

**VITO BREDI, CONSTITUTIONAL CRISES AND REGIONALISM, EDWARD
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I. BACKGROUND: REGIONALISM AND ETHNO-NATIONAL CONFLICT

The book tackles one of the most hotly debated issues in contemporary comparative federal studies, i.e. sub-state identity formation and the consequences in terms of (constitutional) conflict with the centre. It also convincingly challenges the assumption that constitutional texts are ethnically neutral. In fact, such an assumption still permeates some constitutional traditions due to a rooted constitutional narrative, in countries such as the US, France, or Australia, where the author is based. At the same time, such a fiction in historical, anthropological, ideological, political and also constitutional terms, has been proved wrong for quite some time,¹ and is not per se a novelty, although it is extremely helpful to remind of it, especially in tense times like the current ones, where ethnic oppression is often hidden behind the language of constitutional neutrality. Ethnicity in fact does influence constitutions no less than ideology, and often they are linked to one another.

Constitutional Crises and Regionalism further develops a line of research already inaugurated in a previous book by Vito Breda.² Using the same case-studies approach, combined with the resort to legal, sociological and political science methods inspired by the UCL Constitution Unit, the 2018 volume analyses the practices of conflict and cooperation between minority groups and central institutions in a number of countries that are largely the same as those looked at in this new volume.

¹ See inter alia A.D. Smith, *The Ethnic Origin of Nations* (Oxford: Blackwell, 1986).

² Vito Breda, *Constitutional Law and Regionalism* (Cheltenham and Northampton, MA: Edward Elgar, 2018).

The topical issue at stake is regional conflict and ethnicity. If both central and regional/substate institutions are (explicitly or implicitly) ethnically shaped, it is likely that they clash, as the demands tend to be the same over the same territory. Such a trend towards a growing ethnicization of federalism and similar concepts³ is remarkably growing in the last decades. A link between federalism and accommodation of ethno-national claims has always existed (even in pre-modern times⁴) and it was present in the very first experiences of modern federalism, which were established during the 18th and 19th century in the classical “coming together” federations:⁵ the USA, in the first place, Switzerland, and Germany, i.e. the three prototypes of aggregative federations. Then, the idea was to bring together existing entities to create a more powerful and bigger one, rather than to accommodate ethnic claims. That was, however, the time when all other countries were looking for a way to establish nation states; so, federalism was back then also and primarily an instrument to achieve national statehood in particular contexts, bringing together existing sovereign entities. In the context of Switzerland and partly of Canada, multinational federations were created due to the specific configuration of the respective country, but the aim remained the same: the establishment of a bigger entity which could become more competitive in the new world of (nation) states.

After the first World War, several new federal countries were established on the basis of the dissolution of many multinational empires,⁶ which created, as a result, many nation states based on the presumption of a national homogeneity of the newly established countries. In some cases, also multinational countries had been formed out of that process, such as the Kingdom of Serbs, Croats and Slovenes, where the national issue was critical and not less relevant than in mono-national states since, in principle, pluri-national federations were a sum of mono-national entities.

A new and more numerous waves of federal or quasi-federal countries came after the second World War, when federalisation and devolution took place within existing unitary states, like Italy, Belgium, UK, South Africa, or former British colonies, such as India and

³ The Author opts for regionalism, others prefer autonomy; the essence is however the division of political power between at least to spheres of government. See inter alia and for partly different approaches concurring in the conclusion R. Watts, *Comparing Federal Systems* (Montreal et al: McGill/Queens' Univ Press, 3rd ed. 2008), L. Basta-Fleiner, J.-F. Gaudreault-Desbiens, *Federalism and autonomy*, in *Routledge Handbook of Constitutional Law*, eds. M. Tushnet, T. Fleiner, C. Saunders (Abingdon and New York, Routledge, 2013) pp. 143 ff; F. Palermo, K. Kössler, *Comparative Federalism* (Oxford: Hart, 2017); and P. Popelier, *Dynamic Federalism* (Abingdon and New York, Routledge, 2022).

⁴ H. Beck, P. Funke (eds.), *Federalism in Greek Antiquity* (Cambridge: CUP, 2015).

⁵ A. Stepan, “Federalism and Democracy: Beyond the U.S. Model”, *Journal of Democracy* Vol. 10, No. 4 (1999) pp. 19 ff.

⁶ T. Hueglin, A. Fenna, *Comparative Federalism: A Systematic Inquiry* (Peterborough, CA: Broadview Press, 2006) p. 3.

Nigeria. In many of such countries (Belgium before the federal transformation, Italy, Spain, UK) the term “federalism” was deliberately avoided as the idea was to come up with something that looked like federalism (including for the purpose of protecting minority identities) but was not called federalism as this was (and still is, in many political cultures) reminiscent of fears of separation. Sometimes special autonomy arrangements only affected parts of the territory of certain countries, which were for the rest not federalised: the Nordic islands for example, but also somewhere else (among others Bougainville and New Caledonia, two of the cases discussed in this volume). This, again, had the main purpose of protecting concentrated communities that were in a minority situation within the state and in addition it allowed to address the special needs of islands and other remote areas.

However, the strongest link between federalism and national accommodation is to be observed as of 1989 in the last wave of constitutions, as a response to the proliferation of ethno-national conflicts and also, unfortunately, civil wars. This way, federalism (regionalism, autonomy) as a tool to “hold together” countries, rather than being driven by governance ideas, has been used massively throughout the world as a sort of compromise between the fully-fledged statehood on one hand, that some minority groups claimed, and keeping together existing states without damaging their territorial integrity on the other. The use of federalism and related concepts for the accommodation of national diversity has become extremely popular over the last three decades, to the extent that such accommodation is now not only the main but probably the sole reason for resorting to federalism (and the like) in the last constitutional generation. This testifies of the potential of federalism/regionalism to solve such issues, being the most peaceful and often the only viable instrument to address them avoiding ethno-cultural violence or assimilation on one hand, ethnic cleansing on the other. At the same time, the growing focus on this function in the last constitutional wave often undermines other very important aspects of federalism/regionalism, such as governing pluralism far beyond the ethno-cultural dimension, including also territorial, societal and political pluralism.

II. THE BOOK AND ITS ACHIEVEMENTS

Breda’s book takes these developments for granted and does not engage in definitional issues about regionalism. Taking a global view (although with a strong prevalence of Western democracies), the volume assumes that regional constitutional crises are produced by the current ethnic revival (p. 3). While previous approaches were assumingly based on homogeneity, modern democracies (does this include China?) are “fuelled by diversity” (p. 7). Such diversity challenges the perceived legitimacy of central institutions in the regional autonomies chosen as case studies, and the author argues that “a well-

engineered system of regional governance can induce perceptions of the representativeness of both central and regional institutions by channelling alliances based on shared values into law” (pp. 1-2). The research aims at detecting when and under which conditions constitutional law can be a positive or a negative driver for change (p. 9).

What links the indeed extremely different regional governance regimes explored in the book is assumingly the fact that all of them are “multinational highly divided societies” (p. 2). There is, however, no conceptual explanation of the choice of cases, and while the presence of “divided societies” can be assumed, the multinational character of some of the territories in point is all but demonstrated. Is Northern Ireland “nationally” different from the UK, or Hong Kong from China? Is Sicily “ethnically” (whatever the difference between nationality and ethnicity may be) different from Italy? Does the loss of perceived legitimacy by the central institutions in the analysed territories (p. 6) depend on the ethnic revival or on other factors? Is Hong Kong challenging the legitimacy of Chinese institutions because of an ethnic difference or due to other reasons? Is the challenge posed by mafia to the legitimate authorities in Sicily something that has to do with ethnonational conflict or rather a clash of power? The book falls short of explaining the criteria that make a society divided, and it therefore results in a series of self-standing chapters (the expression is by the same author, p. 10) arguably linked by some degree of tension with the central institutions of the respective country, based on different motives, which in the end have little in common. One may wonder why significant cases such as Ethiopia, South Sudan, Kenya, Nepal, Myanmar, possibly the Philippines have not been considered in the study. Not even the concept of divided society is explored in the short introduction, nor in any of the chapters, and no reference is provided to the relevant legal and political science literature on the topic.⁷ A deeper understanding of legitimacy clashes, their causes and possible remedies would have benefited from resorting to the work of, for instance, Gagnon.⁸

The book focuses on a number of paradigmatic examples of regional constitutional crises, when “a significant part of the residents [in a given substate unit] no longer think that central legal institutions should govern them” (p. 220). The extent this is linked to an “ethnic revival” (or might cause it, like in the case of Hong Kong) is not further explained.

Chapter 1 deals with Northern Ireland and its turbulent relationship with the UK, until the post-Brexit days – although the book does not consider the 2022 elections and the significant changes they brought. On top of the institutional setting and of the dynamics of sectarianism, the impact of Brexit merits careful consideration: the process was essentially

⁷ Such as recently, inter alia, Y.T. Fessha, K. Kössler, F. Palermo (eds.), *Intergovernmental Relations in Divided Societies* (Abingdon and New York: Routledge, 2022), or A. Gagnon, A. Tremblay, *Federalism and National Diversity in the 21st Century* (Cham: Palgrave, 2020).

⁸ A. Gagnon, *The Legitimacy Clash* (Toronto: University of Toronto Press, 2022).

an English decision and vote, carried out essentially ignoring the claims of minority nations such as Scotland and Northern Ireland, and proved the book's assumption that constitutions and constitutional dynamics are not ethnically neutral, nor can they be, when majorities decide over minorities, even involuntarily.

Chapter 2 on the Basque country goes to the roots of the challenges to Spanish legitimacy, prior and above all after the end of political violence in the autonomous community. As the author correctly notes, despite the significant changes in attitude and especially notwithstanding the permanent ceasefire announced by the paramilitary organization ETA in 2011, a "diverging perception of constitutional legitimacy" (p. 65) remains in the region. The chapter maintains that this is due to the long-lasting legacy of ETA and to the deficiencies of the system of territorial governance, which is based on a (deliberate) lack of clarity of the 1978 constitution.

Chapter 3 is devoted to the peculiar case of Sicily and to the parallel sovereignty of mafia over the island. The author supports with adequate documentation the roots of mafia and its "hemiparasitic" nature, engrained in the poverty of the population compared to the rest of the country, which has made it "the guarantor of legal and illegal commercial operations in the region" (p. 69). While allegiance with the mafia by some sectors of the Sicilian society (and politics) indeed challenges loyalty to the Italian state and thus originates to a certain degree a conflict of legitimacies, a criminal organization based on mere economic interests cannot be compared to ethno-national conflicts discussed in the book. Unlike other chapters, the one on Sicily does not discuss the system of government, but simply the way mafia operates. The choice of this case study is even more disconcerting as Italy has a few other (special) regions that would perfectly fit in a book dealing with ethno-national legitimacy contestations, such as notably South Tyrol but also others.

Chapter 4 examines two issues that have little in common with one another, besides being geographically located in North America as the author candidly admits, p. 88): the time of political violence in Québec in the early 1960s and late 1970s, and the creeping genocide perpetrated against indigenous Alaskan women. Québec nationalism that supported and partly resorted to political violence in that time was operating in a constitutional setting that deeply differs from the current one, due to extremely significant constitutional moments such as, *inter alia*, the patriation of the Canadian constitution in 1982, two referendums on independence in 1980 and 1995, the Supreme Court reference on secession, the Clarity Act (2000) and a completely changed socio-economic situation. For the author, the gradual repositioning of the Quiet Revolution towards procedural liberal democracy has been "a positive driver of change in the crisis which occurred between the 1960s and 1980s" (p. 101). The (part of the) chapter on the epidemic violence against

Alaskan native women commendably casts light on an often-ignored history of abuses and racial violence, which put the legitimacy of the US institutions into question in the eyes of the native community. The author describes the legislative steps undertaken from 1934 (Indian Recognition Act) to 2022, when the Violence Against Women Act Reauthorization Act (VAWA) was enacted: a step-by-step trajectory that “is likely to reduce the lingering suspicion that US institutions are still acting as a colonial power” (p. 114).

Chapter 5 opens the part of the book devoted to East Asia and Oceania, by considering the tense relations between Hong Kong and China after the city was handed back to China in 1997. Rather than an ethno-national conflict, the driver the crisis is, as the author rightly points out, “the difference in ideological roles that constitutional law has in China and in Hong Kong” (p. 115), combined with the (consequent) emergence of a regional identity in the Special Administrative Region. There are some ethnocentric elements in the emerging sub-state nationalism in Hong Kong: while over 90% of the population is Chinese Han, in recent surveys the number of persons identifying as Hong Kongese is growing, but this is clearly the result of the oppressive Chinese rule challenging the western-liberal constitutional tradition of Hong Kong, largely mirrored in the Basic Law and watered down way before the ‘transitional’ period of 50 years set by the same constitutional document. Be it as it may, there is clearly a clash of legitimacies between Hong Kong constitutional tradition and Chinese hegemonic approach, including in terms of (developing) identity, and it will be interesting to observe if the fabric of identities will continue as the conflict unfolds – or will rather be eventually repressed by China.

Chapter 6 looks at New Caledonia, which is one of the most interesting cases of the volume from a constitutional point of view, because the conflict has been channelled through constitutional and procedural steps way more than in other contexts discussed in the book. The recent resurgence of violence in 2024, after a unilateral reform that expanded the right to vote to non-Kanak population (a development the book could obviously not consider), seems to confirm that the conflict has not been settled despite the high degree of institutionalization, and that economic dependence from France is the main reason that prevents independence, together with an institutional system that still underrepresents and frustrates indigenous claims. Also, certain rigidities in the French legal approach, such as the linguistic policy, foster the sense of marginalization of the Kanak community and therefore nurture the identity-based conflict. The author includes the paradigm of unity of the French constitutional system among the drivers for conflict, although it is precisely and only for New Caledonia that such a principle (even dogma) has been partly derogated. It is true, however, that despite what might seem “concessions” from a French metropolitan point of view, a real accommodation of the needs of the local indigenous population remains far from being achieved.

Chapter 7 discusses the interesting case of Australian Northern Territory, where federal intervention allows the federal Parliament to pass laws that directly concern indigenous peoples without their involvement. Further drivers that alienate Aboriginal and Torres Strait Islanders from the majority-dominated society and call the legitimacy of federal policies into question are, for the author, the deep divergence in terms of values between Aboriginal peoples and non-indigenous Australians and the poverty and remoteness of the Aboriginal communities (p. 172). From an institutional point of view, the Northern Territory has the same system of government like the Australian states, with one fundamental exception: the Commonwealth can pass any law it wants. The chapter analyses the policy named Intervention over the past years, especially following a report from 2007 that casts light on sexual abuses of Aboriginal children. It convincingly shows the dynamic of the so called 'modern racism', a value-based difference that marginalises Aboriginal and Torres Strait Island Peoples due to their different set of values that inevitably clashes with materialism (the so called 'dollar dreaming') on which the 'white society' is based and that cannot be solved even by affirmative measures. The chapter does not discuss the 'voice' referendum, that was held in October 2023 about whether to change the Constitution to recognise the First Peoples of Australia by establishing a body called the Aboriginal and Torres Strait Islander Voice. The rejection of the referendum by a significant majority of Australians has certainly further enhanced the lingering crisis of legitimacy of public institutions among the first nations.

In chapter 8 the case of Bougainville is discussed. On the one hand, Bougainville perfectly fits in a book devoted to the clash of legitimacies and ethno-national conflicts, as a paramount example of these dynamics. On the other, however, it is also the only case present in the volume where independence is the likely perspective, after the landslide vote (97%) in a referendum held in 2019. While the process to negotiate independence from Papua New Guinea and the establishment of a new state is complex, this is the set goal and there is also a due date for completing it (2028). Following the referendum, a dedicated body, the Constitutional Planning Commission, has been set up to work out all the open issues. The experience can overall be considered a success story, taking into account the spillover of conflict between the independence of Papua New Guinea (1975, and the disregarded contextual declaration of independence of Bougainville), the establishment of the autonomy (1976) and the normalization process that started with the Lincoln agreement in 1998, that paved the way to the Arawa peace agreement in 2001. The author effectively contends that the three main drivers for a positive change are the role of hybrid institutions, that balance traditional customs with liberal values (unlike in Australia); a significant role of women in such institutions; and the management of the extractive sector, which was the main reason for the escalation of the conflict on the island.

III. FURTHER RESEARCH STEPS

The conclusions are persuasive in proving that, overall, the cases presented in the volume “provide a substantial critique of using expedients or a Panglossian legalistic manipulation of meanings” (p. 224). In fact, ethnically biased language in the long run can be counterproductive, whereas a society (and a constitution) that cares for its diversity and introduces means of cooperation rather than conflict might help attenuate the challenge to legitimacy that a tense situation poses.

The volume shows the contemporary salience for constitutionalism in the 21st century of the link between federalism/regionalism and ethnic studies. These include in first place the constitutional management of pluralism as a whole, in its various territorial, ethno-cultural and other manifestations.⁹ While this has always been the core task of federal systems, recent developments seem to indicate that most countries that are decentralizing do so in order to respond only to ethno-cultural challenges. If so, greater attention should be paid to rule of law instruments that balance the idea of exclusive control of a territory by a titular group. An aspect that the book touches upon and that deserves to be developed in further studies.

Federalism is the matrix of most other instruments for the constitutional management of pluralism. For a long time, a sort of in-vitro combination of the goal (accommodating the claims of self-government by certain groups within unchanged national borders) and the tool (self-government for the territories where such groups reside) has produced a variety of territorial autonomy arrangements that have been more or less successful depending on how several factors have played out. While this function has been inherent to the idea of federalism, contemporary societies are becoming too complex for such a simple approach based on a clear distinction between the goal (accommodation) and the tool (self-government): decision-making has become an extremely complicated task, and competence matters are too manifold and fragmented to be clear-cut and therefore attributed to the exclusive responsibility of one level of government only. Rather, societies are pluralizing also internally, and functions become transversal. The exclusive power of a level of government and the exclusive ownership of a territory by a (assumingly homogenous) group are too fictitious to be effective. They were perfectly fitting the idea of the nation state and have tried to replicate it at subnational level but are now inevitably aging like their prototype.

The constitutional systems are pluralising, and decisions are being made by a growing number of actors vested with different legitimacies beyond the mere political/electoral one.

⁹ See also S. Tierney, *The Federal Contract* (Oxford: OUP, 2022).

These actors are arrayed both vertically (levels of government) and horizontally (parliaments, governments, agencies, courts, administrations, interest groups, etc.). Numerous norm suppliers coexist and shape decision-making and implementation in each subject area, and, at each level, a plethora of actors access institutions in both formal and informal ways to make their claims heard and possibly influence legal norms. Subject matters become more articulated the more society and technology evolve. Thus, jurisdictions tend to overlap as no field can be clearly separated from others, and the legal and administrative regulation of each competence matter is subject to an entanglement of norms and procedures produced by several authorities at different levels, often in an uncoordinated manner. At the same time, there seems to be no alternative to the evolution of governance towards greater complexity and pluralism, not only because societies are simply becoming more intricate, but also because democracy requires that many voices be heard and included in decision-making processes, especially in order to increase social acceptance of norms. Such a pluralizing context significantly involves groups and their rights and affects in particular groups that are likely to be in a structural minority position when decisions are made by majority rule.

This is why the analysis of conflicts of legitimacy must take into account many more factors than traditional self-government arrangements and clear-cut identities in order to address the claims of an increasingly pluralising society. At the same time, federalism and the like are as critical as never before as it represents the prototype of institutional regulation of pluralism. The book by Breda rightly considers a variety of factors that influence the role of constitutional law as a positive or negative driver for change: further research is needed to depict the elements of identity and to approach them in a methodologically sound way.

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