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RIGHT TO SECESSION: exploring the Canadian way

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In the last few months the debate on the right to secession in states that are part of the European Union, such as Spain and the United Kingdom, has strongly emerged. This debate does not occur in a vacuum, in fact there are precedents that are worth exploring. Especially relevant is the Canadian case, as in this country there have been large developments in this discussion and decisions have been made and actions carried out that can serve as a reference for the ongoing debate in Europe.

Among the many texts of constitutional and international law dealing with secession, it seems particularly interesting to take as a useful point of reference the opinion that in August 1998 the Supreme Court of Canada (which also serves as the constitutional court) issued on the legal aspects (both of constitutional law and of international law) on a hypothetical secession of Quebec.

The questions which the Court answered were twofold:

1. On the foundation of the Canadian Constitution: is there a right for Quebec to secede unilaterally from Canada?
2. Could Quebec appeal to the right to secession on the basis of international law? And in particular, can it refer to the right to self-determination?

In response to the first question, the Canadian Supreme Court starting from the consideration that, even though it is essential to develop a reflection on the subject starting from the concept of democracy, democracy can not be understood only as the power of the majority. If we consider the consequences of secession of Quebec – it added – we have to take into account the fact of the existing deep and extensive ties (economic, social, political and cultural) that interest the citizens of Canada as a whole, and that would be threatened by a decision of the people of Quebec to break the ties that bind them to Canada. For this reason it has to be excluded that secession can be performed in a unilateral manner, in other words, without conducting a negotiation with the other members of the Federation.

However, it is also true that if Quebec were to speak with a clear majority in favour of secession, this would attribute to the secession a democratic legitimacy that would necessarily have to be recognized by all other members of the Federation.

According to the Court, even if Quebec were to obtain a clear result in a referendum in favour of secession, it could not unilaterally dictate the terms of its secession to the other members of the Federation. The democratic vote, by itself, would have no legal effect. But no one could sustain the opposite either, in the sense that the continuity of the Canadian constitutional order could not ignore a clear expression of the will of a clear majority of Quebecers to not stay in Canada. The other provinces and the federal government would have no basis to deny the right to the government of Quebec to try to achieve secession, provided that in doing so the Quebec government respects the rights of other Canadian citizens.

The only truly "unilateral" procedure in this process would be the promotion of a referendum as a way to determine the orientation of the majority of the population of Quebec, but this would be only the beginning of a process that would impose an amendment to the Constitution, and open a negotiation process where the outcome – according to the Court – can not in any case be given for granted. It would not make sense, in other words, to suppose that the fact of engaging in negotiations implies the existence of an absolute legal right to secede. Nor, on the other hand, could one imagine the continuation of the current Canada as if the Quebec citizens had not clearly expressed their desire for secession.

The focus of the negotiation would be in finding a balance between the different rights and obligations of the "two majorities": that of Quebec and that of Canada as a whole. Nobody in this negotiation would have the right to dictate their own terms.

Regarding the second question, on international law, and in particular on self-determination, the Court ruled in the sense that all international texts (and particularly the United Nations Charter) do not recognize the right to self-determination as absolute, instead they condition it with another fundamental principle in international relations: the territorial integrity of states. The Court also added that self-determination, understood as the right to form their own state away from another, is based on the assumption of the existence of a colonial situation or oppression and denial of rights, and – in view of the Canadian constitutional system of the country's current political practice – dictates that the people of Quebec can not reasonably claim that they were being denied in any way political participation and access to the various levels of government.

In conclusion, what seems particularly interesting in the opinion of the Canadian Supreme Court is that it does not take sides, from a legal standpoint, between separatism and preserving national unity, but instead moves the whole reasoning toward the modalities of a possible secession, admissible in theory but in no case considering it beforehand as an indisputable right. The court, centres its reasoning, which is legal but is also political, on the presence of different and conflicting rights and duties (those of those who want secede and those of the country as a whole) which have to be compatible with a negotiation, a negotiation that becomes in the true focal point of the question, leaving the maximalist pretensions and non-negotiability of the "separatists" and of the "unitary".

A very sophisticated analysis, very civilized, very little dogmatic, that deserves careful consideration taking into account the examples that are occurring in Europe and that express territorial tensions and to whom the resolution of the Quebec case could prove a valuable reference.