

NATIONALISM AND POPULISM AT THE NATIONAL LEVEL

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Relevant Information



This document summarises the key point of one of the round tables held at the [Fide Foundation 2nd International Congress at Oxford, on Nationalism, Populism and Identities: Contemporary Challenges](#). The key topic was the Impact of nationalism and populism at the national level.

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The panel was comprised of **Professor Stefania Baroncelli**, Tenured full professor, Public and European Union Law, Free University of Bozen/Bolzano., **María Garrote de Marcos**, Associate Professor of Constitutional Law at the Faculty of Law, Complutense University of Madrid.; **Juan Martínez Calvo**, practicing lawyer as partner in Simmons& Simmons Madrid Office; and as a contributor to the paper: • **Professor Richard H. Pildes**, Professor of Constitutional Law, New York University. Member of the American Academy of Arts and Sciences and the American Law Institute. Also, We would like to thank the following persons for their contributions during the preparatory sessions of the working group: **Joaquín Echanove Orbea**, Partner in DLA Piper; **Marie-Pierre Rey**, Professor of Russian and Soviet History at the University Pantheon-Sorbonne and since 2017, also director of the Sorbonne research program 'Identities, international relations, and civilizations of Europe'. Member of Fide's International Academic Council until 2022; and **Daniel Rodríguez Bravo**, Partner of CMS Rodriguez-Azuero (Colombia)

About the Fide Foundation

The Fide Foundation is a legal-economic think-tank based in Spain, committed to involving the civil society in all major legal and economic developments in Spain, the EU and abroad.

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I. NATIONALISM AND POPULISM AT THE NATIONAL LEVEL

INTRODUCTION

Denationalization and decentralization have been, in general terms, successful processes since the 70s in Europe. But centralisation of power vested in the European Union and decentralization at a subnational level have changed deeply, in the last years, the constitutional landscape in many of the European Countries.

Those processes have modelled in parallel a common European understanding about how nationalism should be understood in a modern, heterogeneous, and inclusive society. In this concept of moderate nationalism, the idea of cession of powers of the state to the European Union and to the infra state Regions or Federated States has been broadly accepted as positive and a key concept of the current constitutional model in the European Countries.

Nevertheless, today there is evidence that this moderate idea of nationalism has been challenged from different positions. Populist politics have fuelled these challenges. In identifying solutions and giving effect to them, there needs to be an appropriate democratic consensus on how to allocate decision-making powers. There needs to be full protection for the common norms which underpin a pluralist society; for the rights of both sides of a political argument, both at state sub-regional level and at infra sub-regional level; for the rights of those who, like the non-voting younger generation, will live with the consequences of the decisions taken by today's voters.

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DECENTRALIZATION AND EUROPEAN CONSTRUCTION:

Denationalization and decentralization have been successful processes, despite some fault lines, throughout Europe since the 1970s and primarily imply cession of powers from the States to the EU and cession of powers from the states to sub-national authorities. Nevertheless, today we are experiencing a certain level of crisis in this dual process: both from the perspective of European institutional construction and progressive attribution of new powers to the EU and in the resurgence of certain infra-state regional tensions that are calling for independence based on secession and



concomitant creation of new states. In both cases, nationalist movements of double sign have gained strength and have been boosted by populism. The dynamics of these nationalist movements are very similar in their logic: the consideration of a common front, identified with the “oppressive state” - peripheral- or with the supranational authorities or foreign elites -centralist-

In relation to the problems that infra-state decentralization has generated, different situations and degrees of conflict may be identified and classified.

THE IMPACT OF POPULISM IN THE INFRA-STATE NATIONALISM: EVALUATION.

Political decentralization has made it possible to facilitate the rise of peripheral nationalist movements in the institutional framework of the State, often with success but, in the constitutional European landscape of the last 40 years, decentralization with federal or pseudo-federal constitutional structures have proved to be a flexible instrument to develop the integration of these movements.

However, recently we have been witnessing the rise of separatist nationalist movements that no longer accept integration, even if it creates benefits and privileges, but rather defend the rupture. 5

With elites frequently defining common objectives, it is true that in some regions very important minorities are in favour of secession from the states to which they belong.

The rational and long-term successful decentralization structures established through federal instruments has been challenged not only by some centralist populism parties, but also by the secessionist movements.

Nevertheless, the differences among movements, the idea that independence will lead the people to a much better future, is an argument common to Catalan, Scottish, Flemish, Basque, Northern Irish, Sud-Tirolean nationalists, etc. Therefore, any analysis and any proposal for political action in the face of secessionism must also involve consideration of populist proposals.

SUB-STATE NATIONALISM IN EUROPE, SECESSIONIST PROPOSALS AND POPULIST INSTRUMENTS.

This new era of infra-state nationalism has boosted other problems that the traditional federal instrument is not able to confront. One relevant new problem relates to the fact that in almost all cases of infra-state pro-independence movements the society is highly divided. How to manage the rights of the minorities who want to remain in the unified state in those infra-state regions which seek to pursue independence?

In all the cases analysed (Scotland, Catalonia, Northern Ireland, Brussels region, Alto-Adigio) there is a relevant minority -- in some cases very close to the majority -- which support the Unionist decision and do not agree with the pro-independence movement.

Populism frequently entails an unacceptable element in a democratic society, namely anti-pluralism, which should not be accepted. The people in the majority should not be in a position to limit individual rights and this is at the heart of our democracy. In the same way no secessionist movement can build a community will that does not respect the individual rights of citizens living in a certain region who do not want to belong to a newly established community.

If all European secessionist processes have, at best, narrow majorities, what democratic constitutional process should be given effect? In deciding on constitutional reforms which are impliedly secessionist in nature, what role should be played by referenda? What role should be given to young people considering that they will bear the consequences of adults' choices?

PLURALIST INSTITUTIONAL INSTRUMENTS AND PROTECTIONS OF INDIVIDUAL RIGHTS.

In democratic systems, we can define three types of consensuses: Consensus on the commitment to being part of a common political community. The second type is the evolutionary consensus which establishes the "rules of the game" (the processes that control the exercise of power) for example, how should conflicts be solved? In democracy the rule is that government must have a majority to justify the right to legislate. If it does not accept this principle, it will lead to conflict. But even majority rule must be balanced with respect for minorities. The third type is the political consensus, about political

action of governments. Dissent and opposition regarding a proposed political action are, therefore, characteristic elements of democracy.

a) About Referendum

Does the majority rule serve, by itself, to decide the general future of a society and, in particular, independence and the creation of a new state? Certain issues are considered so momentous for a society that they typically require super-majority approval, sometimes in a referendum, before a fundamental change can be made. Absent a super-majority requirement and additionally instruments to protect minorities, a new State proposal might not have the broad legitimacy required for such changes by virtue of a rule requiring no more than a simple majority. Most democratic Constitutions prescribe majority rules for routine issues but require higher majorities or successive majorities for the most important decisions, such as changing the Constitution. A decision to secede is however a decision that not only changes the Constitution but one of its fundamental principles, the state's unity. And who will vote? The people of the secessionist region or the national electorate or both?

As an instrument of direct democracy, it exaggerates the pure majoritarian forces in society and thus can have polarizing effects. A referendum is not compatible with negotiation, and it cannot measure intensities of beliefs or able issues to be worked out through discussion, and it can be more dangerous to minority rights than representative assemblies.

Furthermore, referenda (popular consultations on a prior legislative initiative discussed with publicity and respect for procedure and minorities) should be differentiated from a plebiscite-type consultation. In the latter case, there is less space for reasoned deliberation.

In the referenda, the consultation is sufficiently debated and legally structured, with foreseeable consequences. There is no doubt that at some point in a political conflict that seeks the secession of a part of the state, if it is to be carried out, it must be asked directly. It is a constitutional decision of the first order, but it is not a starting point but a point of arrival.

Referendums require caution to the extent that they are majority instruments incapable of protecting losing minorities and potentially capable of producing destabilizing effects and generating conflicts, in the case of the presence of ethnic, linguistic, religious minorities.

However, the Venice Commission of the Council of Europe has affirmed that the use of the referendum within the legality is a condition of democratic guarantee and subject to an agreed, publicly discussed content and clear content, could be a useful instrument as a constitutional instrument to handle intra-state independence movements.

Regarding Referenda, there are many procedural issues of enormous relevance: First, the question. As the Supreme Court of Canada has held in its doctrine on clarity, it is essential that the question submitted to a referendum be unequivocal, that it allows knowing exactly the will of the people regarding the secession of the territory; Second, the necessary majority. The Canadian Supreme Court requires a clear majority, which does not mean requiring a supermajority, but the results must be conclusive.

b) About Federalist instruments

Considering that the decentralization process has been very intense in the main regions in which the pro-independence movements are stronger, it is not clear if a greater level of decentralization and a more intense federalism could be a solution to find new consensus for the problem of the nationalism and populism at a national level. Indeed, the main pro-independence groups tend to reject this deeper federalism as a solution.

Nevertheless, in the long-term federalist instruments seems to be indispensable for the integration and to reach a new consensus and offer a high grade of flexibility to address the new integration problems that will appear.

c) Consensual democracy instruments

In highly divided societies before trying to reach an agreement at the national level (state – region) building a useful federalism for a long-term new consensus, it would be necessary to reach an agreement on basic consensus at the regional level between the pro-unionist and pro-independence

groups. The issue is also that normally rules set at subnational level focus on a static concept of minorities' protection. This type of subnational rules does not normally take into account new actors living in the territory, such as immigrants, bilinguals, new residents.

A new look into democracy is required. Which instruments can be useful to build this basic consensus in highly divided societies? The consociational democracy that Lip hart theorized could be a useful instrument inside the regions which claim for independence, to balance conflicts between groups before addressing the relation central government- regional government. The pro-British-Scottish or the pro Spain-Catalans, for example, which are a minority inside the "federated state", deserve some protection of their participation rights or cultural rights inside a Scotland or Catalan federal state.

The split of the power between confronted groups in different aspects of government and the constitutional claim for consensus in relevant decisions are instruments useful to equilibrate those societies with a relevant conflict. The state-region conflict may be, moderated not only through decentralization processes but also sharing the power inside those societies between pro-independence and pro-unionist groups. That means that the majority rule is not always the rule to apply in highly divided societies. There can be regions in highly divided societies without clear majorities in which both groups (pro-independence and unionist) must cooperate, and their rights must be protected in a cooperative way with the rights of the other/other groups.

The inclusion of additional consensus requirements in the decision-making constitutional processes (limiting the majority rule) can be an instrument to handle with populist and the anti-pluralist instruments those movements try to implement. Probably they will lose much of their strength and democracy and individual rights will be much better protected.

The evolution of the political conflict in Northern Ireland in the last 24 years since the Stormont agreements, despite the recent difficulties, shows that the power-shared constitutional instrument works towards the objective of reaching more broaden consensus in highly divided societies with pro-independence strong movements.

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NATIONALISM, POPULISM, AND IDENTITIES:

CONTEMPORARY CHALLENGES

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