Chapter Six

Secession and Federalism

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Secession has long been a word with powerful magic: it conjures up the dismemberment of countries and the creation of new and unpredictable regimes. But, since the break up of the Soviet Union, secession has become both more familiar and less fearsome. It is true that television news brings us graphic pictures of the strife precipitated by the creation of new states from the destruction of old ones, but we also have the occasional reminder of secessions which have received general approbation: Estonia, Latvia and Lithuania. And then there are cases of more ambiguous virtue: Georgia, Ukraine, and the long running case of Quebec. Secession can no longer be assumed to be a bad thing. It has become a more complicated notion as it is seen that it can be associated with the establishment of regimes with a strong commitment to freedom and liberal democracy. After all, wasn't the United States a case of secession from the British Empire?

Whatever the growth in familiarity with the idea of secession, it is not seen to have any relevance to Australia. There may have been some crazy Western Australians who talked about it in the 1930s, but they didn't really mean it. Any current talk of secession is just a joke, a cry for publicity, or some kind of trick to avoid taxation or the bailiffs.

But it is the contention of this paper that secession should be taken seriously in Australia, not as a prescription for immediate action, but as a way of thinking about the serious problems that beset the operation of our federation. It is not so much a case of thinking about the unthinkable, but thinking about the dissatisfactions that might justify secession of a component of our federal system, and the actions that should be taken to remedy current problems. In this way, thinking about secession highlights the points of conflict between local majorities and national majorities, a conflict which a federal system is designed to accommodate but which our federation is increasingly failing to do. If local majorities feel they have lost the ability to shape the governmental decisions that affect them, secession is a logical course of action.

Secession

Secession is the withdrawal of territory, by the community that occupies that territory, from the jurisdiction of a larger entity. As the excellent book by Allen Buchanan (1991) indicates, a simple definition of secession masks many problems, both practical and theoretical, but at its heart secession is a claim for self government. For this reason, Buchanan argues that there is a moral right to secession, albeit a conditional one., Some of the conditions include the exhaustion of less extreme remedies, fair dealing with those who have property rights in the seceding territory but who do not live there and, of greatest importance, that the regime established in the newly autonomous territory is a liberal democratic one. Indeed, Buchanan argues that the liberal individualism that underpins our notion of democracy must include the group right to define the political community in which individual rights are to be exercised.

This latter point is an important one, because much of the coverage of secession in the press implies that secession is about linguistic, religious, or cultural claims to self–determination, and that the ethnically non–challenged need have no dealings with secession. This is not the case: the

territorial claim to self government by a political community springs from claims that individuals have to shape their future irrespective of their cultural baggage.

But, in the Australian case, what grounds could be used as the basis for secession on the part of an Australian State? As Western Australia has more of a history of secession movements than any other State in our federation, let us assume that this question is applied to Western Australia. Two answers can be given: secession precipitated by the effects of discriminatory redistribution on the residents of Western Australia and, secondly, secession prompted by the unilateral breach by the central government of the constitutional arrangements that established the federation, to the detriment of the rights of self government of the residents of the State.

Discriminatory Redistribution

The term "discriminatory redistribution" is one taken from Allen Buchanan (1991), and describes the situation where a disproportionate share of the costs of the policies of a government fall on the residents of a particular territorial component of the country. Buchanan argues that the lack of redistributive justice is frequently a component of secessionist claims, either from wealthy areas with claims that they are being impoverished, or from poor regions with claims for greater equality in the distribution of national wealth.

Western Australia has frequently made both sets of claims, sometimes simultaneously. The Case for the People of Western Australia (Western Australia 1934), presented to the British Government in 1934 to support the secession of the State from the federation, made the discriminatory effects of national policy on the residents of Western Australia a central component of its case. Three claims in particular were perennial complaints after the 1920s.

The first of these was the national policy on tariffs. Western Australia, as a State which has always generated a disproportionate share of its wealth from exports, suffers a substantial penalty from a national tariff policy that favours a protected manufacturing industry that is disproportionately concentrated in the south–eastern corner of Australia. Some of the edge has gone from this claim since the national government has been in favour of reducing tariffs, but the point remains, and has been restated by our present Premier, Richard Court, as a claim for a greater say by the Western Australian Government in the framing of national economic policies.

The second claim was that transport policies discriminated against Western Australia. Originally, it was Commonwealth policies on coastal shipping that caused dismay. The Commonwealth requirement for Australian crews with high wages and restrictive working arrangements not only greatly increased costs for the many commodities imported into the State from the rest of Australia, but led to the lingering death of the industry. In later years, it was the two airline policy that milked the residents of Perth for the benefit of other Australian air travellers. The building of the transcontinental rail link, the lifting of restrictions on road freight, and the abolition of the two airline policy have weakened both claims, and it would be hard to mount a claim for substantial discrimination against Western Australia on the grounds of transport policy at present.

In contrast, the third claim is still a lively one. The effects of an ever expanding national arbitration system have reduced the ability of workers and employers in Western Australia to enter into agreements which reflect local conditions and the state of the local economy. This was felt to be a major problem in increasing costs to the State from the 1920s, a problem of regional inequity and rigidity that has got worse as the ambit of the arbitration system and national awards has broadened. Some of the substantial costs to regional employment of these policies have recently been outlined by the Industry Commission (1993), and the competing plans for labour market reform from State and national governments indicate that there is broad agreement that the present system has many flaws, one of them being an insensitivity to the idiosyncrasies of State economies.

Put together, these three claims for discriminatory redistribution point to grounds for complaint, but are far short of grounds for secession. Moreover, Western Australia has benefited considerably from favourable transfers of funds channeled through the central government, and still sees itself as a State with special claims for national subsidies. Untangling the net costs and benefits of membership of the federation for the residents of Western Australia would be a hard task indeed, and would be highly unlikely to show that they were substantially subsidizing the rest of Australia.,

In a federation where average State per capita income varies as little as it does in Australia, the claims for discriminatory redistribution are not likely to be persuasive. Economics, in other words, is not a convincing ground for secession in Australia at the moment, however powerful a claim it may have been in the 1930s. We must turn to stronger meat, claims based on the politics of self–government.

Breach of Constitutional Arrangements for Self–Government

The essence of a federation is that a number of territorial communities agree to form a larger union while preserving constitutionally guaranteed rights of self government over those matters not referred to the new national government. Such an arrangement seeks to preserve the responsiveness of the regional community or State Government to State interests and State majorities, while accommodating the preferences of national majorities for matters of nationwide concern.

Such an accommodation raises issues of practical and theoretical complexity, which is why a federal system provides a variety of institutional structures for the representation of diverse interests and the resolution of conflict. But the touchstone of a federal system is that it recognizes and respects the ability of State communities to govern themselves in the areas assigned to them by the constitutional settlement.

Unfortunately, this principle is steadily being eroded in our federation to the prejudice of the rights of self government of Australian citizens. Notwithstanding the very limited powers granted to the central government in the Constitution in 1901, there is hardly any aspect of government activity with which Canberra is not currently involved in one way or another. This, we are told, is simply the result of Australia being one nation, of many issues being of national concern, of the benefits of national uniformity, of the need to discharge our international obligations, and of the superior virtue and wisdom of the government in Canberra.

These specious claims, even if true, do not alter the fact that, the more the central government is involved in matters of State jurisdiction, the less the residents of the State can shape government policy to suit their particular goals, needs and resources. For every involvement of Canberra in areas of State policy making, there is a net loss of influence for the political community of the State. This process has been going on for so long that it is close to denying the citizens of each State control over key areas of State activity.

From education and health, to welfare and industrial relations, the issue is never simply what is the best policy to suit current local conditions, but what can be done by the State Government given the limitations of a host of inter– governmental agreements and potential financial penalties deriving from Canberra. Much of the governmental process has moved from a concern with real political issues and the search for real political solutions, to the metapolitics of bureaucratic deals between departments in State capitals and the corresponding departments in Canberra. This amounts to a substantial denial of self government with all the costs of lack of responsiveness, inefficiency and frustration that this system entails.

The Question of Consent

Whether this situation can amount to grounds for secession requires two preliminary questions to be answered. The first is whether there has been popular consent to this massive expansion of central government involvement in State issues, and the second is whether there are other means of remedying the problem short of secession.

If consent is taken as being agreement to the expansion of central government influence through the procedure of formal constitutional amendment, then the answer is a resounding No. Of the forty–two changes to the Constitution that have been submitted to the people at referendums since 1901, only eight have secured the necessary majorities, and only three of these amendments could be seen as increasing the ambit of Commonwealth jurisdiction. In no way can the present scope of Commonwealth involvement be seen as stemming from popular consent expressed through formal constitutional amendment.

It could be said, however, that Australians have elected the governments that have presided over this expansion of Commonwealth power, and thus have consented to it. The trouble with this argument is that all governments have an appetite to extend their influence, State and Commonwealth, yet when their ambitions have conflicted, the Commonwealth has, more often than not, had its way. In other words, the increase in Commonwealth involvement is less a reflection of popular consent for what the Commonwealth government was doing, than a failure of the mechanism designed to find an accommodation between the rival ambitions of State and Commonwealth governments. To argue that any policy followed by a national government automatically indicates the consent of the governed is a prescription not only for the end of federalism but of constitutional government as well.

The whole idea of a federal system is to limit the ambit of national majorities to those questions that have been agreed upon to be national. It is not the particular Commonwealth policies that need to be agreed to in the fields of health and education, for example, but the changes to the rules of the game that make possible the pursuit of such policies by the national government. These questions have never been asked, let alone answered. And part of the reason why they have not been asked is precisely because the answer would be No.

Exhaustion of Lesser Remedies

Let us assume that there has been no consent to the radical reduction of the autonomy of State communities: what of the second precondition for secession? This is the condition that there is no other, less radical, way that this situation could be remedied, and in particular, that there is no method of removing the problem that lies within the discretion of the State Government.

This leads to an issue that has been avoided thus far: how did we get into this mess? The response must be that there were two faults in the design of the Commonwealth Constitution that have proved to be of great significance: the first was the constitution of the High Court, the second was the process for the initiation of constitutional amendment.

Much of the explanation for the present extent of Commonwealth influence can be traced to the constitutional interpretations of the High Court. These have led to the increase in Commonwealth power directly, and indirectly. Decisions on the external affairs power of the Constitution, for example, have given the Commonwealth the unilateral ability to amend the scope of its jurisdiction in areas of settled State administration without the need for formal constitutional change. At one remove, decisions of the Court since the early years of the federation have given generous interpretations of the Commonwealth's constitutional powers over financial and taxation matters, and constrained those of the States. The interpretation of section 90 of the Constitution, which has denied the States the right to levy a retail sales tax, is but one example, as is the lack of restraint on the interpretation of section 96, the grants power of the

Commonwealth. This has helped to give the Commonwealth greatly superior access to revenue, and the resources to buy its way into influencing policies outside its jurisdiction. It is this financial dominance that has been the most important single factor in the extension of Commonwealth involvement in State political issues.

The greatest impact of the High Court, however, has been even more indirect. Since the Engineers' Case in 1920, the Court has had no federal jurisprudence, no notion of a federal system that requires constraints on national power to protect the self governing capacities of the States. While the Court is now able to derive implied individual political rights from a Constitution that is silent on the issue, it has been unwilling to protect the rights of State political communities in spite of clear intent in the Constitution. This failure of the Court to develop a set of principles that protect a federal division of powers has denied Australians a balanced interpretation of the Constitition. It has also deprived them of an informed debate over the proper scope of Commonwealth powers.

How can this problem with the High Court be remedied? A recent comparative article by a Canadian scholar (Bzdera 1993) has shown that there is an inexorable logic that drives centrally appointed constitutional courts to interpret the constitution in favour of the central government. In spite of some gestures to the sensitivities of the States in this matter, the Commonwealth government maintains its monopoly control over the appointment of justices to the High Court. What is needed is a system where a committee of State Attorneys–General appoints every alternate judge to the Court. In the long term this might have a beneficial effect on the operation of the federal system. It would certainly enhance the popular acceptance of the High Court as a legitimate umpire in constitutional adjudications.

To make such a suggestion not only points to a defect in the design of the Constitution in 1901 as it affects the composition of the High Court, but it also highlights a problem in altering the Constitution to remedy the defect. Section 128 of the Constitution gives the Commonwealth Government of the day a veto over what constitutional amendments are submitted to the people. In other words, only constitutional amendments that suit the partisan goals of the Commonwealth Government ever get to be voted on at constitutional referendums. This explains both why so few constitutional amendments have passed, and why the States, individually and collectively, have no ability to initiate constitutional change to the Commonwealth Constitution. In sum, until there is a constitutional amendment that sets up a procedure that permits a resolution passed by a majority of State Parliaments to initiate the process of constitutional change, the remedy to the problem of the High Court and its interpretations of the Constitution is beyond the power of the States.

Secessionist Movements

So, we have a claim for secession and have exhausted conventional remedies: what happens next? It is here that claims for secession divide into those that can only be met by secession from the larger entity, and those that are part of a process of strategic bargaining for change in central government policies, a process in which secession itself is a final, and perhaps never invoked, step. Of course, it is part of the strategy of secessionist claims to blur this distinction so that opponents to secession are never sure how seriously separation is contemplated.

But the overwhelming evidence from those periods when secession has been an issue in Western Australia is that it was part of a process of strategic bargaining. While the key actors in the process may have been dyed in the wool secessionists (note Besant 1990), it is clear that the voters regarded claims of secession as a cry of protest and frustration at their lack of power to influence government policies that they felt were ignoring their interests or doing them harm.

This was the conclusion of Harry Hiller (1987,1989),, a Canadian sociologist who studied secessionist movements in the Canadian province of Alberta during the 1980s, and the State of

Western Australia in the 1930s and 1970s. He stressed that such movements were an expression of the powerlessness felt by the residents of peripheral, but resource rich, parts of the federation who were unable to influence what were regarded as the economically predatory policies of a central government that was captive to the interests of the large population centres in the East. He pointed to the paradox that those who supported secession saw themselves as good Canadians and Australians, who had been driven to support secession by the unwillingness of central governments to make policies in the interests of all citizens, and not just to cater for the concerns of the numerical majority who lived in two large provinces or States. For these people, support for secession was one of the few ways to redirect the attention of the central government to their grievances.

From this perspective, secessionist movements in Australia represent a lack of trust in the existing processes of government and, in particular, a profound lack of confidence in the ability of a distant central government to respond to their particular needs. The irony is that, the more the central government becomes involved in areas of State jurisdiction, the greater the potential for conflict between the priorities of the State political community and those of the Commonwealth. The multiplication of forums in which the interests of the local majority and the national majority can collide will intensify the sense of difference between State concerns and those of Canberra.

There is recent evidence that this process is at work in Queensland and Western Australia, where the distinction between the interests of the State, and the interests of a Canberra–centred national majority based in New South Wales and Victoria, is acutely felt. As part of the 1993 Australian Election Survey run by a team of researchers from several Australian universities, a study focusing on the attitudes of individuals to government has found that Queenslanders and Western Australians are much more likely to trust their State governments than the national government (Denemark and Sharman, 1994). In complementary fashion, the residents of New South Wales and Victoria trust the national government more than their State governments.

Secession and Federalism

The tension between these two perspectives — a local majority but national minority stressing its distinctive needs, and a national majority stressing the overriding claims of national majorities — is one that the federal system was designed to accommodate. But it can only do this by separating the spheres in which national majorities and local majorities have paramountcy. This maintenance of separate spheres does not mean that co–operation between State and Commonwealth governments is precluded, but that differences in priorities between agencies reflecting local and national views are settled by negotiation and compromise. If the differences persist, there is no automatic presumption that the central government will have its way through financial dominance or favourable judicial interpretation of the Constitution. Just as there are areas where the national majority must prevail, there are many others where local majorities must have the final say.

And if there is doubt as to the appropriate category for a particular matter, two methods of resolving persistent differences are provided: first, an appeal to a constitutional court that is imbued, both in its composition and its jurisprudence, with the federal principle of divided spheres of governmental authority; and secondly, a method of constitutional amendment that, while giving the national majority a final veto, enables local majorities to initiate constitutional changes and be a part of their endorsement.

To describe such a system is to remind us how our system has fallen short. The blurring of responsibilities and the constant harping on the virtues of uniformity and national solutions to every problem, no matter how trivial, has created a system of government that is shapeless, and remote. Like the index of the current phone directory, the attempt to force every government

activity into a single alphabetical listing destroys the sense of differentiation between local, State and national responsibilities and fosters the belief that we should not distinguish between State concerns and national ones.

As well as being a recipe for inefficiency and unresponsiveness in government, such a system leads to the alienation of those communities who know they are not at the centre of things. Such communities resent the easy assumption that, because it suits a distant majority, it must apply to them: with justification, they feel that they are losing their ability to shape their own destinies in matters that are of predominant concern to them alone.

This is the benefit of thinking about secession. It is not a course of action that is ever likely to be carried out by an Australian State, but thinking about the justifications for secession forces us to realize where our system of government is defective and needs repairing. Chief among these are the mechanisms that differentiate between the responsibilities of State political communities and national majorities. Without this clear distinction, citizens cannot exercise their political rights effectively.

A properly working federal system is the best shield against secession, since it provides a powerful defence against the basic moral claim to secede – the claim to effective self government. The challenge for Australians is to make our federation fulfil its promise, and to restore the sense of State autonomy within a fair and predictable federal constitutional structure. Secession can then return to its familiar home: the fleeting images of the television news.

Endnotes: