17. Secession in federal systems: voice versus exit

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EXPLANATION OF SECESSION

Secessionist movements are on the rise globally (Fazal 2018). From political tensions to violence and civil war, many of the numerous conflicts of our time are rooted in and can be explained by secessionist claims. Given the frequency and intensity of these struggles, it may seem paradoxical that the creation of new states by secession is regulated only sparsely and quite ambiguously in international law. This paradox can be explained by the very nature of international law, a law essentially defined by states, which have little interest in allowing regions or communities to question the territorial integrity of states. The sparsity and ambiguity of secession rules in international law should not be mistaken for an absence of regulation. By mentioning the principle of self-determination of peoples in its first article, the United Nations Charter seems to provide a powerful argument for secession. To this day, however, the bearing of this principle and especially its relation to the principle of territorial integrity remains unclear. Consequently, international law still has great difficulty defining the holder of the right, namely, the 'peoples', and distinguishing their right to external self-determination, namely, secession, from their right to internal self-determination within a state.

Apart from international law, many states deal with self-determination matters in their national legal order. For the same reasons as stated above, constitutions rarely address self-determination in its external dimension; if they do, they mostly ban secession by insisting on the unity and indivisibility of the country and its territory. Numerous constitutions, however, address internal self-determination by granting autonomy – a limited right to self-determination – to one or several territories or communities. Further, some constitutional systems allow territories (e.g., districts or communes) under specific conditions to secede from one subnational unit (e.g., a state, province or canton) and join another unit or become a subnational unit of its own.

The modern concepts of secessionism and the collective right to self-determination date back to the American Declaration of Independence of 1776 and to the French Revolution of 1789, and have been multifaceted and ambivalent from the beginning. By arguing that the British Crown violated fundamental individual and political rights ('no taxation without representation'), the thirteen American colonies declared their secession from the British Empire and thus gained independence. By contrast, self-determination was used to justify (colonial) expansion in the French case. The – oftentimes fraudulently asserted – consent of the people served as a justification to annex territories such as Avignon, Belgium, the Palatinate and the Swiss Confederation from 1790 onwards.

The principle of self-determination gained further momentum during and after World War I, which saw large multi-ethnic empires such as the Austria-Hungarian and Ottoman empires split into independent states. In 1920, the legal nature of the right to self-determination was formally discussed for the first time. In a now famous 1921 case, the League of Nations denied a right to secession from Finland to the Åland Islands but left open a backdoor to secession should a state fail to effectively protect a minority on its territory. This argument of secession as a remedy of last resort, which had been used by the American colonies in 1776, can be seen as a blueprint for the further development of the topic and dominates the doctrine in international law until today.

Secessionism and self-determination played a particularly important role during decolonization. The General Assembly of the United Nations (UN) passed several resolutions which emphasized that 'all peoples' have the right to self-determination. It must, however, be noted that according to the resolutions as well as the preliminary discussions in the assembly, this principle was only meant to apply to narrowly defined colonies, namely, territories separated by oceans from the colonizing state, dubbed 'saltwater colonialism'. For political reasons, states were and are hesitant to recognize a right to external self-determination and ultimately to secession to other groups of people. Even saltwater colonies were typically once only allowed to make use of their right to self-determination within arbitrarily drawn colonial borders most often cross-cutting the settlement areas of nations and peoples.

With the adoption of the two UN human rights covenants in 1966, the concept of self-determination has become more human-rights oriented. Both covenants guarantee self-determination as a fundamental human right in their first article. Again, due mainly to a lack of consensus among states, the bearing of this right remains unclear outside of the colonial context. On the one hand, there are unresolved controversies about the right-holder, the 'peoples', and the difference between peoples, populations of a given state, and minorities. Ethnic, religious and linguistic minorities, according to the covenant, have the rights to enjoy their own culture, profess their own religion, and use their own

language, but not to self-determination. On the other hand, there are no undisputed answers to the question of what the right to self-determination implies, whether and when it allows for secession, and whether and when it corresponds to a right to internal self-determination in the form of an autonomy regime.

The absence of clear legal rules on secession constitutes a great problem for transnational governance. As there are no reliable legal venues to debate the right to self-determination and adjudicate controversial cases, there is a risk of conflict escalation. Such risk is increased because secession for most groups is only available as a last-resort remedy. Leaving secessionism mostly in the realm of power politics and emotions creates incentives to strengthen one's bargaining power by using violence, for example, and/or demanding interferences by kindred states. Instead of being solved, political tensions about the right to self-determination often lead to long, violent or frozen conflicts.

REASONS TO STUDY SECESSION

Separatism is a global phenomenon. Around the world, groups of people invoke their right to self-determination and ask for more autonomy (including federalization or decentralization of the state), claim independence (secession) or (re-)unification with a kindred state (irredentism). Even though colonization seems a topic of the past, secession claims have not diminished; secessionist movements are on the rise in both the so-called developed and so-called developing world. Understanding how these claims came to be and what their legal and political grounds are helps greatly in understanding many of the political and military conflicts of today's world.

For a long time, secessionist movements seemed to exist mainly in new and fragile states. Secessionism was often seen as a reaction to the neglect and marginalization of regions and communities or as a consequence of exclusive and sometimes violent national assimilation policies. National minorities with their own territory developed an appetite for their own state when they were, or felt, excluded from power, resources, opportunities and national identities. Nowadays, the majority of states, including well-established liberal democracies, are confronted with more or less virulent separatist movements. New states, such as Kosovo and South Sudan, come into being and are recognized by some states but not by others. Additionally, there is an increasing number of territories with a controversial status, such as Crimea, Taiwan, Jammu and Kashmir, Golan Heights, and Transdniestria.

Furthermore, students of secessionism have much to gain methodologically from this field of law. Given that the legal justification of secessionist claims remains ambiguous and unclear outside of colonial contexts, the study of secessionism and self-determination is an excellent exercise in the thorough analysis of case studies. It also illustrates one of the great challenges that inter-

national law faces today: while international law is no longer only applicable to inter-state relations, it is still established almost exclusively through such inter-state relations. The increasing number of violent secessionist movements – and their root causes, such as the oppression of groups – also raises crucial questions related to prohibition of interference and the conflicting duty to protect against systematic and severe human rights violations.

HOW SECESSION FITS INTO FEDERALISM RESEARCH AND STUDY

Federalism can be understood as an implementation of the right to internal self-determination. Federal systems can prevent or accommodate claims to external self-determination by granting autonomy within the state. The idea is that most communities do not develop an appetite for their own state when their main claims to self-determination are answered. Federal systems thus often guarantee rights to self-rule in policy fields most crucial for the identity and well-being of peoples or minorities: culture, language, religion, education, and sometimes development. They also provide mechanisms to communities and territories to have a relevant impact on decisions made at the center and to strengthen unity in diversity by shared rule. In such a way, federal systems allow policies of common interest, such as security, international relations, and economic and social development, to be dealt with in common. How exactly power is divided and shared, how much autonomy a subnational unit is granted and how much (counter-majoritarian) influence it has on joint decisions will affect whether the population of the unit agrees to remain part of the state or if it claims external self-determination and thus full independence.

While the first federations, such as the United States and Switzerland, came into being through the partial unification of formerly independent units ('aggregative federalism'), most of today's federations were born as reactions to separatism. Formerly unitary states at some point decided to devolve powers to subnational units, to strengthen their participation in the making of national rules, and to accept them as equal partners in a federal covenant ('devolutionary federalism'). Examples of the latter include Belgium, Ethiopia, Nepal, and numerous federal or regional systems granting autonomy, such as the special regimes for the Basque Country, Greenland, Mindanao, Sabah and Sarawak, South Tyrol, and Zanzibar.

However, federalizing or decentralizing a country to prevent secession remains controversial. Politicians and scholars refer to the 'paradox of federalism' (Erk and Anderson 2009) to point to the risk of self-rule exacerbating divisions within a country, strengthening differences between groups and allowing regions to institutionally and financially prepare for independence.

Following the logic of this paradox, granting autonomy legitimizes the secessionist claims that federalism tries to ultimately invalidate.

Still, secessionist movements seem to be more virulent and violent in unitary states not granting autonomy. The idea of using federalism as a peaceful reaction to secessionism is that it allows communities and regions to govern themselves and to have a fair access to power and resources while remaining part of a larger unit. Such a strategy of federalization makes sense from an international law perspective as well. If groups are considered peoples with a right to external self-determination in situations of outright oppression (secession as last resort), granting self-rule and a right to participate in the making of shared rule delegitimizes secessionist claims and reduces the likelihood of new states to be recognized by others.

LEARNING OBJECTIVES

- Students familiarize themselves with the controversies characterizing the internationally guaranteed right of peoples to self-determination.
- They know about the challenges of defining 'peoples' and 'minorities' and determining their rights under international law.
- They understand different constitutional approaches to external and internal self-determination.
- Students are aware of the complex interlinkages between secessionism, federalism and other forms of vertical power-sharing.
- They can distinguish different forms of separatism and grasp their complex links to federalism and internal self-determination.
- They know a number of case studies and are able to understand the controversies surrounding them.
- They can argue about the right to secession and assess the legal and political values of arguments.

HOW TO STRUCTURE AND TEACH SECESSIONISM

To present secessionism, teachers will have to rely on a wide range of sources. Given that the legal justification of claims for secession remains ambiguous in many contexts, case studies are important. By analyzing different situations in which claims for secession are being voiced, students can understand the variety of their nature and the reasons for the ambiguity in this field of law.

The judgment of the Supreme Court of Canada regarding the secession of Quebec constitutes a good starting point for analyzing the role of judicial actors. In this important 1998 case, the Supreme Court examined the existence of a unilateral right to secession of the Province of Quebec under Canadian constitutional law as well as under international law. It held that Quebec could

not secede unilaterally, but that the federal government would be obliged to negotiate secession if a clear majority of Quebecers supported a clear question on secession. By contrast, the Spanish Constitutional Court rejected the right of Catalonia to hold an independence referendum and firmly sided with the national government in the political crisis. Another relevant text to introduce discussions about the right to secession is the Advisory Opinion delivered by the International Court of Justice in 2010 in order to answer the following question raised by the UN General Assembly: Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law? A special focus should be put on other recent independence referenda, their legality, their legitimacy, and their effects. In addition to Quebec and Catalonia, Scotland and Kurdistan are interesting cases.

Other case studies may take the constitution of states faced with secession claims as a starting point. Ethiopia's Constitution provides an interesting and rather unique example by stipulating in its Article 39 para. 1: 'Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession'. Para. 4 of Article 39 prescribes in detail how this right is exercised. This constitutional approach to secession can be contrasted with constitutions silent on the issue and the numerous constitutions prohibiting secession. As an example, Article 238 para. 1 (last sentence) of the Constitution of Ecuador may be discussed: 'Under no circumstances shall the exercise of autonomy allow for secession from the national territory'. Other interesting constitutions to examine are those of Liechtenstein, St. Kitts and Nevis, Sudan, and Uzbekistan, as well as Afghanistan, Bhutan, Bolivia and Myanmar.

When there is a right to secession based on international and national law or when regional communities claim a right to self-determination irrespective of such right, independence referenda usually follow. Because the right-holder is the people, the people must decide. However, what democratic secession should look like is far from clear. Should there be a qualified majority requirement ensuring that a region clearly aspires to independence and does not simply follow a political mood, or should a simple majority suffice to avoid a status quo bias? Questions like these are highly controversial and should provide for interesting classroom discussions. Another question to which no definite answer has been found is whether special participation quorum requirements guarantee that the decision to secede is broadly shared by the population and is not an elite project, or whether such turnout requirements incentivize manipulation, ethnic mobilization or fraud.

Closely linked to these normative issues is whether a right to self-determination can be claimed once or repetitively. While some hold the view that the questioning of international borders should be a one-time event and any deci-

sion final, others claim that the right to self-determination does not cease to exist when it has been used in a failed referendum. When there is an agreement between actors that an independence referendum can be held in a region, such an agreement usually attempts to settle a territorial conflict 'once and for all'. As the Scotland case and many others illustrate, such hopes are not always fulfilled. Famously, France, in an agreement of 1988, granted New Caledonia the right to hold three independence referenda. It is, however, important to note that even in such a situation, the secession of last resort under international law most likely cannot be forfeited.

A presentation on secession should not only include recent case studies but also the historical evolution of the right to self-determination of peoples. The American Declaration of Independence of 1776, for instance, hints already at the controversies surrounding the topic to this day by establishing a right to secession as a remedy of last resort:

> Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

The report presented to the League of Nations concerning the secession of the Åland Islands is another case worth discussing.

Furthermore, the right to self-determination and secession should be discussed in the context of decolonization. Here, the legal justification of secession loses much of its ambiguity. Attention should, however, be drawn to the fact that the generally accepted definition of colonialism in this context is a narrow one ('saltwater colonialism') and that the extension of an unambiguous right to external self-determination faces many difficulties. Case studies of decolonization to consider are Algeria, Cambodia, Democratic Republic of the Congo (DRC), Ghana, Namibia, Sri Lanka and Tanzania as well as Bermuda, Hong Kong and New Caledonia. In the context of decolonization, the making of new states such as Eritrea, Singapore and South Sudan are also worth considering.

In the same vein, it can be useful to consider countries that have come into being based on consent or other forms of agreement. Interesting examples include Montenegro, Palau, Timor-Leste and Slovakia. These examples should then be contrasted with claims and events which have not resulted in new countries but rather in persistent or frozen conflicts.

Finally, a link can be made between secessionism and federalism. Federal systems worth examining are Canada, India, Nepal and Nigeria. By comparing

legal orders that successfully prevented or accommodated claims for secession through federalization with less successful nations, students will be able to grasp what is at stake when discussing federal ideas and minority rights. Federations and other federal systems with autonomy regimes can hence be contrasted with regions and communities whose separatist claims have not been answered, been crushed, or are still lingering. Regions worth considering are Abkhazia in Georgia, Biafra in Nigeria, Casamance in Senegal, Bougainville in Papua New Guinea, Catalonia in Spain, Darfur in Sudan, Kabylia in Algeria, Katanga in the DRC, Nagorno-Karabakh in Azerbaijan, Patagonia in Argentina, Rakine State in Myanmar, South Brazil and Brazil, South Yemen and Yemen, Tigray region in Ethiopia, Wallmapu in Chile, and Western Sahara in Morocco.

QUESTIONS FOR CLASS DISCUSSIONS OR ESSAYS

1. Should all peoples or all minorities have a general right to secession under international law? Discuss and present arguments *pro* and *contra*.
2. Assuming there is a right to secession under international and national law, what majority in an independence referendum should be required for secession? Is a simple majority sufficient, or should a qualified majority agree to secede?
3. Discuss the relation between secessionism and federalism. How does one influence the other?
4. Does federalism accommodate or exacerbate ethnic divisions? Discuss using examples.
5. How can constitutions deal with secession? How can actors and procedures be defined?
6. Some argue that providing a right to secession serves as a guarantee for fair treatment of territorial minorities. Others argue that a right to secession can be used as a political instrument to obtain unfair benefits from the central government. Discuss the value of both arguments and take a position.
7. Some legal systems ban secessionist speech and secessionist parties. According to Article 10 para. 2 of the European Convention on Human Rights, for instance, the exercise of free speech may be subject to restrictions necessary in the interests of territorial integrity. Discuss the legitimacy and the effects of such human rights restrictions.
8. In what situations are unilateral secessions legitimate? Argue and discuss examples.
9. Give examples of countries that dealt successfully with secession claims. What are the similarities and differences between their approaches?

10. Are there secessionist claims in your country? If yes, could a federal system deal with them? If such a system is already in place, how does it influence the secessionist claims? If no, why not? Develop.

READINGS FOR STUDENTS

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TEST/EXAMINATION QUESTIONS

1. Explain the commonalities and differences between internal and external self-determination and the interconnections between the two concepts.
2. Discuss the origins of the right to self-determination of peoples and the controversies characterizing the right until today.
3. If colonized peoples have a right to self-determination, how could or should colonization be defined?
4. Should national minorities suffering from severe and systematic human rights violations be considered peoples having a right to secede?
5. Choose a country faced with secessionist claims and analyze the legal justification of these claims under international law.

6. Give an example of a federal system that dealt successfully with claims for secession and name reasons for this success.

POINTS FOR EVALUATION

To evaluate whether students have reached the learning objectives, teachers can rely on a wide range of examination types. Apart from traditional classroom exams, oral presentations and research papers in which students analyze a case study are particularly well suited. Another viable option is to let students write an essay about one of the controversial topics surrounding secessionism, allowing them to develop their own positions and ideas.

Given the particularities and challenges faced in this field of law, the primary objective of instruction should be to equip students with the necessary tools for their own analysis of case studies. After having followed the instruction, a successful student, when confronted with a case not discussed in class, is therefore able to put into context claims for secession and to assess their legal grounds. To evaluate this capability, more open-ended tasks like writing a research paper present themselves.

To reach the primary objective of independent analysis of case studies, students need to be familiar with the history of secession and the right to self-determination, the controversies surrounding these topics as well as the different contexts in which they apply. To assess whether students reach these objectives, more traditional examination types such as a written exam should work.

SUGGESTIONS FOR FURTHER READING

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