POSSIBILITIES TO MANAGE THE SECESSION WITHIN CONSTITUTIONAL FRAMEWORK

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Abstract

For certain international law theorists, secession is legitimate if it is constitutionally established. Only if the secession exists as an option in the constitution, which establishes the conditions under which it can be exercised, one can speak about legitimate secession. Although, few constitutions in the world envisage this possibility (for example Burma Constitution between 1947-74; Constitution of former SFRY, 1974; Constitution of the Former USSR, 1977; Constitution of Ethiopia, 1995), nevertheless, the ideas to integrate the provision for secession in the constitution is not new and constitutes a complex mix of legal arguments relating to justice, democracy, recognition and the right to self-determination. Whether those attempts are justified or not remains open to debate. Nonetheless, even in those cases where the provisions for secession exist in the constitution, they are often declarative, and the ways for their exercising are far from clear and thus do not have a substantial value.

Keywords: *international law; secession; constitution; court; right*

Introduction

The term secession is based on the Latin words "*secede*" meaning "*separation*" and "*cedere*" meaning "*departure*", which indicates departure or withdrawal from somewhere or something. During the Roman Republic (510 BC – 27 BC), this act was used as an expression of the Plebian discontent because of the lack of political power of the plebian assemblies and low economic welfare of Plebeians. During the *secessio plebis,* the Plebeians were abandoning the city and were encamped on the surrounding hills, and threatening the wealthy upper class – the Patricians, that they will establish a rival city unless their demands are met (Borkowski & Plessis, 2005:5). Despite the centuries-long practice and general meaning of interruption of certain continuity, it

is difficult to find an acceptable definition of secession. Various authors use variety of suggestions, and most commonly used are the ones that do not contain sufficiently comprehensive elements (or at least sufficiently clear elements) that have the capacity to become commonly accepted definitions. For this text, the definition of Aleksandar Pavković and Peter Radan (Pavković & Radan, 2007) will be used, according to which the secession is a creation of a new state through withdrawing of the territory and the population, previously being part of an existing state (Pavković & Radan, 2007:5). Despite a theoretical lack of clarity, the secession demands exist almost everywhere around the world. Some of them had bloody outcomes or are still ongoing (such as in the previous SFRY and in the recent case of Ukraine), some of them are trying to address the separation within the democratic frames and with democratic means (for example Scotland) and some of them are in a loophole, without any possibility for achieving separation according the domestic legal frame (for example Catalonia).

Secession is not prohibited by international law, but it is not allowed either. However, international law is clear on one point - that the principle of territorial integrity of an existing state is the superior one and thus implicitly means rejection of the secession. There are no legally established standards for secession, but there are different opinions that tend to justify the secession in some cases or at least put it in a legal frame. Those opinions range from finding the political phenomenon as utterly inadmissible, unacceptable, and illegal, to the ideas that are advocating for permission of secession in certain circumstances. According to the proponents, international law should accept and codify a certain limited or qualified right for secession. Nonetheless, most of them agree that a possible "right to secession", should not be set as a general rule, but its acceptance and practicing should depend on factual circumstances following a case-by-case approach (Beran,1987; Buchanan,1991; Cassese, 1995).

Apart from the analysis of the possibility for international codification of a limited "right to secession" within the scope of international law, there are few opinions regarding the creation of a legal provision related to secession and its incorporation into the national constitutions. The arguments stress the need to avoid unpredictable situations and with that, to minimize the possibility for devastation of the society. The opinions vary from the acceptance of such possibility, to the complete denial under the stances that the political phenomenon of secession is quite opposite to the core principles of constitutionalism, cannot generate a legitimate right, and thus cannot be accommodated within the constitutional frames.

The paper presents theoretical knowledge founded around the ideas of possibility for creating a legal provision of secession and incorporating it within the national constitutions. It is considering the theoretical explications convened around arguments pro and arguments against that possibility, analysis of the legal and political documents that historically had envisaged that option, juxtaposed with the opinions of the relevant legal bodies, such as Venice Commission and constitutional court's rulings in the concrete cases.

A constitutional right to secession

The ideas to integrate the "right" of secession in the constitution are not new and constitute a complex mix of legal arguments relating to justice, democracy, recognition and the right to self-determination. It goes alongside with the reflections on political sociology for the multiethnic societies and nationalism, as well as encompasses the views about the constitutionality and state-building of federal democracies. Nonetheless, the provision that tackles secession, in most cases, does not exist in most constitutions in the world; i.e. the constitutions are silent about this phenomenon. However, only few constitutions in the world historically envisaged this possibility, but the conditions for this practice were extremely difficult to fulfill. For example, Burma Constitution between 1947-74, predicts the right to secession, but establishes almost impossible conditions and procedures for its realization, and does not give such a right to the two states that have the greatest aspirations for securing independence - the Karen and Kachin states. Another example is the Constitution of the previous Socialistic Federative Republic of Yugoslavia from 1974, that stipulated the right to self-determination that involves secession, but territorial revisions were only possible by consensus of the 6 republics and the 2 provinces (Preamble and Article 5 para. 3, Constitution of Yugoslavia). The Constitution of the USSR from 1977, in Article 72 gave the republics a right to freely secede, but without modus for practicing that right. Consequently, when Georgia and the other republics claimed the right, its exercise was denied (Silverstein, 1958: 43-57; Heraclides,1991).

When established as a constitutional right, the conditions towards secession are often subject to different interpretations, which regularly do not encourage secession. Thus, for example, the First Russian Constitutional Court in its decision from 1992, protects the territorial sovereignty of the Russian Federation and denies the Declaration of State Sovereignty of the Republic of

Tatarstan, in particular, the referendum regarding the status of the Republic. Although other republics in the USSR had similar referendums for their independence, the Court disputed the Declaration because the referendum polling did not mention the option of Tatarstan to be part of Russia. Although the right to self-determination and the possibility for its practicing can be found in domestic law and it was guaranteed by the Russian Federation, the Court balanced the right with the principle of respect for territorial integrity and the human rights. As a supportive argument, it cited Article 29 of the Universal Declaration of Human Rights, pointing that the exercise of the own rights implies the respect of the enjoyment of the rights and freedoms of the others, and gave an opinion that practicing the rights otherwise represents an abuse of justice. Consequently, according to the Court opinion, a unilateral secession, not only violates the territorial integrity of a sovereign state and disturbs the national unity of the people, but it also violates the constitutional order. On the other hand, the secession can only be possible and just if it is reached through a negotiation process that involves all the stakeholders (Summers, 2007).

Another example is the Constitution of the Federal Democratic Republic of Ethiopia, from 1995, that predicts representative democratic structures and recognition of the right to self-determination, until independence for the various ethnic groups in Ethiopia. Still, although the right to secession is recognized in this document, its application in practice is extremely limited (Micheau, 1996).

Arguments "*pro*" and "*against*" the establishment of a provision of secession within the constitution

There are different opinions about whether or not the constitutions should have provisions about secession. For some international law scholars, the international law, in certain documents, tacitly recognizes the right to secession (such for example the UNGA Resolution 2625, in cases when the government of the state is not representative), while the others, explicitly reject such ideas pointing that the main concepts of the secession are not only against the states, but also against the international order which main subjects are the states. International law is primarily the law of the states, and in that sense, it should not include provisions for own destruction (Horowitz, 2003). For the others, a more pragmatic group, secession already exists in practice and consequently, a specific and limited right to secession needs to be introduced within the international law (Beran,1987; Buchanan,1991; Cassese, 1995). However, the international

community, in the current state of affairs is far from accepting even a conditionally qualified right to secession.

In a similar manner, there are debates about the possibility to include such provisions in the national constitutions, but the opinions whether secession is justified in a constitutional sense, vary in theory.

Arguments "pro"

Certain theorists advocate for introduction of the right to secession in the constitutions, but in parallel with the conditions for its fulfillment, such as a necessity of a super-majority that would limit the secessionist elections and would "protect" and "support" democracy (Sunstein, 1996). The opposite block sees this constitutional engineering as pointless if the main idea is to create situations with little or no chance for realization (Norman, 2003).

Wolfgang Danspeckgruber is one of the theorists who consider that the existence of a constitutional provision will remove secession from daily politics. Consequently, the abovementioned provision will be a mechanism for voluntary agreement, which will contribute to the partnership and its consolidation. This provision will support confidence-building among different ethno - social groups that exist within the territorial borders, it will diminish antagonism, and it will increase stability and peaceful realization of the right to self-determination (Danspeckgruber, 2002:351-352). As an argument, Danspeckgruber cites two constitutions as examples - namely the Constitution of Ethiopia and the Constitution of South Africa. According to Article 39 (1) of the Constitution of Ethiopia "(...) every nation, nationality, and people of Ethiopia shall have an unconditional right to self-determination, including the right to secession" (Constitution of Ethiopia, 1995); and Chapter XIV Section 235 of the Constitution of South Africa, that stipulates that "The right of self-determination of the people of South Africa as a whole, as manifested in this Constitution, does not exclude, within the scope of this right, recognition of the idea of the right to self-determination to any community that shares a common cultural and linguistic wealth within the territorial entity of the Republic, or is otherwise determined jointly by the national law" (Constitution of South Africa, 1996).

Without a doubt, for some theoreticians, secession is inconsistent with conventional expectations of the constitutional order and that is to hold the political world together and not allow it to fall apart, but Mark E. Brandon (Brandon, 2003), considers the importance of the

incorporation of secession norm with national constitutions. According to Brendon, if the people who are united together in a political society find themselves divided in what they consider to be significant; this division is long-lasting; and they don't want to live together anymore, then secession can be a practical option. The existence of a clear provision in the constitution, in the cases that are extreme, can prevent a full destruction, claims Brandon. Consequently, constitutionalism needs not only be concerned with the creation and maintenance, but also with the dissolution of the political order (Brandon, 2003). Brandon establishes his thesis on the ideals of Alexander Hamilton, for whom the US Constitution is an experiment in making it possible to reestablish the government through "reflection and choice" instead of "incidentally, by force" (Hamilton, 1787). Alongside this opinion, it is a lack of pragmatism to be fixed with the contracts that exist more than 400 years (Brandon, 1998).

For Wayne Norman, interestingly, the greatest enthusiasts around the constitutional regulation of the right to secession are the theorists with little or no sympathy for secessionist movements, with a paradoxical tendency for secession to be legally possible, but practically impossible - hoping that possible right holders won't use that chance. Until now, the justification for possible incorporation of the secession provision into the constitution was considered by the existence or non-existence of the moral right to secession, that is, to determine under what conditions a territorially concentrated group has a moral right to secede. If the group has secured its moral grounds, then the questions are asked whether this right should be incorporated into the constitution. However, for Norman, this issue should not be treated in isolation and needs to be examined within a broad discussion, considering all the aspects of constitutionalism. Nevertheless, Norman is not for a general acceptance of the secessionist clauses within the constitution. Anyhow, the fact that 90% of the states in the world have significant minorities, the secession clause needs to be put in the constitutions of certain types of states, preferably into the constitutions of the advanced democracies (such as Canada; Belgium; France; UK..). That modus can generate possibilities to apply the outcomes of what follows into the divided societies, such as the ones in the Balkans. This secessionist provision should stem from constitutional negotiations and build on a wide range of constitutional provisions that at the same time would protect the interests of the minorities (such as the provisions that are promoting an autonomy, or recognition) and the interest of majority (such as the provisions that are promoting uniqueness and stability) (Norman, 2003). According to Norman, the non-existent constitutional provision

for secession can be worse than its existence because: 1) the popular secessionist movement, which lacks the legal means to carry out its political agenda, will cause political uncertainty; and 2) the legal procedure for practicing such right can reduce the chances for raising of a serious secessionist movement (Norman, 2003).

For Allen Buchanan, it is necessary to identify the different types of secession, as well as the conditions under which secession can be achieved, but also to offer a moral framework that will enable substantive (though incomplete) guidance to resolve disagreements surrounding secession. However, the moral framework without proper constitutional embodiment is only a moral vision, and the vision, although it is necessary for action, is far from permissible. Buchanan considers that secession should be embedded in a particularly powerful institution, such as the constitution of the modern state and such an agreement should be established upon the liberal values that are supporting autonomy, liberty, and diversity (Buchanan, 1991; 2003).

Another set of reasons that advocate why the provisions for secessions should be embedded in the constitution of a multinational state are based on the possibility or likelihood that the secessionist movements will increase the territories controlled by the national minorities, regardless of whether there is an explicit recognition of such a right. Therefore, the state should deal with the secessionist quests and bargains within the rule of law and not as a part of political questions. The primary criticism of such interpretation of the possible right to secession stems from the potential realization of other, morally dubious activities, such as prostitution, narcotics and alike. By analogy, it may be arguable that those activities will happen, whether being legal or illegal and thus it may be better to be legalized to be removed from the black market (Buchanan, 1991).

Secessionist politics may involve a spectrum of activities ranging from arguable, legally acceptable acts, such as advocacy and propaganda for secession, to legally and morally dubious activities, such as unilateral declarations of independence and armed actions. Identification of these possible “legal activities” can further help the state to give a proper response in order not to reach the ultimate spectrum - unilateral independence and military conflict. Still, Buchanan, argues that it is important to determine what behavior should be regulated - whether it is secession advocacy, secession mobilization, the attempts for secession, or secession itself. It is possible that some of the abovementioned situations can fall under the freedom of speech or under the freedom of association, only if the law and the public security are respected. Therefore,

although legally possible, it is difficult to determine which behaviors or acts can be eventually legalized by a constitutional theory of secession (Buchanan, 1991).

For Diane F. Orentlicher there is no unique formula for dealing with the secessionist quests. She proposes a problem-solving mechanism through mutual agreements and negotiations rejecting the unilateral acts. The commitment to resolve the disagreements over the separatist movements through mutual agreements underscores two situations: 1) the negotiating partners should accept the possibility of secession as a result of the negotiations and 2) in principle, the disagreements about secessionist quests should not be solved solely through a referendum. If the separatist's issues are resolved only by voting, the losing party could invoke the political authority and reject the results of the voting. However, voting can play a legitimate role in resolving disagreements within the broader context of the negotiations. The same applies to a referendum, which in turn can only play a role if the negotiating parties agree to hold a referendum and accept the results from it. For the same reason, a vote that can lead to a political divorce could undoubtedly have legitimacy only if the national constitution provides that possibility - assuming that the constitution was enacted in a democratic, legitimate way (Orentlicher, 2003).

For Orentlicher, the ideal situation is if the negotiations over the disagreements related to the secessionist demands, take place in a framework that: 1) is set up upon strong prerequisites for mutual accommodation; 2) it is minimizing the risk of a dead end; 3) does not encourage secession. The first two objectives aim towards achieving a mutually acceptable results and are securing that none of the parties prevents the mutually acceptable agreement. On the other hand, the effective institutional design of the negotiations must be able to address the situations where a mutually acceptable result cannot be achieved, especially where the survival of the group is seriously compromised. The third objective serves for the same interest as the first two and protects potential political divorces (Orentlicher, 2003).

Arguments "against"

There are several reasons why the theorists argue *"for"* or *"against"* incorporating secession in the constitutions, and generally, they are geostrategic (envisaging the aspects of defense and security), moral reasons, as well as economic reasons. For many American theorists, the existence of secession provision in the constitution is unjustified since the Union of states existed

prior to the Constitution. Therefore, any secession would destroy the Union and, according to them, will lead to a complete undoing of the shared American values (Sunstien, 1992). Following that line, Cass Sunstein advocates against the introduction of the constitutional right to secession and claims that such a right does not exist under the American constitutional law, and argues that the secession is prohibited under the principles of constitutionalism (Sunstien, 1991:633).

The ones that are against the incorporation of the provision of secession into the constitution, are pointing out that incorporating such a "right" will destroy the spirit and the ideals of constitutionalism. Additionally, it is impossible to set such a detailed constitutional provision, since many situations are uncertain and it is too difficult to be predicted in a constitutional text.

The strongest argument against the ideas of incorporating a provision on secession within the constitutions is given by the Venice Commission, on the question of the Parliamentary Assembly of the Council of Europe, to give an opinion over the matter if the question of self – determination and secession can be addressed by the constitutional law. The given answer was not based on the international law but on the national constitutional sources, and it was analyzed through the rulings of the constitutional courts and equivalent authorities.

According to the Commission, secession in its inherent nature is contrary to the constitutional law, since the intention of the secession is to dismember and destroy the very foundation of the state. Most constitutions in the world are silent on the issue of secession, and that silence may sometimes be used to outlaw the situations. However, each constitution must be interpreted in its context and therefore, it is difficult to find a general understanding of that silence. Nevertheless, the prohibition of secession is implicitly based upon the provisions that are protecting and proclaiming the indivisibility of the state, national unity and more commonly the territorial integrity (Venice Commission Report, 2000).

In that sense, the fundamental rights, such as *freedom of association*, or *freedom of thought and expression* can be restricted for the goal of the protection of the territorial integrity, and that can refer to the programs or the acts of the political parties or other organizations that agitate against territorial integrity. Consequently, any contrary actions can be considered as unconstitutional. Unlike the secession, the self – determination is not alien to the constitutional law, although the provisions for its practice are not clear. The self – determination must be dissociated with the secession and can be seen as a right of the independence of a state that is already constructed, or

as internal self – determination; a right to people to freely determine their political status within the state borders (Venice Commission Report, 2000).

Referring to the destructiveness of secession, the Commission points that after many years of total stability, the process of dissolution of the three federations (SFRY, USSR, and Czechoslovakia), was peaceful in the example of Czechoslovakia; extremely bloody in the case of Yugoslavia, and to a lesser extent bloody in the case of the Soviet Union. It is interesting that two of the above-mentioned states in their constitutions had provisions for secession of their constitutive Republics (Venice Commission Report, 2000).

The example of Canada – Quebec case: reviewing secession demands within the constitutional framework

In 1995, the Canadian Supreme Court argued the case of the secession claim of Quebec from Canada. Namely, the Canadian Minister of Justice formally asked the Court to look at a number of issues regarding the legality of secession. The subject of the issue was whether Quebec has the right to a unilateral secession from Canada. The Supreme Court of Canada ruled that there is no right either under the Constitution or in the international law for Quebec to secede unilaterally from Canada (Venice Commission Report, 2000). Although the Supreme Court unequivocally rejected the existence of such a right, it sought to deal with the potentially destructive issue of secession through the rule of law, in the absence of explicit constitutional norms regarding secession (Buchanan, 2003; Turp, 2003). The Court concluded that the secession causes constitutional change and therefore cannot be exercised simply with the vote of the majority of the secessionist region. Consequently, it must be achieved through a constitutional change that should result of a negotiation process. By stating that secession must be achieved through negotiation, it is clear that secession must be a consensual, not a unilateral action. The Court concluded that in the Quebec case, the right to secession could not be applied as an ultimate remedy. Under the international law, the external self-determination can be enjoyed by former colonies, people that are repressed or are under military occupation, or by the group whose access to the government is denied, or - in cases where the realization of the internal self-determination is impossible. The Court found that the Province of Quebec does not belong to abovementioned

groups since the people of Quebec are not victims of injustice. It is unrealistic to seek consent from the state for secession, only in the cases where the secession is seen as a remedy against injustice. The same point can be drawn in terms of legitimacy. A state that respects the rights of all citizens, both individually and collectively, is legitimate, and in that state, the whole territory belongs to the people as a whole. In other words, the territory belongs to the people, not to the government, and therefore the territory can be alienated only with the consent of all people, not exclusively with the consent of the people that live in the secessionist territory (Buchanan, 2003). Nevertheless, according to some scholars, the Supreme Court read a modest secessionist clause in the Canadian Constitution, although the Constitution itself does not explicitly regulate the secession. Namely, the Court analyzed the question upon the fundamental and organizational principles of the Constitution, namely federalism, democracy, the rule of law and the minority rights. In those aspects, the Court dismissed the legality of unilateral secession but did not find that the basic idea of secession was contrary to the principles of constitutionality (Norman 2003:213). In the Quebec – Canada case, the proponents of the secession have invoked ordinary democratic arguments, calling upon the moral right that derives from the principle of democracy and underlies the majority procedure at the federal and at the provincial level. However, according to the Court, the principle of democracy is not the only fundamental principle and must be balanced against other fundamental principles, such as the protection of minorities, the constitutionality, the rule of law and the federalism. The decision to split on the basis of a simple democratic argument, based on an exit procedure, that requires a majority vote in the region ready to break away, actually makes the exit too easy, terribly underestimating the state's commitment to the deliberative democracy (Buchanan, 2003).

Conclusion

Although for some authors, secessionism is inconsistent with constitutionalism and as such it cannot be incorporated within, for certain international law theorists, secession can be legitimate if it is constitutionally constituted. By that notion, the secession as an option should exist in the constitution, alongside with the conditions under which it can be exercised. To the contrary, many of the constitutionalists find secession alien to the core ideas of constitutionalism and they consider that such ideas cannot be incorporated into the major legal act. There are only few

constitutions in the world that historically predicted the possibility for secession, but those provisions were only set in a declarative manner. The possibility for secession demands to be addressed within the constitutional frame, under democratic principles, is presented in the given example of the Québec – Canada case, whereas the inquiry about the legality of secession was balanced against the other fundamental principles. Nonetheless, the question of whether secession can be justified in a constitutional sense remains an open and controversial topic.

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