An Introduction to Constitutional Secession

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The author explores the relevance of secession clauses in a constitution. He argues that providing for secession in their constitution is a way for states to regulate self-determination in a peaceful manner. He concludes that there is however no consensus on the form or the content that such a secession clause should have.

Abstract provided by the Editorial Board

Introduction[1]

Should a country's constitution include a secession clause? Since the fall of communism in Eastern Europe in the early 1990s, academics from all over the world have renewed their interest in the principle of self-determination and more specifically, secession. Regional groups, not only in European countries but also in many states worldwide, are increasingly demanding greater autonomy or independence. For most of human history and persisting into the present day, one of the most effective measures of secession has been war. The reaction of the international community to these new movements has been unequal and often dictated more by politics than law. Unfortunately, even though a principle of self-determination exists in international law, it is far from clear if and to what extent such principle can be enforced. Therefore, it is a task for national law (i.e. constitutional law) to regulate self-determination. The purpose of this essay is to introduce the issue of the constitutional right to secede and to examine comprehensively the legal implications of the same. This question finds itself trapped between international law and constitutional law. The right of self-determination within international law will not be thoroughly discussed since a complete and fair treatment of this issue would require a separate essay.

I. Self-determination in International Law

A. Legal Personality and Recognition of Statehood

The meaning of self-determination is to become a subject of international law, and a country or a somehow autonomous or semi-autonomous region within a country to determine its international obligations. This principle incarnates the fundamental right of every people to define liberally its own political status and freely pursue its economic, social and cultural development (e.g. to become an independent state).[2]

A state can be defined as a *sovereign* and *independent* entity consisting of a permanent *population* that occupies a clearly defined *territory*, over which a *functioning government* operates.[3] Recognition as such is not constitutive for a state to exist.[4] However, international law does not take into consideration the political interests of the international community, which hinder *de facto* the implementation of these international legal rules.[5]

The question arises as what to do with non-recognized entities that fulfil all the abovementioned criteria (e.g. Taiwan, Catalonia, Quebec, Basque Country, Scotland, Flanders, etc.). This conundrum seeks a solution through the principle of self-determination.

B. Limited Applicability of the Principle of Self-determination

By 1970 self-determination was established as a general principle of international law. Its enforcement, however, remained restricted to a right to be free

[*] Special thanks for the careful review of the essay to Prof. em. Dr. Raymond J. Goodman, of the University of New Hampshire (USA), and Dr. Rekha Oleshak, Senior Research Fellow at the Institute of Federalism (University of Fribourg, CH).

[1] This essay merely introduces the complex topic of Constitutional Secession and represents therefore just the tip of the iceberg.

[2] Besson Samantha, Droit international public, Abrégé de cours et résumés de jurisprudence, 2nd ed., Bern 2013, pp. 32 sq.; Daes Erica-Irene A., The Right of Indigenous Peoples to "Self-Determination" in the Contemporary World Order, in: Clark/Williamson (ed.), Self-Determination, International Perspectives, Chippenham 1996, p. 47.

[3] Besson (Fn. 1), p. 33; Crawford James, Brownlie's Principles of Public International law, 8th ed., Oxford 2012, pp. 128 sq.

[4] Ziegler Andreas R., Einführung in das Völkerrecht, 3rd ed., Bern 2015, 428.

[5] Grant Thomas D., Defining Statehood: The Montevideo Convention and its Discontents, in: Columbia Journal of Transnational Law, Vol. 37/1999, p. 414.

from colonial domination. In fact, there is a customary rule for the external self-determination obtainable from the practice of decolonization. In the sense of the establishment of an obligation for the international community of states, the United Nations allow peoples subjected to foreign domination (colonization or foreign occupation by force) or as part of a state that practices apartheid, to determine its own destiny in one of the following ways: to gain independence, to associate or integrate into another already existing state or to be able, at the least, to choose independently its own political system.[6] Despite being defined as a human right of general nature, it remains unclear as to whether the actual scope of the right to self-determination extends above the narrow context of decolonization.[7]

II. The Constitutional Right of Secession

The absence of a clear solution in international law does not provide the necessary legal certainty of the right of secession. Therefore, the burden to regulate self-determination and secession vests with national law (i.e. constitutional law).

A. The Philosophical Views of Statehood

In order to differentiate between the legitimacy and illegitimacy of the constitutional right of secession, it is important to understand the philosophical context in which the right of secession exists.

The solution to the debate finds its roots in the conflict between two different concepts of political order: the Hobbesian Paradigm and the Althusian Paradigm.[8]

1. The Hobbesian Paradigm

The Hobbesian Paradigm, as depicted by English philosopher Thomas Hobbes in his political work *Leviathan* (1651), implicates a contract among egotistically motivated individuals who unanimously consent to transfer their individual sovereignty and autonomy to a single, third party sovereign. Once the sovereign is established, his power is considered to be absolute and indissoluble. Consent has the same implication that might be given to modern contract theory: once and for all. This view of the state brings us to the impossibility for a group of people to secede as a consequence of the irrevocable transfer of their sovereign wills in the original contract. Basically, they give up their right to secede.[9]

Even constitutional democratic states can reflect the Hobbesian Paradigm where the people delegate their authority to a democratic legislative body in a permanent and irrevocable manner. The modern incarnation of Hobbes' view of the state, however, can only function if based on certain principles of justice. If the modern version of the Hobbesian Paradigm treats the world's constitutional democratic states as being "just", what might explain the secessionist movements in countries like Canada, Italy, Spain, Belgium, the United Kingdom, and others?[10]

2. The Althusian Paradigm

Alternatively, the Althusian Paradigm, as described in the political work *Politica* (1603) by Dutch philosopher Johannes Althusius, labels the origins of political order as a creature with social bonds and duties that make it of federative nature. His teachings show that the original political unit lies in the family because it contains the roots of authority and subordination. Families later willingly unite in what could be a village or a town (i.e. a commune or municipality) and delegate their authority to a council. All councils of a specific region can also unite to form a province (i.e. canton) that becomes one of the state's subnational units. The symbiotic relationship of all these independent social players is what Althusius means with the term sovereignty. The delegation of authority (i.e. the original consent) is seen as uninterrupted with a possibility to withdraw from it at any time (i.e. social units can legally secede from their upper social unit).[11]

B. Debate

Depending on the political and philosophical view of the state, one can argue *whether secession should be*

[6] Focarelli Carlo, Schemi delle lezioni di diritto internazionale, Perugia 2003, pp. 28 sq.

[7] Belser Eva Maria/Fang-Bär Alexandra, Self-determination and Secession: Historic and Current Ambiguities of International Law (pp. 47-79), in: Belser/Fang-Bär/Massüger/Oleschak (eds.), States Falling Apart?, Secessionist and Autonomy Movements in Europe, Bern 2015, p. 65.

[8] Livingston W. Donald, The Very Idea of Secession, in: Society, Vol. 35/No. 5/July-August 1998, p. 38.

[9] *Ibid*., p. 39.

[10] Kreptul Andrei, The Constitutional Right of Secession in Political Theory and History, in: Journal of Libertarian Studies, Ludwig von Mises Institute, Vol. 17/No. 4/Fall 2003, pp. 44, 49.

[11] Livingston (Fn. 7), p. 39.

included in constitutional law or not. What speaks for and what against constitutional secession?

1. Arguments Against Constitutional Secession

On the one hand, Cass Sunstein argues that a right to secession would endorse strategic behaviour by the subnational units. For instance, economically rich regions such as Catalonia and Veneto would try not to supply the central state with the essential resources needed to uphold justice in the entire country.[12] Sunstein further posits that "if the right to secede exists, each subunit will be vulnerable to threats of secession by the others".[13] Such state of affairs could possibly lead to pernicious effects on the democratic process, which, in a constitutional government, should promote democratic participation based on compromise, cooperation and political stability (i.e. the dissolution of the central state's authority). For want of a better word, this could lead to political disaster. To deal with such problems, Sunstein would rely on the internal mechanisms provided by constitutional democracy such as federalism and judicial review among others.[14]

Allen Buchanan follows a similar path. He argues that a right to secede would create an encouragement for the central state's government to repel efforts to decentralize in the fear that this would lead to its disintegration.[15]

2. Arguments for Constitutional Secession

On the other hand, Wayne Norman sees the constitutional right to secede as a speculative way of persuasively keeping secessionists within the territory of the democratic state.[16] Furthermore, he argues that the constitutionalization of the right to secede would serve to engrave secession in the rule of law thus reducing the possibility of violence or disorder in the political order of the democratic state.[17] Finally, he states that the existence of a secession clause would be "*evidence that the state is united by consent and not by force*".[18]

Another interesting argument brought by Daniel Weinstock posits that secession may be treated as a questionable vice such as prostitution or the use and abuse of marijuana, tobacco or alcohol. If it is to be treated as a questionable vice in which people are going to engage regardless of its legal status—legal or illegal, the better solution is to legalize secession since the government can regulate the behaviour.[19]

C. Notable Mentions of a Constitutional Allowance to Secede

Having enquired whether a constitutional secession clause could be appropriate or not, is it worth considering what such clause looks like in the world's modern legal systems.

1. Countries with Explicit Rights of Secession

There are two countries with an entrenched principle of secession: *Ethiopia* and *St. Kitts and Nevis*. In both of these country's constitutions, secession provisions consist in a detailed procedure that would have to be followed for a secession to take place. In both countries nervous minorities demanded these provisions as a condition for their partaking in the new states.[20] Art. 39(1) of the Ethiopian Constitution (1995) states, that "every nation, nationality, and people in Ethiopia has the unconditional right to self-determination, including the right to secession".[21] Further explanations are to be found in the five sections and five subsections of the same Article.[22] In a similar way, eight clauses and three sub-clauses in Section 113 of the Constitution of St. Kitts and Nevis (1983) include the expressed right of secession.[23] In the late 1990s, the people of Nevis chose to exercise their right to secede from St. Kitts without success. Both Ethiopia and St. Kitts and Nevis remain federated.[24]

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[12] Sunstein Cass R., Designing Democracy: What Constitutions Do, Oxford 2001, pp. 102 sq.
[13] *Ibid*., p. 103.
[14] *Ibid*., p. 112.
[15] Buchanan Allen, Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law, Oxford 2004, p. 349.
[16] Norman Wayne, Negotiating Nationalism: Nation-building, Federalism, and Secession in the Multinational State, Oxford 2006, p. 175.
[17] *Ibid*., pp. 174 sq.
[18] Norman Wayne, Secession and (Constitutional) Democracy, in: Democracy and National Pluralism, Requejo Ferran (ed.), London 2001, pp. 5 sq.
[19] Weinstock Daniel, Toward a Proceduralist Theory of Secession, in: Canadian Journal of Law and Jurisprudence, Vol. 13/July 2000, pp. 261 sq.
[20] Norman (Fn. 15), p. 176.
[21] Constitution of the Federal Democratic Republic of Ethiopia (1995).
[22] Kreptul (Fn. 9), p. 73.
[23] Norman, (Fn. 15), p. 176; Statutory Instruments 1983 No. 881, the Saint Christopher and Nevis Constitution Order 1983.
[24] Kreptul (Fn. 9), p. 75.

2. Countries with Procedures for Changing Borders

Austria and *Singapore* do not expressly recognize a right to secession but somehow allow the possibility for changes to the territory.

Austria, for instance, states in Article 3 of its constitution (1920) that "a change in the federal territory (…) can, apart from peace treaties, only be effected by corresponding constitutional laws of the Federation and the State whose territory undergoes change".[25]

After its secession from Malaysia in 1965, Singapore inserted a provision in its constitution (1965) stating that no part of the Republic of Singapore can be surrendered or transferred in any way whatsoever unless such action has been supported by a national referendum by not less than two-thirds of the entire population of the republic.[26]

3. A Quasi-constitutional Right of Secession

There are countries with active secessionist movements but without any mention of secession in their constitutions whatsoever. However, it occurs that constitutional judges could interpret other constitutional principles and provisions in a way that one can *read* a right to secede *into* the constitution. The first to do this were the *French* judges, who found in this a way to give "Overseas Departments" the right to be independent from France.[27] Worth mentioning is the *Canadian* case: in 1998, the Canadian Supreme Court released an *Opinion* explaining what steps would be needed for Quebec to secede.[28]

Conclusion

The necessities of national minorities should be open for free negotiation. The deficiency in free negotiation would enhance the rise of secessionist movements. A constitutional silence on the issue of secession would be counterproductive for both the state and the secessionists. A constitutional clause of secession would help minorities gain more leverage in their negotiating ability with the central state. This is leverage, which these national minorities would not have gotten otherwise because of their small size and less importance. If secessionists lack the conviction to secede, and their will to secede consequently diminishes, the internal political stability of the central state would benefit tremendously.

It remains controversial whether it is appropriate for constitutions to deal explicitly with secession. There is no specific consensus as regards the debate about the content of such a clause of secession or even about its existence. Such opinions vary depending on which philosophical theory of the state is supported.

[25] Bundes-Verfassungsgesetz (*Gesetz, womit die Republik Österreich als Bundesstaat eingerichtet wird*), StGBl. Nr. 450/1920.

[26] Part III, Article 6(1) of the Constitution of the Republic of Singapore (1965).

[27] Norman (Fn. 15), pp. 176 sq.

[28] The full Supreme Court opinion available at <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do>, accessed on the 31st of March 2016; Kreptul (Fn. 9), p. 78.