

## FEDERATIVE TOOLS: A NEW PERSPECTIVE FOR SECESSION

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### Abstract:

From a political point of view, secession is compatible with federalism as the corresponding right to enter in a Federation. From a legal point of view, it has to be provided by the federal constitution, a legal rule or by case law. But it is very unusual or complicated to contemplate secession. Then, the problem is « How to legally anticipate and allow secession? ». This leads to various debates about the potential possibility of allowing secession in a federal constitution. However this debate and the constitutionalization of secession can be avoided by considering that federalism never attains any stability in every ratio of power (federal/state or regional government, centralization/decentralization of power, etc.). Admitting that there is always imbalance, leaving room for manoeuvre in restricting the amount of constitutional rules and, as a consequence, granting autonomy to the federal members. So, every Federation has to be organized by means of *federative tools* (like subsidiarity, distribution of powers, autonomy, etc. in a specific legal or constitutional way), which means instruments adapted and adaptable to every situation at every time. In such a view, these *federative tools* would be the occasion to contemplate secession in some conditions (more) adapted for the federal and the regional forces. The regional force could benefit from such autonomy (not limited by the federal constitution) and the federal government could have a clear legal framework to organize and contemplate negotiations with the regional force.

Key Words: secession, federalism, federative tools, constitution, federal government, state government.

Catalonia, Scotland, Quebec, are recent examples among others illustrating movements claiming political and judicial separation or independence. These regional procedures are common reflexes against globalization because the impact of globalization has an opposite but related effect: regionalism in the sense of the strengthening of local cooperation around common values. This reflex leads some regional or state governments to organize secessionist referenda or popular consultations. Well known examples are the referenda organized by the province of Quebec (1980 and 1995), by Scotland, in September 2014 or the popular consultation in Catalonia in November 2014.

From a political point of view, secession can be compatible with federalism, seen as the corresponding right to enter in a Federation. The possibility of being part of a Federal country

has to be related with the capacity to separate. From a legal point of view, secession is more complex. It has to be provided for by the federal constitution, a legal rule or by case law.

Before any development of this theme, it is important to understand the definition of each term in a legal sense, because consultation, referendum, separation, independence, autonomy or secession are not synonymous and, therefore, do not have the same consequences.

Two main ways exist to ask the population of a region (the term « region » is used to name the local or regional entities, known in different cases as « province », « autonomous communities », « state member », etc.) to give its opinion: a political way called « consultation » and a legal way called « referendum ». Each one has different effects.

Consultation, and specifically popular consultation, is an operation referring to a vote by an electoral body and consisting of giving an opinion about a specific question - from the Latin term *consultatio*, which means « deliberation », « action to seek opinion », « consultation ». This opinion is not compulsory (Gérard Cornu, 2013, p. 226). This means that the result of consultation has no binding effect. In November 2014 and in October 2017, Catalonia organized a consultation which was not binding because of the refusal of the Constitutional Tribunal of Spain to recognise the non-constitutional nature of this consultation (decisions of October 9 2014 n° 5829-2014 and October 17 2017 n°114/2017).

Besides, the referendum has a different signification and consequently, a different impact. Referendum is defined in several countries as the vote on a « particular piece of legislation for approval or rejection » (Joseph R. Marbach, Ellis Katz and Troy E. Smith, 2006, p. 539). In this way, the result of referendum is binding and has a compulsory force. Depending on the answer, the rule in question, will or will not become legal rule. From this starting point, the major difference between consultation and referendum is the impact of the result: compulsory or not.

In a federative context and in a perspective of secession, only the referendum has a legal impact and so a real importance. Secession is different from separation, especially in a federative way. Separation is one of the fundamental principles of federalism (along with autonomy, participation and cooperation). Because of the pre-existence of regional identities (seen as national identities before the creation of the Federation) and in respect for the cultural, legal and constitutional identities of every member of the Federation, each member state has a state constitution ruling the organization of powers and institutions. As a corollary, separation of powers is also an illustration of the principle of separation in federalism. From this definition, separation is not relevant when speaking about secession.

In the organization of a referendum, the most important element is the distinction between autonomy and independence. As I have said, autonomy is another fundamental principle of federalism. Autonomy is a first step on the way to independence. In a federative context, the principle of autonomy means that institutional and legal systems of the member states and of the federal government are permitted and protected by the federal constitution. So, each order of government is self-governing for its own competences and no hierarchical relation exists between the different orders of government. It implies the capacity to decide freely in a legal order and to exercise all the attributions conferred by the constitution. This means that autonomy is linked to the organizational form of the Federation and to its distribution of powers. Autonomy is inherent to the organization of the State and for that reason, can vary in time and space.

So secession is a corollary of independence and not autonomy. It implies the capacity to exercise every aspect of sovereignty, from internal and external points of view, without any type of submission (except to international law and conventions).

From these clarifications, the interest of a referendum (with regard to secession) is to decide on the independence or not of a territory. Nevertheless, for the Spanish case, the constitution does not provide for any possibility of a secession after a referendum and even less after popular consultation. Secession of a region and so independence is not actually possible if the national government does not decide in this way. So, as things stand, secession seems to be impossible from a legal point of view. However, the problem of independence of a region continues: how to legally forecast and allow secession? Using the various and numerous claims and specific statutes of different regions of Spain (the Basque Country, Navarra, Catalonia, Andalusia, etc.) one solution could be to modify the Spanish constitution and organize Spain with *federative tools*. They would enable the inclusion in the constitution of some fundamental principles and permit their protection. If they were not respected, the solutions of secession would be conceivable. Let us understand what federative tools (I) are and how they can allow secession (II).

## **I Definition and advantages of *federative tools***

In every Federation, some invariants exist and represent fundamental elements of the Federation. They are not fixed principles but are evolutive and adaptable. Let us consider what the federative tools are (a) and how they can be organized (b).

### **a) Understanding of the concept of *federative tools***

*Federative tools* are instruments of a federative system. Nevertheless, it is not necessary for a Federation to exist to enable the existence of *federative tools*. If they represent fundamental constituent elements of federalism, some existing entities hold *federative tools*. A clear example is the European Union. Without actually describing the European Union case and its *federative tools*, let me explain what federative tools are.

Federations are built by historical, political, sociological and economical conditions. These different conditions are specific for each Federation. For this reason, each Federation has a specific construction and it is organized according to its own institutional and constitutional rules. Nevertheless, it is possible to identify common characteristics in various Federations that always exist. These invariants are not fixed and « frozen » in time but are evolutive and adapted to major changes in economical and political conditions. As an example, we can observe that subsidiarity is not a concept existing in a formal way (*i.e.* written into each federal constitution or into fundamental laws) but existing in practice in every Federation. Indeed, if each federal constitution did not organize the possibility to an order of government to interfere in the sphere of competences of another order of government to help or to stand in for the latter, this type of action would exist in every Federation. In the same way, distribution of financial powers is generally not envisaged in the federal constitution and can vary according to each Federation and according to the periods that every Federation goes through but the idea of distribution of financial power is a fundamental idea existing in all Federations.

So, these two kinds of invariants can be seen as *tools*, because of their existence in every Federation and of their permanence in every Federation, whatever the form they can have depending on the Federations and on the periods of time in question. A tool is here understood as an instrument, a technique existing by itself enabling existence and functioning of a system.

The specificity of a tool is to allow one to build or modulate a situation to give it a form. So *federative tools* allow for the construction and evolution of every federation depending on its own political, historical, economical and sociological conditions.

Through the study of various Federations, nine *federative tools* can be identified:

- the distribution of legislative competences between all the orders of government (the distribution of executive competences is related to legislative competences) ;
- the distribution of financial competences between all the orders of government ;
- a division of sovereignty legally recognized, either by the federal constitution or by a fundamental law, or by case law ;
- a federative pact establishing the basic and fundamental rules of the creation and the existence of the Federation ;
- the recognition and the protection of four essential principles : autonomy, separation, participation and cooperation ;
- the recognition of subsidiarity (by the federal constitution, by the law or by case law).

These nine tools represent fundamental elements of a Federation (or a quasi-Federation), always identifiable in every country which has adopted a federative form. These tools can be organized into two categories.

### **b) Two categories of *federative tools***

It is possible to organize these federal tools into two types: contractual tools and dialogical tools.

Contractual tools are:

- the federative pact identifying the bases of the Federation (created by association or dissociation, the organization of powers)
- the identification and the recognition of sovereignty according to each order of government (based on the people, on constituent power).
- the distributive tool, which includes the distribution of legislative and financial competences.

In this idea, the contractual tools have a function of organizing the basis of the federation. They have been decided by the « fathers » of the federal constitution, generally obtained by compromise and in a contractual manner.

Besides contractual tools, which organize the basic rules in the federal constitution, dialogical tools complement them, anticipating the existence of and respect for other fundamental rules but letting them develop and potentially change. In this view, dialogical tools are a means of evolution and adjustment. But to understand, it is important to define dialogical logic.

Dialogical logic is distinguished from dialectical logic.

Indeed, dialectical logic involves the existence of contradictory and complementary forces and implies the existence of a synthesis making it possible to find a balance of these forces. The classical rhetorical illustration is the formula: « thesis-antithesis-synthesis ». In the federative context, this logic would imply, for example, the existence of a balance between federal and state forces. More precisely, it would consist in considering an equilibrium between centralization and decentralization and so the possibility of finding a balance of forces giving each order of government sufficient power to take all the decisions forming part of their competences. Observation of some Federations reveals that this ideal situation is never achieved.

Centrifugal and centripetal forces are never in balance. One is always dominating the other.

Dialogical logic rests on a similar presupposition but does not lead to the same result. If contradictory and complementary forces exist, they do not find a balance. There is no synthesis. In this view, when dialectical logic permits a synthesis, dialogical logic never permits a lasting equilibrium. Forces are always in conflict and there is always a domination of one over the other.

Dialogical tools are different tools from contractual tools. While they are also fundamental aspects of a federative system, they do not have the same function. The function of the dialogical tools is to regulate forces while contractual tools have a function of organizing the bases of the federation. These tools have to be modified to adjust the powers allocated (more or less regarding the circumstances) to an entity: either the federal or the state or regional entities. In this way the federal constitution has to protect these tools but without giving them a fixed application.

Dialogical tools are fundamental elements of a Federation such as

- autonomy
- separation
- participation
- cooperation
- subsidiarity.

The four main principles (autonomy, separation, participation and cooperation) are thus implemented according to the federal constitution but also according to political choices. Their implementation can change but these principles as *federative tools* are protected by the federal constitution. Dialogical tools provide room for manoeuvre in their practical application. The principle of subsidiarity is also a dialogical tool because the idea of subsidiarity has to be recognized in the functioning of the Federation but its implementation can be different according to periods of time and regarding to the need for help of a regional or local government by the superior level of government.

In consequence, the eight *federative tools* (considering that legislative and financial powers are linked and are a part of the same tool, which is the distributive tool), have to be protected by the federal constitution (federative pact). This protection does not mean precise organization but clear protection because the degree of power of every order of government will depend on each Federation, each period according to the needs of the member states.

## **II THE USE OF *FEDERATIVE TOOLS* TO ALLOW SECESSION**

*Federative tools* are fundamental principles permitting the existence of a federative system and its evolution. These tools represent the pillars of a Federation or a quasi-Federation. Nevertheless, they also represent a point of reference for appreciating the level of protection and of implementation of these basic elements of federalism. Indeed, *federative tools* are a « thermometer » of the « temperature » of the Federation. In this view, the non-respect of one of the tools or the surpassing of a minimum threshold can represent the justification for a demand for secession.

### a) Interest of *federative tools*

*Federative tools* can represent a way of asking for secession. But how should we understand secession? What is clearly a secession in a federative context?

Secession is a voluntary pacific or aggressive action by a part of the population of a State to separate and to create a new State or to become part of another existing State. Secession involves not **just** autonomy but independence (at least for the time being). Edward Freeman noted, a century ago, that a federation is « essentially a perpetual union » and that a federal constitution could not « any more than any other constitution, contain provisions for its own dissolution » (Edward Freeman, 1972, p. 90). Moreover, a Federation is in its own nature essentially voluntary, so keeping a constituent unit against its wishes in a Federation is contradictory to the idea of federalism. These two ideas lead one to consider that even if a federal constitution does not provide for the possibility of secession like every union act, the idea of federalism as an evolutive system cannot prevent secession as an act of will. Therefore, secession is not something prevented in the constitutional text but it can only be a process of negotiation, involving a constitutional change or, at least, a constitutional amendment.

If the philosophy of *federative tools* allows a balance between federal and state forces (depending on the periods of time in question and on the needs of the different governments) the tools also imply a sharing of sovereignty. As a consequence, every order of government and especially state governments need a minimum of legislative and financial power. This minimum has to be written into and protected by the federal constitution.

To regulate this balance of powers, subsidiarity is essential. For the same reasons as for legislative and financial powers, subsidiarity needs to be written into and thus protected by the federal constitution. Nevertheless, it does not need to be precisely organized by the constitution, it simply needs to be recognized as a regulating principle for legislative and financial competences. As with the distribution of competences, the implementation of subsidiarity can be decided by intergovernmental meetings to meet a need depending on the moment. In this perspective, the state and federal representatives can opt to assign more or less power to the federal or the state governments for a limited period. The level of power, of sovereignty has to respect a minimum threshold and subsidiarity, as a fundamental principle, has also to respect a threshold and not become an intrusion by federal government into the state government's sovereignty. For the same reasons, the federative pact (federal constitution) has to ensure, as *federative tools*, fundamental federative principles like autonomy, separation, participation and cooperation.

From a practical point of view, the organization of the federation by *federative tools* implies a « light » constitution concerning distribution of competences and the ratio of power between the federal and the state governments. It means that if the distribution of competences – and especially legislative and financial competences – has to be considered by the federal constitution as a *federative tool*, their practical implementation needs to be flexible. Depending on the moment, the federal government has to play a different role and so occupy a different position. In a context of macroeconomic stability and social calm, federal power has to let the state or regional governments act more freely than in periods of crisis. In such periods, which means in periods of economic and social problems, the federal government's role is to help every member of the Federation by means of aids and grants-in-aids. The role of the federal government is more important and it can interfere in state or regional competences via a

legislative or/and financial support. This type of situation is very common and several situations can illustrate this case (among many examples, allow me to quote the American case with the *New Deal economic program* or the Canadian case during the crisis of the 1930s, the intervention of the federal government in the state's competences during the macroeconomic crisis in the 1990s and the adoption of the *budgetary discipline law* of 2000 in Brazil. See, for the American case, Jérôme Elie, 3-2003, pp. 409-428 ; for the Canadian case see Henri Brun, Guy Tremblay and Eugénie Brouillet, p. 422 ff. ; or see Kent Eaton and Tyler Dickovick, vol. 39, n°1, 2004, pp. 90-122 for the Brazilian case). In this view, the recognition and the protection of *federative tools* represent the best way to limit intrusion and overlapping of competences of the federal government.

### **b) Use of *federative tools* for secession**

The inscription of the *federative tools* in the federal constitution represents the guarantee of respect for these fundamental instruments. Each tool represents a capacity of action of each order of government. So state governments as much as the federal government must have the power to act in every field of competences attributed to them. Each government has to be able to guarantee a minimum capacity of implementation of its competences. The *contractual tools* permit decision regarding the distribution of competences, identification and recognition of the part of sovereignty of each order of government and its origin (people, constituent power), to determine the level of legislative and financial power of each constituent unit of the national state. Likewise, dialogical tools represent a guarantee of autonomy, of separation, but also of participation and cooperation in the national state. These four main principles, like subsidiarity, will be protected. Considering the disequilibrium of forces in the entire life of a Federation, the recognition of a minimum threshold of each tool is the assurance of the respect for each constituent unit. When this threshold is not respected, the federative pact is not respected either, giving the member state the right to justify a secession. When a government judges that limits are surpassed or that a *federative tool* has been violated, it will demand the possibility of secession. This will represent a legal justification to contemplate secession because the contract of creation of the Federation has been broken.

Advantages of *federative tools* are important at different levels and in different domains. Firstly, they give a constitutional value to fundamental principles of federalism. Indeed, their inscription in the constitution gives to them a specific and supreme value allowing each member of the Federation to request that they be thoroughly protected. If one of them is violated, the consequences can justify a demand for secession.

Secondly, *federative tools* are a « thermometer » of the centripetal and centrifugal forces in the Federation. They permit measurement of the level of centralization or decentralization at any given moment (more or less long). Thanks to this measure, the overstepping of a limit is more easily identifiable and the claim is politically and legally justifiable.

Thirdly, *federative tools* are also a solution to avoid opposition between federal and state (or regional) governments. The threshold represents a limit which cannot be overstepped at risk of conflict between the orders of government as an infringement of sovereignty. So they represent the threshold of « symbiosis » in the Federation.

Finally, their existence and moreover their protection by the federal constitution have a psychological effect on the constituent units. They restore the confidence of potential secessionists and avoid claims because they know that if one or more tools are not respected, it would represent a reason (legal and political) to claim secession.

These four elements represent safeguards for preventing disequilibrium of forces in the national sphere and against the overlapping of competences, particularly of the federal government in state domains. They have a legal value so they constitute legal arguments for claiming secession.

This legal solution needs a constitutional change but represents a really important safeguard to avoid overlapping or any federal intrusion in the constituent units. It is a legal instrument directly useful for claiming secession. Nevertheless, a political (potential) solution exists, too. But this political solution is much more risky and hazardous. This solution is achieved via previous popular consultation and by a significant result in favour of secession. If a majority of voters decide on secession, then a discussion has to be engaged with national authorities, having as consequence the conclusion of an agreement to envisage secession. The Quebec case can serve as an example for future and other cases (even if the majority votes against secession). In fact, as in the majority of Federations, the constitutional text does not provide for secession. So, the implementation of a referendum to decide on unilateral separation of a constituent unit of a Federation can have merely a political effect. Consequently, it is not a referendum but a popular consultation. Nevertheless, the organization of a popular consultation can be the first step towards initiating a negotiation process. Secession would then be justified by democratic procedure. This democratic procedure involves the decision of the all citizens of the Federation and not only the citizens of the secessionist member state. Indeed, to permit secession, all the members of the Federation must decide whether or not to accept secession. So, another vote must be organized, but for the whole Federation and all the citizens of the country.

*Federative tools*, like any legal instrument, necessitate a lengthy procedure in order to be implemented but they represent a genuine « legal weapon » with significant effects upon any unit of the national state. They constitute an important safeguard for avoiding any situation of locking up for a constituent unit.

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