

## The Secession Conundrum – Through the Looking Glass

Henri de Waele\*

David HALJAN: *Constitutionalising Secession* (Oxford/Portland: Hart Publishing 2014), 429 pp., ISBN: 978-184-9464-376

In the age of globalisation, secession has long remained a spectre at the feast. The importance of the nation state was supposedly on the wane, and borders were believed to lose every significance over time.<sup>1</sup> It seems though that some of man's innate tendencies cannot be expected to fade away soon. As in all conventional relationships, when the ties that once bound for whatever reason start to lose force, the desire to draw a line and break away will simply not allow itself to be subdued. Ostensibly, the separatism phenomenon is so deeply engrained in human history that no *nouvelle vague* of modernity could ever succeed in pulling away the rug from under its feet. During western Europe's roaring nineties, the harrowing events in the Balkans reminded us that the genie had never been successfully pushed back into the bottle; and in today's world, secessionist cravings appear to (re-)emerge ever more ubiquitously. Worryingly, at present these even begin to nibble at the proud *communautaire* fabric of the European Union, threatening several of its member states, sparking unprecedented conundrums.<sup>2</sup> To be sure, the theme never had to suffer from a dearth of academic attention either. Publications have been burgeoning, with the lion's share authored by legal scholars, political scientists, sociologists and historians. Hence, despite its

\*Professor of International and European Law, Radboud University Nijmegen; Guest Professor of European Institutional Law, University of Antwerp; Senior Fellow, Centre for European Integration Studies, University of Bonn.

<sup>1</sup>Compare e.g. M. van Creveld, *The Rise and Decline of the State* (Cambridge University Press 1999); see also D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford University Press 1995).

<sup>2</sup>On which, *inter alia*, C. Brölmann and T. Vandamme (eds.), *Secession within the Union – Intersection Points of International and European Law* (ACELG/ACIL, 2014).

*European Constitutional Law Review*, 11: 609–616, 2015

© 2015 The Authors

doi:10.1017/S157401961500036X

continual relevance, one rightfully wonders whether any novel views could still be added to the debate?

#### CORE THESES

Judging by its cover, a paradox would seem to lie at the heart of a book entitled ‘Constitutionalising Secession’ – or at least at first blush, its title comes across as oxymoronic. Why constitutionalise secession? It is, after all, commonly regarded as denoting a rejection of the normative hold of a particular political order. Why then entrench in that order the possibility of its repudiation? Constitutionalising so controversial an eventuality would thus appear a complete non-starter – in keeping with the taboo on discussing divorce on the wedding day. The gist of David Haljan’s argument lies elsewhere however. His conviction is that ‘secession should be measurable in constitutional terms’, and that ‘in providing that measurement (...) we come to understand the deep structure of a constitution’.<sup>3</sup> Consequently, he aims to address to what extent constitutions can make provision for secession, the key question being ‘whether a substate group in a constitutional democracy under the rule of law may take a decision to secede to the exclusion of all others in the state, and present it to them with the understanding and expectation that the decision will be incontrovertibly accepted as legitimate, valid and binding’.<sup>4</sup> Evidently, the framer of the research took his cue from the Canadian Supreme Court’s 1998 opinion, in which the possible unilateral declaration of independence by Québec was also wrapped in constitutional garb (and the author, not coincidentally, has been an active lawyer in Canada himself).<sup>5</sup>

It may pique the curiosity of readers of this journal to learn that Haljan typifies a constitution as ‘that institution by which we identify, articulate and apply the commitments representative of our common-holding as an association’.<sup>6</sup> The author subscribes to a special brand of the consociational or communitarian vision, which he labels ‘associative constitutionalism’ – a conception which endeavours ‘to capture more firmly the mutually reinforcing nature of political and legal relations and their dynamic nature’.<sup>7</sup> He objects to the reified perceptions of both a constitution and constitutional law that have resulted in the conventional, excessively narrow reading of (the limits to) secession in federal systems, advocating a more flexible understanding instead. On this footing, he believes that unilateral secession may violate the institutional premise of a constitution (the product of an act of association itself), and for that reason

<sup>3</sup> Haljan, *Constitutionalising Secession*, p. 14.

<sup>4</sup> *Ibid.*, p. 19-20.

<sup>5</sup> *Reference re Secession of Québec* [1998] 2 S.C.R. 217.

<sup>6</sup> Haljan, *Constitutionalising Secession*, p. 81.

<sup>7</sup> *Ibid.*, p. 382.

alone, is to be subjected to the very principles and procedures contained therein.<sup>8</sup> Thus, 'constitutionalising secession' does not entail (the mandatory introduction of) express provisions outlining the specific modalities, but the open acknowledgement that the matter is already covered and controlled by the rules as they stand; for it happens to be an inescapable consequence of the intricacy and complexity of associative relationships that much of their detail and scope remains unarticulated. Yet, to the mind of Haljan, since courts operate as prime moderators of these associative relationships, as a corollary, queries surrounding (tentative) secessions do become eminently justiciable.<sup>9</sup> Such daring theses obviously beg to be subjected to closer scrutiny.

#### UNDERLYING PREMISES

Regardless of the approach chosen, it merits questioning if the act of secession, and the issues that arise both *post* and *ante*, can truly be captured in legal terms to begin with. As indicated already, separatism is *in se* perhaps so hardy a phenomenon that it defies the ability of law to set down constraining precepts.<sup>10</sup> Different from what the leading analyses by Buchanan, Beran, and Wellman suggest, this does not automatically mean though that the entire process possesses a predominant 'a-legal' character.<sup>11</sup> In the introductory paragraphs of his book, Haljan argues that the law *does* have something to say, and that even if we may attempt to remove the act from that dimension, we are unlikely to succeed in removing that dimension from the act. He demonstrates persuasively how the rule of law itself functions as a counterlimit, committing the expression of popular sovereignty to those actors and forms for which the system itself has made provision. Therefore indeed, no appeal to a primordial 'will of the people' ought to be able to serve as a trump card and disqualify the legal *status quo*, for it lacks the constitutional authority to do so. Nevertheless, with a humility one seldom encounters in *la doctrine*, Haljan shows himself well aware that an exclusively law-oriented discourse is bound to fall short. Almost by way of compensation, his book is replete with insights derived from socio-political theory and philosophy. In addition, he exhibits a keen empiric

<sup>8</sup> *Ibid.*, p. 192.

<sup>9</sup> *Ibid.*, p. 298.

<sup>10</sup> Somehow disconnected from, rather than antecedent to the formation of a system's *Grundnorm*; even when Haljan does not adopt a rigid Kelsenian perspective, in accordance with that vocabulary he does repeatedly tag the break-up as a 'revolution'. For his take on such a 'transformative event', see below.

<sup>11</sup> See e.g. A. Buchanan, *Secession: The Morality of Political Divorce from Fort Sumpter to Lithuania and Québec* (Westview Press 1991); H. Beran, 'A Liberal Theory of Secession', 32 *Political Studies* (1984) p. 21-31; C. H. Wellman, *A Theory of Succession: The Case for Political Self-determination* (Cambridge University Press 2005).

sensitivity, by discounting how the conduct in, and resolution of, a situation of an (imminent) rupture may be influenced by the degree to which the rule of law and basic rights were respected in the region concerned. That sensitivity equally goes to explain his interest in the legitimacy of the process and its outcome, rather than placing the focus on its validity, in contrast to the countless studies delivered by lawyers before him.<sup>12</sup> Likewise, he is to be commended for not turning a blind eye to the psychological and economic side, underscoring the inevitable importance of cost/benefit factors for regions cherishing the thought of going solo; moreover, following Buchanan, he justly zeroes in on discriminatory redistribution (a policy systematically working to the disadvantage of one group to the advantage of another) as legitimating a strategy of progressive disassociation.<sup>13</sup>

#### AN ATTRACTIVE RECONCEPTUALISATION

The antagonism between ‘primary right’ and ‘just cause’ theories of secession is the main driver of scholarly debate. Through the former lens, the right to secede is seen as inherent and readily invocable: while its exercise may be qualified, its existence does not depend on, or derive from, a prior or ulterior source.<sup>14</sup> The latter approach perceives secession instead as principally responsive, a remedy merely coming into play in case of grave and intolerable injustices.<sup>15</sup> In legal and political practice, the second is far from settled, and the former flatly denied, save for those ‘pure’ reliances on self-determination in last century’s (post-)colonial settings.<sup>16</sup>

Haljan extensively engages with both trails of thought, in order to find out to what extent they lend themselves to constitutional characterisation. In a strikingly original move, he singles out nationalist theories of secession for a similar treatment, in the idea that the bonds and obligations that underlie the remedial variant form a logical stepping-stone for a separate assessment of national identity and autonomy as the main foundations. Eventually, both the primary right and

<sup>12</sup> Among the recent monodisciplinary works are *inter alia* C. Walter et al. (eds.), *Self-determination and Secession in International Law* (Oxford University Press 2014) and S. F. van den Driest, *Remedial Secession: A Right to External Self-determination as a Remedy to Serious Injustices?* (Intersentia 2013).

<sup>13</sup> Haljan, *Constitutionalising Secession*, respectively p. 113-115 and p. 165-179.

<sup>14</sup> See e.g. H. Beran, *The Consent Theory of Political Obligation* (Croom Helm 1987); D. Philpott, ‘Self-determination in Practice’, in M. Moore (ed.), *National Self-determination and Secession* (Oxford University Press 1998), p. 79-102.

<sup>15</sup> See e.g. A. Buchanan, ‘The International Institutional Dimension of Secession’, in P. B. Lehning (ed.), *Theories of Secession* (Routledge 1998), p. 227; A. Birch, *Nationalism and National Integration* (Unwin Hyman 1989).

<sup>16</sup> Though the scepticism and hostility deserve mentioning that already the Wilsonian (Fourteen Points) pledge faced.

nationalism models are cast aside as insufficiently supportive of an enduring constitutional association, whereas the remedial right theory is found acceptable for recognising, or at least not contradicting, it.<sup>17</sup>

The upshot of this appraisal is a right to secede squeezed like Alice through the looking glass: it constitutes no genuine entitlement, but a trimmed-down remedy that can only be called in when reciprocal duties are no longer respected – but even then, without negating the core commitments that were once consciously undertaken. Oppression may hence very well trigger dissolution of the polity, but does not imply an absence of commonalities. This reasoning possesses a singular attractiveness, whilst the conclusion is not out of step with the mainstream scholarship.

#### A THEORY/REALITY DEFICIT

In the eyes of Haljan, nationalist theories of secession must be rejected primarily for seeking to exclude the rest of a state's population from being consulted: '[t]he decision to secede is not for one section of a constituency to make' but rather 'for all to consider and deliberate upon'.<sup>18</sup> That contention is evidently dubious, for it would allow only the entire United Kingdom to decide on the destiny of Scotland, Spain on that of Catalonia, or the erstwhile Soviet Union on that of its individual republics.

To be sure, the author does not mean to say that associative commitments cannot be rescinded; a completed 'transformative event' may ultimately result in a new constitutional order still. But, as the author phrases it in somewhat gammy prose, 'that occurrence may not occur by excluding one or the other section of the population'.<sup>19</sup> In the staunch view of Haljan, whenever a sub-state group wants to go solo, it is to initiate a process of deliberation in which all citizens are involved. The right of secession emerges merely when such deliberation is denied or seriously frustrated. Consequently, whereas in this view the Kosovars were entitled to break away from Serbia, the contemporary rebel provinces in the eastern Ukraine are not. Yet, judging by that standard, no right to dissolve the linkages would accrue to either Scotland or Catalonia without the consent of the British and Spanish people – unless and until the governments and London and Madrid were to refuse all requests for dialogue. True, the fracturing of a territory invariably has wider ramifications that render a wide prior conferral desirable.<sup>20</sup> Nonetheless, the author's position is hardly tenable here, ensnared in overly abstract considerations.

<sup>17</sup> Haljan, *Constitutionalising Secession*, respectively p. 122-123, 192-193 and 246-247.

<sup>18</sup> Haljan, *Constitutionalising Secession*, p. 247.

<sup>19</sup> *Ibid.*

<sup>20</sup> Vindicating the opinion of the Canadian Supreme Court (*supra* n. 5), which embraced a kindred 'duty to negotiate'.

At this juncture, as carefully thought-through as it is elsewhere, his innovative treatise seems slightly too far removed from real-life exigencies.

#### THE QUESTION OF EXTRAPOLATION

Hitherto, many writers on secession have placed federal regimes at the centre of their inquiry. The volume under review here, firmly grounded in the Canadian experience, is no exception. Can theories devised for, and inferences drawn from, such particular settings be analogously applied to unitary systems? One is prone to think that this is not immediately viable. On the face of it, both the 'primary right' and 'remedial' approaches might be given credence in the (often) multi-ethnic or multilingual contexts of federations, but less so in more homogeneous and legally hermetic polities. Thus, earlier studies have perceived countries like Spain, Yugoslavia or Switzerland as suitable testing grounds, with the USA and UK forming more doubtful specimens. Haljan focuses on Canada, contending that if constitutionalising secession proves achievable in a federal setup, then *a fortiori* in unitary states.<sup>21</sup> In his thick form of constitutionalism, the associative ties that have been forged do not allow an easy severing. It is consequently believed better attuned to the constraining of separatism than thinner versions. At the same time, it is difficult to join him in the idea that an analytical template appropriate for reconceptualising the Québec scenario may be readily extrapolated to non-federal contexts (think e.g. France or Italy). Arguably, there lies more plausibility in the reverse position, namely that what can be proven to hold for constellations with the stronger bonds (i.e. unitary systems), must equally apply to federated settings.

By the same token, it can perhaps indeed be posited, predicated on the Canadian experience, that a fundamental concern for the valid and legitimate ascription and exercise of democratic political power underlies both written and unwritten principles in a federation – further encasing secession in the constitutional *chassis*.<sup>22</sup> Yet, that does not even necessarily translate to other federal regimes: tellingly, in actual practice, express or implied references to (the modalities for) breaking away from the union franchise are few and far between.<sup>23</sup> The postulate of a 'duty to negotiate', impressed upon the Québécois by the Canadian Supreme Court, was received with marked interest but without universal endorsement. This indicates as well that the differences between the

<sup>21</sup> Haljan, *Constitutionalising Secession*, p. 27.

<sup>22</sup> Haljan, *Constitutionalising Secession*, p. 295.

<sup>23</sup> Cf. W. Norman, *Negotiating Nationalism. Nation-Building, Federalism, and Secession in the Multinational State* (Oxford University Press 2006); S. Mancini, 'Secession and Self-determination', in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), p. 481-499.

various constitutional systems probably outweigh the commonalities, and may run deeper than the legal theorist is able to fathom.

### THE BIG ABSENTEE

The reader might have been struck by the absence of public international law from the foregoing paragraphs. This reflects the choice made by the author of the book under review, who himself excised the relevant chapter from the manuscript (originally a Ph.D. dissertation defended at the K.U. Leuven in 2007). On the one hand, this exemplifies how it is actually possible to discuss secession from an exclusively constitutional vantage point – in itself a most remarkable achievement. Also, one must have sympathy for the author's (or publisher's?) wish to arrive at a more condensed exposé. On the other hand, in so doing, Haljan has boldly gone where few scholars have gone before, delivering a less comprehensive analysis than he was assuredly capable of. Additionally, considering that in its present state, the book is definitely not one of the slimmest anyway, the axed chapter could hardly have led to an excessive inflation. The omission is all the more problematic now that the author's propositions do not sit wholly comfortably with the main tenets of public international law. As known, the latter have been presumed agnostic on the legality of the issuing of unilateral declarations of independence.<sup>24</sup> Haljan, however, forcefully defends that such manoeuvres by sub-state groups have neither constitutional nor democratic legitimacy.<sup>25</sup> While this does not go on to outlaw the action *per se*, in his eyes it does necessarily invite the participation of the composite *demos* (i.e. all members of the association).

The author's largely oblique attention for the non-constitutional legal literature is especially puzzling in light of the tolerance he exhibits towards remedial secession.<sup>26</sup> It appears somewhat peculiar then that in the closing passage, public international law is faulted for ignoring or failing to respect that a constitutional order forces a transformative event upon citizens: in attaching cardinal value to human rights as justifications for a separation as *ultimum remedium*, it wrongly imposes commitments foreign to the associative collection that constitutes the state, thereby erroneously reifying the state apparatus.<sup>27</sup> Without a self-standing, holistic assessment of the international legal cadre, this conclusion arrives a little out of the blue, underscoring that said dimension is best maintained in any publication on the topic.

<sup>24</sup> International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Reports 2010, p. 403.

<sup>25</sup> Haljan, *Constitutionalising Secession*, p. 381.

<sup>26</sup> Regrettably failing to take on board, *inter alia*, the sterling recent work of van den Driest (*supra* n. 12).

<sup>27</sup> Haljan, *Constitutionalising Secession*, p. 389.

## CODA

Haljan's treatise successfully drives home the point that secession not only challenges, but also informs our understanding of the meaning and function of a constitution. Overall, the author delivers a gripping account of the (potential) ruptures caused by separatist tendencies, revealing how these can be properly framed in constitutional terms – even when the conclusions premised on that approach are, to the mind of the present reviewer, not entirely satisfactory. The latter can in no way be attributed to the quality of the narrative, which is dense but fluid, provocative, and interspersed with some rare witticisms.<sup>28</sup> Haljan also deserves credit for his meticulous gauging of the virtue of nationalist theories, offering a further substantial enrichment of the existing literature. And though the associative constitutionalism thesis fails to convince on all counts, it does represent a valuable contribution to the debate – a debate that has far from run its course.



<sup>28</sup>Featuring for instance sections entitled 'The Hart of a Constitution' and 'Next Steps: Who's the Boss?'.