

Secession And Federalism: A Chiaroscuro

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Abstract

The relationship between federalism and secession might be regarded as antithetical but is an unavoidable fact in multinational political communities. Integration and disintegration are both possible trends in a federation. Recent political events in Catalonia show the salience of independence claims, a political phenomenon already experienced by other countries such as Scotland or Quebec. Liberal democracies evolve and debates on self-government and self-determination cannot be discussed as they were decades ago. Constitutional right to secede is extremely rare, however we can find good reasons both in constitutional and normative analysis supporting democratic self-determination. Minority nations, as permanent minorities, claim for liberal guarantees to protect them from majorities, but also democratic rights to express their views on their constitutional future. Pacts are the basis of any political agreement and any federal arrangement requires individual and collective compromises to be respected.

Introduction[1]

Wo viel Licht ist, ist starker Schatten

[Where the light is brightest, the shadows are deepest]

Johann Wolfgang von Goethe

If federalism has fifty shades, secession is certainly one of them. The long shadow of disintegration hangs over (almost) every current or past federation in the world. The emergence of independent States out of former federal units has been a common outcome of collapsed federations. Perhaps due to these historical precedents, federalism and secessionism are generally seen as antithetical trends since they are considered to be pushing in different directions.

Federal political systems are “shared rule plus self-rule” (Elazar 1987) institutional designs aiming at either “holding together” (India or Belgium) or at “coming together” (Switzerland, US, EU) (Stepan 2005). Some of them are plurinational, although a majority claim to be mononational[2] (Requejo 2005). Conversely, secession implies a breaking up of the status quo. That is, creating a new State on a piece of territory formerly belonging to another State (or federation of States). Therefore, it entails a transfer of sovereignty from a parent State to a new political unit (Pavkovic and Radan 2007), which is the reverse of any “coming together” federation and the undesired outcome of a system that is “holding together”.

In spite of these contradictions, pro-independence movements (and secessions) are an inescapable part of plurinational federal political systems. First, federalism has often been used to accommodate diversity, with minority nations typically living in federal regimes or at least in States with a certain degree of political decentralisation. Second, centripetal and centrifugal forces are part of any plurinational federation’s political life. Third, debates on secession and national pluralism are always mediated by local understandings of what federalism really means. Burgess (2006) makes a distinction between Anglo-American traditions and Continental traditions of federal thought. Some European countries seem closer to the Catholic notion of “subsidiarity” and Bodinian unique sovereignty; while the Anglo-American tradition would certainly seem to be influenced by the Protestant “covenant” tradition, which would give certain flexibility to sovereignty negotiations. The language of federalism is not only varied but is also constantly evolving and being renewed from a historical perspective (Norman and Karmis 2005).

The Right to Secede in a Federation

Regulations on the right to secede are extremely rare[3], but if they do exist, it is normally in a federal context. Ethiopia and St. Kitts and Nevis have regulations on the right to secede, and the EU Treaty of Lisbon includes Article 50 that contemplates withdrawal from the Union. Apart from these cases, recent regulations on self-determination and secession demands include the Supreme Court of Canada’s 1998 Opinion on the secession of Quebec[4] and the 2000 Clarity Act in Canada. [5] Another is the 2012 Edinburgh agreement on the 2014 Scottish independence referendum in the context of Scotland’s devolution scheme. [6] Former federations, such as the USSR, also included the right of constituent units to secede.[7]

Instances such as the dissolution of the USSR or the passing of the Canadian and UK legislation raise one crucial question

(although there are others): does the right to secede foster secessionism in a federation? Broadly speaking, there are two answers to this question.

Bauböck (2000) argues that the virtue of federalism is precisely to replace self-determination by self-government for minority nations; therefore federalism must exclude secession rights and strengthen self-government. From a more legal perspective, Sunstein (1991, 2001) has famously argued against “secession clauses” in federal constitutions since, in his view, such clauses would lead to strategic behaviours (blackmail) and would undermine the constituent units’ commitment to the constitutional pact from the very beginning.

However, these arguments have been refuted by other authors, who claim the contrary. Kymlicka (2001: 224) stresses the virtues of self-government and federal agreements and affirms that:

the goal shouldn’t be to provide iron-clad guarantees of existing state borders (which cannot be done in a free and democratic society), but rather on providing firm guarantees that the rights of internal minorities will be protected in the event that state borders change, and that the majority group will survive as a nation even if it loses some minority territory.

Moreover, a “secession clause” can actually help to keep talk of secession out of the political debate and to provide actual commitment to the Constitution by defining a clear “way out”, thus preventing potential blackmail (Weinstock 2001; Norman 2006). These views in favour of “constitutionalising” secession seem to be more consistent with some moral approaches formulated by political philosophers. Approaches based on Kantian moral individualism tend to be more reluctant to accommodate these policies than Hegelian approaches that include a commitment to the politics of recognition (Requejo 2013).

Normative Accounts on the Right to Secede in Federations

The moral ground for the right to secede is generally presented as a conditioning factor. Buchanan (2004) justifies a right to unilateral secession when an existing intrastate agreement has been breached by the Central/Federal government, thus endangering the rights of the self-governing minority. Similarly, Seymour (2007) equates the right to secede with external self-determination. While internal self-determination should be a primary right of minority nations, external self-determination would only be justified in the context of an absence of internal self-determination. Equal recognition, proposed by Patten (2014) is another moral foundation of minority rights. When equal recognition is not fulfilled, there will potentially be more ground for claiming a right to secede.

In my opinion, these theories use a common positive intuition by placing fairness at the centre of any justification of secession rights in a federation (Sanjaume-Calvet 2016). However, defining the right as a “remedy” to injustice, clearly a Lockean approach, has some important problems.

Aside from domestic legislation, justice can be defined by international standards; however, the parent State, or the majoritarian nation within the federation, will always be the one that defines the terms of a “just” accommodation in times of conflict with a minority. That is, the parent State has the last word on “what is just”. Moreover, the only legitimate actor in the international arena is the State, not the minority. Therefore, given the fact that secession demands, especially peaceful ones, are often regarded as domestic affairs, minorities tend to be at the mercy of their own parent state. This has important

implications since in the eyes of the parent State or the majority group, these kinds of demands are easily labelled as an unfair claim or even a “vanity secession”.^[8]

Furthermore, in the absence of a clear “just” ground to claim external self-determination (i.e. human right violations, forceful annexation, breach of self-government agreements, absence of internal self-determination...) this kind of approach might be undemocratic when taken at face value. In a hypothetical case in which a territorial minority in a given federal unit has 90% support for secession but the parent State refuses to grant any legal path or agreement regarding this demand, there would be no legitimacy to unilaterally secede, since there is an absence of a “just cause”. Democratic support in itself cannot be claimed as a ground for unilateral secession in this approach. How can consent be a criterion that is absent from a theory of self-determination?

Real world cases, however, are more complicated. Normally the “just cause” is contested at parent State level and at the minority internal level; while in the international arena, such conflicts can remain a domestic issue for a long time (Coggins 2014). Moreover, there is (obviously) a correlation between injustice or perceived injustice and support for secessionism. In liberal democracies, support for secession rarely achieves overwhelming majorities (Griffiths 2016), but if it exists for a sustained period of time it can be a proxy for malfunctions (and at least perceived/real injustices) in a political system^[9].

Catalan Self-determination

Recent events in Catalonia are an example of these political tensions (Cuadras-Morató, 2016). The 2010 Constitutional Court decision on the Catalan Statute of Autonomy and the recentralisation policies led by the conservative (PP) Government resulted in Catalan political forces developing plans for external self-determination (referendum) and secession (an independent Catalan Republic). Between 2012 and 2015, the central Government, Parliament and courts repeatedly rejected laws and legislative initiatives calling for a referendum on independence or self-government (Gagnon and Sanjaume-Calvet 2016).

In the Catalan regional elections on September 27, 2015, the pro-secession parties achieved 47.74% of the vote. On 1 October 2017, the Catalan authorities organised a unilateral secession referendum. The turnout was around 43% and the Yes vote obtained 90% support. The Catalan Government claimed a secessionist victory and declared independence in two sessions in the Catalan Parliament on 10 and 27 October. The parties that were against independence had called on their supporters to boycott the referendum and did not take part in it. In addition, the Spanish police forces forcefully cracked down on it, causing more than a thousand injuries. Criminal courts and prosecutors charged the entire Catalan Government, several independence leaders, 700 mayors and members of civil society with accusations of sedition and rebellion (these are criminal charges). Two civil society leaders, the Catalan Vice-president and the Catalan Home Affairs Minister remain in pre-trial detention, while the Catalan President and four regional ministers are currently exiled in Brussels. The Spanish Government imposed direct rule over the Catalan region and called for new regional elections. These repressive strategies, far from demobilising secessionism, seem to have had a “double” boomerang effect against the Spanish Government. First, the elections showed solid support for the secessionist forces in Catalonia. In spite of repressive measures and having its leaders imprisoned (or in Brussels), pro-independence parties obtained 47.5% of the vote share and 70 out of 135 seats in the parliament. Second, the most voted party was Ciudadanos (Citizens Party), an anti-secessionist party that obtained 36 seats and a 25.4% vote share, while the ruling party in Central Government and currently the majoritarian force in the rest of Spain, the PP, only won 4 seats and 4.2% of the vote share.

The events in Catalonia show the difficulties faced both by federal governments and by legal or moral theories on secessionism and federalism. The Spanish executive led by Mariano Rajoy, and the main state-wide parties (PP, PSOE, Cs) reject both the right to hold a referendum in Catalonia and/or the existence of a “just cause”. On the one hand, their discourse is based on the Constitutional Court’s interpretation of the 1978 Constitution, stating the existence of a unique sovereignty and framing a self-determination referendum as unconstitutional. On the other hand, the fact is that state-wide parties appoint the central State institutions (including judges) and hold a qualified majority both in Congress and the Senate, effectively blocking any constitutional reform[10].

The Spanish authorities’ reaction to Catalan demands can be defined as a “prohibitionist regime” that can easily turn into a trap in a liberal democracy. Pro-independence candidates are allowed to stand in elections, but cannot promise the execution of their political objectives.

Conclusion

All in all, plurinational federalism and secession seem to exist together in marriage, albeit an unhappy one. Federal relationships are based on pacts. In plurinational contexts, these pacts call for individual but also collective compromises in which a Bodinian conception of sovereignty (as unique and indivisible) has little room. These kinds of conflicts cannot be dealt with in the way that they were 20 or 50 years ago. Minority nations now demand liberal guarantees to safeguard their self-government and insist on the democratic right to express their constitutional views.

It seems urgent that we find both legal and moral paths in order to frame and understand otherness within a given demos (or *demoi*)[11]. Complex institutional settings must accept their contingency and avoid domination by national groups. However, this does not mean falling into eternal instability. On the contrary, fair mechanisms of power sharing and autonomy can be constructed to prevent break-ups; however, their absence cannot be replaced by the censorship of democratic and liberal rights.

[1] I am grateful to Andrea Romano (Universitat de Barcelona) and Prof. Ferran Requejo (Universitat Pompeu Fabra) for their comments on a first draft of this post.

[2] In this post the words “plurinational” and “multinational” are used as synonymous meaning the existence of multiple nations.

[3] The US Supreme Court famously rejected the right to secede of a State in its ruling *Texas vs. White* (1869). See: 74 U.S. 700 <https://www.law.cornell.edu/supremecourt/text/74/700> [accessed on 6th December 2017]

[4] See: Reference re Secession of Quebec, [1998] 2 S.C.R. 217. <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do> [accessed on 6th December 2017]

[5] See: 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. <http://laws.justice.gc.ca/eng/acts/C-31.8/FullText.html> [accessed on 6th December 2017]

[6] See: <http://www.gov.scot/About/Government/concordats/Referendum-on-independence> [accessed on 6th December 2017]

[7] Article 72 of the USSR constitution affirmed the right of Union republics to freely leave the federation, but in practice there was no law establishing a secession procedure.

[8] This critique has been defined as the “absence of an impartial referee” in these cases. The ICJ has been proposed as a possible candidate to internationally solve this problem since its 2010 opinion on the secession of Kosovo.

[9] The Canadian Supreme Court Opinion on the secession of Quebec in 1998 provided a Solomonic survival guide. A combination of principles was proposed: “democracy, rule of law, federalism and minorities protection” that later on led to the Clarity Act in 2000. Nonetheless, Quebec responded by reaffirming its right to self-determination through the Bill 99, and the French-speaking province has not formally signed the 1982 Constitutional repatriation. In the UK, the 2014 referendum (inspired by the Canadian Clarity Act) returned a clear unionist majority (55%), but instead of defeating the movement for Scottish independence, it fueled the movement (which is strongly pro-EU), which is now reinforced by the UK withdrawal negotiations after the 2016 vote to leave the EU.

[10] See professor Ferran Requejo’s contribution to this project , regarding the Spanish case: <http://50shadesoffederalism.com/case-studies/spain-federal-country/>

[11] Gagnon (2011) has proposed federalism based on hospitality and habilitation.

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Further Reading

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