the defenders of the Spanish nation are referred to as “constitutionalists” or “patriots” rather than “nationalists”, even though the Spanish Constitution itself is nationalist, since it is based on the “indissoluble unity of the Spanish nation” (article 2).

¹⁶ Article 2 of the Spanish Constitution states that “The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognizes and guarantees the right to self-government of

vision of Spain. As presented by the Cs,¹⁷ federalism depends on two conditions: a decentralization of power based on the principle of autonomy, and integration, which results from the application of the principles of unity and solidarity. The decentralization process has been relatively successful in Spain. However, integration is still lacking. To work towards a true federalization of the Iberian peninsula similar to Germany, Austria or Switzerland,¹⁸ the Cs suggests a certain number of constitutional amendments: the inclusion in the constitution of a list mentioning the seventeen autonomous communities and two autonomous cities;¹⁹ the clarification of the sharing of powers between the central state and the autonomous communities to avoid duplication and dysfunction; a derogation from article 150.2;²⁰ the abolition of the Senate²¹ and the provincial councils; a reform of the tax system including

the nationalities and regions of which it is composed and the solidarity among them all.”

¹⁷ Ciudadanos, “Propuestas de regeneración democrática e institucional”: www.ciudadanos-cs.org/var/public/sections/page-nuestras.ideas.reformas-democraticas-institucionales/reformas-democraticas-institucionales.pdf?__v=136_0.

¹⁸ The US federal tradition is generally distinguished from the Swiss federal tradition. See: Gagnon, A.-G., “España y el federalismo”, *El País*, Madrid, October 9th, 2012. Germany and Austria are federal states that can be placed in the first category, and therefore differ markedly from the Helvetic Confederation. It seems slightly illogical for the Cs to bring these three examples together.

¹⁹ The Constitution recognizes the right to autonomy of nationalities and regions, but does not specify which territorial entities are considered to be nationalities or regions, or how many autonomous communities must be created. In general, researchers consider that political autonomy is an option rather than an obligation for the regions, because of the “dispositive principle”. This apparent freedom given to the provinces to create – or not create – an autonomous community is in reality limited by two control mechanisms. First, before the constitution was adopted, a pre-autonomy regime already existed in most territories. The map of autonomy followed the outline traced by the provisional system. Second, the Congress of Deputies is authorized to “take over the initiative of the local Corporations” to create autonomous communities in the “national interest” (article 144 c) of the Constitution). As a result, if some provinces refuse to exercise their right to autonomy, the Congress of Deputies can act in their stead.

²⁰ Article 150.2 of the Constitution authorizes the state to “transfer or delegate to the Self-governing Communities, through an organic act, some of its powers which by their very nature can be transferred or delegated”.

²¹ Under the Constitution, “The Senate is the House of territorial representation” (article 69.1). However, it does not operate as a territorial chamber: the senators do not form parliamentary groups on the basis of their territorial origin but along partisan lines; they defend the interests of their party and not those of

a financial agreement for the Basque Country and Navarre to ensure fiscal uniformity; and greater cooperation between the various levels of government. It is clear that this federal project respects the spirit of the State of Autonomies in Spain.

In short, the Cs proposal does not challenge the current foundations of the constitution. If implemented, it would result in the recentralization of a certain number of powers, since in the view of the Cs the devolution process has been completed and it is now time to work towards greater centralization. In fact, this project would not necessarily earn a “federal” label in a comparative law study.

The PSOE, in turn, suggests that the principles of federalism are already present in the State of Autonomies, a model of territorial organization that it promotes. As a result, the conception of the nation enshrined in the constitution is perfectly acceptable to the socialists. However, forty years on, the State of Autonomies needs to be updated in several ways both to adapt it to the 21st century and to fight the twin temptations of independence and recentralization that are currently emerging. In a similar way to the Cs, the PSOE calls for the names of the autonomous communities to be written in black and white in the Constitution; for the sharing of powers between the state and the regions to be specified;²² and for federal mechanisms for institutional cooperation between the various levels of government to be developed. The socialists, too, consider that the tax system should be amended, without explicitly

their respective autonomous communities. In addition, the Senate has no specific function with respect to the territories. In fact, its vocation is to rule on the same issues as the Congress of Deputies. The only exclusive power held by the Senate is provided by article 155.1, which provides for compelling measures.

²² The PSOE has suggested that the Constitution should simply list the powers of the central state, making it possible for each Statute of Autonomy to list the powers of each autonomous community. The only constraint would be that the autonomous communities respect the powers of the central state as listed in the Constitution. The Cs suggests a change in the constitutional balance of powers, but with a dual list: a list of the powers exercised by the central state, and a second list of shared powers. Currently, the sharing of powers between the central state and the regions is particularly complex, since the Constitution contains two separate lists: one listing the powers of the autonomous communities (article 148) and the other the powers of the central state (article 149). In addition, legislative and executive powers over a given issue may be shared between the central state and an autonomous community, or reserved for one or the other. In such a nebulous system, numerous conflicts can arise. However, the proposal of the PSOE could clarify the distribution of powers, while the proposal of the Cs is practically identical to the current system.

mentioning economic agreements for the Basque Country and Navarre. Justice, fairness, legal security, stability and financial balance are the principles on which the constitutional reform would be based.²³

The PSOE proposes a reform of the Senate, to ensure the representation of the territories within the state and to allow the upper chamber to perform the role set out for it in the constitution. Unlike the Cs, the PSOE would constitutionalize various realities, facts and symbols that reflect Spain's pluralism. The constitution already mentions these differences, in article 2 on the existence of nationalities and regions; article 3.2 on regional languages; article 138.1 on the specific political and economic realities of different areas (article 141.4 and additional provision 3); and, last, recognition for historical rights (additional provision 1 and transitional provision 2), which are embodied in various mechanisms to reform the Statutes of Autonomy, and in fiscal systems for the Basque Country and Navarre. The PSOE mentions other differences in addition to those listed above. First, the accession of Andalusia to autonomy under article 151 would place the region at the same level as the historical nationalities. Second, article 5 of Catalonia's Statute of Autonomy would establish historical rights. Last, several Statutes of Autonomy would be applied according to circumstances in the area of civil law in the territories of the autonomous communities – Valence, Galicia, the Balearic Islands, Aragon, etc.

Another difference, compared to the Cs federal project, is the goal of integrating the autonomous communities into the decision-making process at the central state level, whenever a decision is likely to affect regional interests. In addition, the autonomous communities would be able to designate members of constitutional institutions and organs. Although the proposal does not mention the institutions explicitly, there can be no doubt that participation in the designation of the judges of the Constitutional Court would be considered a major step forward by the autonomous communities. The Constitutional Court is responsible

²³ PSOE, “Hacia una estructura federal del Estado”, July 6th, 2013: web.psoe.es/source-media/000000571000/000000571056.pdf; PSOE, “Un nuevo pacto territorial: la España de todos – Declaración de Granada”, July 6th, 2013: www.socialistes.cat/files/un_nuevo_pacto_territorial.pdf; PSOE, “La política autonómica del PSOE. Una reforma federal de nuestra Constitución frente al neocentralismo y la autodeterminación”, 2015: www.psoe.es/media-content/2015/09/686141-000000555807.pdf.

for settling disputes between the central state and the regions and, as demonstrated on several occasions,²⁴ it is not in reality an impartial arbiter, but a highly politicized organ that places the interests of the central government at the heart of its priorities. Because “the Court has been most instrumental in defining the state of autonomies as one with federal arrangements”,²⁵ the territories should play a major role in designating its members, according to the PSOE.

Another difference with the Cs project would have helped to avoid the constitutional crisis that followed the decision by the Constitutional Court (31/2010). Given that the Statutes of Autonomy are organic laws – with some specific features given that they stem from agreements between the central state and the autonomous communities – the procedure for reviewing their constitutionality should be different from the procedure to assess the constitutionality of other organic laws. Under this reform, no referendum could be held until challenges to Statute has been settled by the Constitutional Court.²⁶

In short, although the PSOE presents its federal proposal as a remedy for recentralization and secessionism, it bears a strong resemblance to the system of devolution currently in place. For this reason, it is difficult to consider it as a federal model from a legal standpoint.²⁷ The Spanish State of Autonomies is neither a federation in the formal sense – the

²⁴ Bengoetxea, J., “Seven thesis on Spanish justice to understand the prosecution of Judge Garzón”, *Oñati Socio-Legal Series*, 2011, p. 1–18; Buchanan, A., “Prólogo a la edición española”, in *Secesión. Causas y consecuencias del divorcio político*, Barcelona, Ariel, 2013; Cagiao y Conde, J., “El federalismo ante la consulta catalana. Una lectura federal del derecho a decidir”, in Cagiao y Conde, J., Martín, V. (eds.) *Federalismo, autonomía y secesión en el debate territorial español. El caso catalán*, Paris, Le Manuscrit, 2015, p. 77–128.

²⁵ Agranoff, R., Ramos-Gallarín, J.-A., “Toward federal democracy in Spain: An examination of intergovernmental relations”, *Publius*, vol. 27, n°4, 1997, p. 1–38.

²⁶ Under the federal project of the PSOE, once the Statute had passed the *Cortes Generales*, a three-month period would begin during which the question of unconstitutionality could be raised. The Constitutional Court would then have six months to render a decision, and a referendum would be held only once the decision had been released and the necessary amendments made.

²⁷ Gagnon, A.-G., Sanjaume, M., “Cataluña: federalismo y derecho a decidir”, *Anuari del conflicte Social*, 3, 2013, p. 432–456.

constitution makes no mention of federalism – nor in material terms since the key principles that govern federations are strikingly absent.²⁸

The IU also proposed a federal reform of the constitution in 2013, in association with the Catalan parties ICV and EUiA. The project is analysed in the next subsection.

1.2 The federal projects of political parties at the regional level

At the regional level, the political parties that have made federal proposals are all from Catalonia. The PSC and EUiA, respectively the Catalan branches of the PSOE and the IU, and the ICV, a party allied with the EUiA during Catalan elections, are the political parties whose federal projects will be examined here.

Unlike the PSOE, the PSC considers Spain to be a multi-nation state.²⁹ Since “federalism provides a suitable institutional structure for states made up of several nations”³⁰ – such as Spain – the constitution should incorporate federalism as one of its structuring principles, starting with article 1. The PSC believes that there is no difference between the terms “nation” and de “nationality”.³¹ In everyday language, “nation

²⁸ Payero, L., Gustafarro, B., “Devolution and secession in comparative perspective: The case of Spain and Italy”, in Schütze, R., Tierney, S. (eds.), *The United Kingdom and the Federal Idea*, Oxford, Hart, 2018, p. 123–152.

²⁹ Fundació Rafael Campalans, “Por una reforma constitucional federal”, *Papers de la Fundació*, 164, 2013: www.fcampalans.cat/uploads/publicacions/pdf/164_papersdelafundacio_def.pdf.

³⁰ *Ibid.*, 5.

³¹ During the constitutive debates, the difference between “nation” and “nationality” was one of the most difficult issues. For the *Alianza Popular* (AP, the conservative party), the *Euskadiko Ezkerra* (EE, the Basque party on the left) and the *Esquerra Republicana de Catalunya* (ERC, the republican Catalan party on the left), nation and nationality were significantly different. As a result, and depending on their respective positions, the AP suggested striking out the term “nationalities” from the constitutional text and leaving only “Spanish Nation”, while the EE and ERC wanted to use the term “nation” for all the political communities within the state, and not only for Spain. A majority of members supporting the consensus – the *Unión de Centro Democrático* (UCD, the union of the democratic centre), the PSOE, the *Partido Comunista de España* (PCE, the communist party of Spain) and the Catalan minority – wanted to combine plurality and diversity within the same political entity. Ortega’s national theory was used to resolve this difficulty. Ortega’s national conception is strongly influenced by the Hegelian distinction between

refers to the society of a state that has been recognized by international law, while nationality is associated with a federated state, *Land* or region; in any case, it is a conventional distinction”.³² The suggested constitutional reform would make it possible to recognize Catalonia and the Basque Country as nations with their own symbols, institutions and powers. As a result, in the federal democratic state proposed by the PSC, all the constituent parties – whether nations or nationalities – would be considered equal.³³

The PSC also proposes a reform of the upper chamber, not only because its operations are redundant and unproductive, but also and above all to respect the principle of participation by federated entities in central institutions, whatever their name – Senate, Council of Autonomous Communities, etc. The federal Senate would be able to take part in the legislative process when a bill was likely to affect the interests of the autonomous communities,³⁴ and would take the lead in intergovernmental

“nation” and “people”. According to Hegel, the nation embodies the national character (*Volkgeist*) through the state, while the people is an agglomeration of individuals bound by objective ties stemming from their shared culture, whose collective consciousness is not anchored strongly enough for them to constitute a sovereign political entity. The nation has a political essence, while the people have only a cultural essence: this is the secret of and condition for their coexistence. In place of nation and people, the Spanish Constitution identifies a (Spanish) nation and nationalities, but the theoretical construction remains the same. A well-documented study of the influence of Ortega’s theory on the constitutional concept of nation is found in Bastida, X., *La nación española y el nacionalismo constitucional*, Barcelona, Ariel, 1998.

³² Fundació Rafael Campalans, *op. cit.*, p. 14. In addition, the ambiguity between nation and nationality stems from the principle of nationalities, which involves considering that “every nation/nationality must have an independent state, and all states must form a single nation”.

³³ However, the term “nation of nations” is acceptable for the PSC. Without appearing explicitly in the Constitution, the formula was materially included in 1978 (see above, note 31). In Spain, the term “nation of nations” means that Spain is a political nation made up of cultural nations, or a nation of nationalities. For all these reasons, a “state of nations” would be a less ambiguous term, and would express the essence of a federation more effectively.

³⁴ The Senate acts as an upper chamber, since it rules on the same issues as the Congress of Deputies. However, the Senate has no right of veto. Once the Congress of Deputies has voted for a bill, if the Senate on an overall majority vote decides not to ratify it, the Congress can overcome its opposition “by overall majority or by single majority if two months have elapsed since its introduction” (article 90 of the Constitution).

relations both vertically – between the governments of the autonomous communities and the central government – and horizontally – between the governments of the autonomous communities – thereby facilitating participation by the autonomous communities in the institutions of the European Union. The Senate would be made up of members of the regional governments, adopting a model close to that of the *Bundesrat*.

With respect to the distribution of powers, the PSC proposes the inclusion of a list defining the powers assigned to the central government in the constitution, along with a residual powers clause, establishing that all other powers would fall under the authority of the autonomous communities.³⁵ As a result, the Statutes of Autonomy would lose one of their reasons for existing: to delimit the powers exercised by each community.

Although the autonomous communities have legislative and executive powers, judicial powers are not devolved. The PSC proposes to extend the federal principle to cover judicial powers, giving more scope to the high court of justice (*Tribunal Superior de Justicia*), changing the composition of the general council for judicial power (*Consejo General del Poder Judicial*), and creating an authority to coordinate the functions and powers exercised by the central state and the autonomous communities in the area of justice (a consultative commission on judicial powers).³⁶

The PSC explicitly mentions the need to take the federal formula into account in the membership of the Constitutional Court. For this purpose, the autonomous communities should help elect judges to the court via the federal senate, which could designate half of the members,

³⁵ A major amendment would affect the power to organize a referendum, which under article 92 is currently held by the central state. The PSC proposes that the autonomous communities should be able to exercise this power. This would make it possible to find a solution to the current situation in Catalonia. It is important to remember that the parliament of Catalonia asked the Congress of Deputies to delegate to it the power to organize a referendum in January 2014, pursuant to article 150.2. Congress rejected the request from Catalonia by a majority vote, and the referendum held on November 9th, 2014 could not be considered official. With the reform proposed by the PSC, this situation would not have occurred.

³⁶ The proposal for constitutional reform made by the Cs, on the contrary, would tend to reduce the powers of the autonomous communities in the field of justice by removing their power to appoint judges to the high court of justice, currently entrusted to the regional legislatures (article 330.4 of Organic Law 6/1985, dated July 1st, 1985, concerning judicial power). In addition, the Cs proposes the abolition of the General Council of Judicial Power.

with the six remaining members being designated by the Congress of Deputies.

The Catalan socialists also suggest reforming the two mechanisms for constitutional amendment (articles 167 and 168). First, article 167 should include protections to guarantee the holding of a genuine public debate in the event of a constitutional reform, to avoid the scenario of 2011, when article 135 was amended on the basis of a simple agreement between the PSOE and the PP in less than a month. Second, the autonomous communities should take part in the constitutional reform process via the federal senate and a final referendum, for which the PSC suggests that a majority of the votes cast in a certain number of regions would be enough to endorse a reform project, instead of the national consultation currently provided for.³⁷

The tax system would also be reformed under the PSC proposal. The principles of solidarity and adequate resources would be given precedence, to guarantee inter-territorial balance. More specifically, because of the financial crisis, social development is under threat. The Constitution would guarantee social services for all citizens (health, education, retirement, etc.) and the central state, as well as the autonomous communities, would be responsible for creating an additional fund to fight poverty. The federal senate would participate in the implementation of financial legislation, since most powers in the area of health, education and social services are under the jurisdiction of the autonomous communities. With respect to the tax collection systems in the Basque Country and Navarre, the PSC suggests that the dysfunctions introduced by the specific economic agreements need to be corrected. For this purpose, the PSC considers that these territories should show more solidarity with the other federated units to compensate for the surpluses generated by their specific regime.

Like the PSOE, the PSC highlights the need to include the specific features of the autonomous communities in the Constitution, and to

³⁷ The PSC ignores a crucial aspect that requires amendment: the procedure under article 168 of the Constitution. This is a striking omission, given that its document recognizes the need to use article 168 to implement the reform. However, the conditions it sets are so exorbitant that the procedure has never been applied, and this situation will not change. As pointed out by many partisans, article 168 is, rather than a mechanism for reform, a way to prevent any amendment of the Constitution (De Vega, P., *op. cit.*).

introduce a degree of asymmetry in the sharing of powers. The Catalan socialists also emphasize that the Statute of Autonomy cannot be under the control of the Constitutional Court after the holding of a referendum, whose constitutionality should be determined before the population of the autonomous community concerned votes on the text. In addition, the Spanish parliament should not take part in the reform process and should not play a role in the promulgation of the statutes of autonomy, which would be assigned to the regional legislature. On this point, the positions of the PSC and PSOE diverge.

Although the federal proposal made by the PSC in May 2013 is substantially different from the path laid out by the PSOE in the rest of Spain,³⁸ in July of the same year the Catalan branch also signed the declaration of Granada,³⁹ apparently aligning with the Spanish socialists.

The IU, its Catalan branch the EUiA, and the ICV see Spain as a *de facto* multinational and multilingual state. In accordance with federal principles, interpreted from a leftist standpoint, they have traditionally defended the right of peoples to self-determination.⁴⁰ They consider that Spain is suffering from a severe constitutional crisis with many causes. First, the economic crisis and the undermining of social and workers' rights have eroded the social contract on which democracy was founded. Second, the political model initiated by the *transition to democracy* has lost its impetus. Last, decision 31/2010 by the Constitutional Court and the recentralization process launched by the central government have shown that the demands for more autonomy from the periphery cannot be heard within the framework set by the Constitution, which leaves no room for interpretation in a federative direction. As a result, "a majority of citizens in Catalonia do not accept the current Statute of Autonomy or constitutional framework, and to resolve this situation, they claim the right to decide."⁴¹ Since the power to organize a referendum has

³⁸ In the view of Alain-G. Gagnon and Marc Sanjaume, the PSC proposal was federal in nature and its goal was not to achieve standardization. As a result, it was clearly different from the PSOE proposal (Gagnon, A.-G., Sanjaume, M., *op. cit.*).

³⁹ Gutiérrez-Calvo, V., Ríos, P., "PSOE y PSC sellan su pacto federal sin resolver el conflicto por la consulta", *El País*, Madrid, July 6th, 2013.

⁴⁰ IU, ICV and EUiA, "Declaración sobre el derecho a decidir y el modelo de Estado", May 25th, 2013: www.izquierda-unida.es/sites/default/files/doc/Declaracion_IU_ICV_EUiA_DerechoDecidir_ModeloEstado.pdf.

⁴¹ *Ibid.*, p. 2.

been assigned to the central state, the government must negotiate the conditions for holding a referendum with the parliament of Catalonia to allow the Catalan population to express its will. This obligation stems from the democratic principle, which requires government by consent.⁴² Once the result of the referendum is known, and if it is not favourable to the current constitutional framework, the state must draw the necessary conclusions and implement the demands made democratically.

In short, the Constitution should recognize both the pluralistic nature of Spain and the right to decide of its member nations, with that right being considered synonymous with the right to self-determination. For that purpose, a constituting process should be launched in Catalonia and in the rest of Spain.

2. Federalism and the right to self-determination

Self-determination is a polysemic term whose meaning varies depending on the intention behind its use. In some cases, self-determination is seen as being synonymous with a type of territorial or non-territorial autonomy; in other cases, liberal democracy is understood to be a sufficient condition for an assumption that the various components of a composite state enjoy self-determination; in yet other cases, self-determination leads to a range of scenarios freely chosen by the members of the political entity holding the recognized right, including the ability to secede. In the Spanish context, the demands made by the peripheral nations fall mainly into the last category. As a result, secession should be an option open to discussion and a free vote, but the electors could also decide to target another outcome, such as the adoption of a federal model.

In the wake of decision 31/2010 of the Constitutional Court, secession made a forceful appearance in the Spanish debate. A significant number of Catalans voted for political parties that made the foundation of an

⁴² According to the IU, ICV and EUiA, “when a significant number of citizens in a specific territory question the existing institutional framework and call for sovereignty, legal means must be implemented to determine the wishes of all the citizens living in that territory” (*ibid.*, p. 3). Although the document does not cite the Supreme Court of Canada in connection with the legality of Québec’s secession, the group’s reasoning has a strong resemblance to that of the Reference (*Reference re Secession of Québec, op. cit.*, par. 88).

independent republic one of their priorities.⁴³ An even greater number of electors support the exercise of the right to self-determination.⁴⁴ Given the context, several political parties, both in the centre and at the periphery, made proposals in support of a reform of the Spanish constitution.

It seems fair to ask if federalism could provide a remedy for secessionism in Spain. The answer to this question must take into account the fact that the Spanish national context is characterized by pluralism. Any new territorial arrangement would have to recognize this internal diversity, and this would be a condition *sine qua non* for successfully exiting the crisis.

As explained previously, there are two conceptions of federalism, and as a result two significantly different federal options available to Spain: one is monist, the other pluralist. While the first presupposes a mechanism for national construction leading to the birth of a nation-state,⁴⁵ the second explicitly recognizes national pluralism. It is broadly accepted that, in a heterogeneous context, territorial federalism creates more problems than it solves. According to Máiz, the formula provides ammunition for both the supporters of centralization (state nationalism) and for secessionists (non-state nationalism).⁴⁶ Where several nations co-exist, asymmetrical multinational federalism – including the possibility of dislocation – appears to be the only acceptable option, and this is the case for Spain.

The construction of a federation by aggregation⁴⁷ requires the ratification by sovereign states of a fully-consented federative pact. By

⁴³ During the election held on December 21st, 2017, the *Partido Demócrata Europeo Catalán* (PDeCAT, the Catalan democratic and European party), ERC and the *Candidatura d'Unitat Popular* (CUP, the popular unity candidacy) obtained 70 seats (out of 135) in the Catalan parliament, with a total of over two million votes. According to the public opinion barometer (April 2018) of the *Centre d'Estudis d'Opinió*, 48 % of Catalans wanted Catalonia to become an independent state, with 43.7 % against: upceo.ceo.gencat.cat/wsceop/6668/.

⁴⁴ 71.4 % of Catalans support the holding of a referendum on independence, with 23.4 % against. Data from the public opinion barometer published in July 2017: upceo.ceo.gencat.cat/wsceop/6288/Abstract%2520in%2520English%2520-857.pdf.

⁴⁵ Maiz, R., "Federalismo plurinacional: una teoría política normativa", *Revista d'Estudis Autònoms i Federals*, 3, 2006, p. 43–85.

⁴⁶ *Ibid.*

⁴⁷ Beaud, O., *Théorie de la Fédération*, Paris, Presses universitaires de France, 2007.

acting in this way, the parties recognize for the future that they remain free to decide their individual and joint political futures. This is what is commonly known as the “right to self-determination”. Because of this right, the parties can choose not to join the federation – this is one of the risks of freedom.

Our analysis of the proposals for constitutional reform based on a federal model, presented in the previous section, leads to three possibilities. First, the models based on a unitary conception of the state are of no help in solving the territorial crisis. The projects of the Cs and PSOE do not require a change to the current foundations of the Constitution – the indivisible and indissoluble nature of the Spanish nation – and as a result their respective “federal” projects are closer to a unitary state that has decentralized some of its powers than to a true federation.⁴⁸ Further, their conception of the nation is close to that of the PP since they state – in accordance with article 2 of the Constitution – that there is only one nation in Spain: the Spanish nation.⁴⁹ Second, the proposals based on a pluralist conception of federalism can be useful in recognizing minority states within the Spanish State. The federal project of the PSC recognizes Spain’s internal pluralism. However, it does not admit the possibility of national self-determination, since the constituent parties are not authorized to refuse to sign the constitutive federal pact.⁵⁰ For the IU, EUiA and ICV, federalism is one possible option in the exercise of the right to self-determination. As a result, a new constitution with entirely new foundations would be necessary.

In short, constitutional recognition of national pluralism and the right of nations to self-determination is compatible with a pluralist model of federalism. Only the proposals made by the IU, ICV and EUiA meet both conditions. It would be possible for the parties that support independence in Catalonia – and their electors – to agree to a federal

⁴⁸ Olivier Beaud describes this system of devolution as “federalism by disaggregation” (*ibid.*). However, also according to Beaud’s theory, a federation is a union of states, which means that a regional state (created by decentralization from a unitary state) is an intermediate category between a unitary state and a federal state.

⁴⁹ For example, the Cs and PSOE supported the PP government in its use of article 155 of the Constitution (federal coercion) when the Catalan parliament declared independence (*Senate Debates Journal*, n° 45, October 27th, 2017).

⁵⁰ According to the PSC, “nationalist parties can adopt the federal formula provided they do not consider independence, which would make federalism meaningless” (Fundació Rafael Campalans, *op. cit.*, p. 17).

reform of the central state along these lines. However, the political parties of Spain, which retain a unitary vision of the country, would probably be unlikely to accept it, including the parties that have proposed federal projects. Their vision is rooted in a monist national conception of the state, while the pluralist federalists and Catalan nationalists share a multinational conception of Spain.

The national question will, however, remain unresolved for as long as the unitary vision persists. Two main arguments support this fact: first, democracy in Spain is historically linked to recognition for its internal national pluralism; and second, federalism is based on a pact (*foedus*) between states. Freedom to join or not to join the federation is a prior condition for any discussion about a federal project, and an exploration of this pathway requires being open to dialogue and negotiation. Unfortunately, these two notions are largely absent from the Spanish political tradition.

Conclusion

This chapter examines the projects for constitutional reform recently advanced by several political parties in Spain, all targeting a federal model. In these proposals, federalism is seen as an alternative to secession, or as a way to resolve the historical problems caused by the territorial form of the Spanish State. As stated in this chapter, a federal reorganization of the Spanish State can make a substantial contribution to solving the national question if, and only if, it is established on the basis of pluralist logic. If national diversity is not recognized and if federalism is founded on a pact between territories, freedom to join the federation is a necessary condition for the adoption of the federal pact. However, this freedom must have, as a corollary, freedom to withdraw from the constitutional pact. As a result, a federal reorganization of the Spanish State would inevitably involve granting a right of self-determination to its constituent nations.

Notes about the Contributors

Olivier Beaud is a tenured professor of public law at Université Paris II Panthéon-Assas, where he teaches constitutional law, philosophy of law and state theory. He has been the joint director of the Michel Villey Institute since 2006, and a senior member of the Academic Institute of France since 2012.

Jorge Cagiao y Conde is a researcher and lecturer (with HDR qualification) in the Department of Law and Languages at the University of Tours. His book *Micronacionalismos. ¿No seremos todos nacionalistas?* (“Micronationalisms – are we not all nationalists?”) was published in 2018.

Alain-G. Gagnon is a professor in the Department of Political Science at Université du Québec à Montréal, where he holds the Canada Research Chair in Québec and Canadian Studies. He is also the director of the new Centre d’analyse politique – Constitution et Fédéralisme (CAPCF: <https://capcf.uqam.ca>).

Dave Guénette is a postdoctoral fellow at McGill University, associated with the Peter MacKell Chair in Federalism. He co-edited the books *Ré-imaginer le Canada - Vers un État multinational?* (with Félix Mathieu, PUL, 2019) and *Cinquante déclinaisons de fédéralisme - Théorie, enjeux et études de cas* (with Félix Mathieu and Alain-G. Gagnon, Quebec, PUQ, 2020).

Christophe Parent is a lecturer in the faculty of law and the social sciences at Université de Poitiers, and a member of the Institute of Public Law. In 2011 he published a book on the concept of multi-nation federal states, *Le concept d’État fédéral multinational: essai sur l’union des peuples*.

Lucía Payero-López is a lecturer at the Padre Ossó Faculty of Universidad de Oviedo (Spain), where she is also involved in research in the Department of Legal Philosophy. Her research focuses on the philosophy of law, political theory and constitutional theory.

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