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The Political Economy of Secession in, and Withdrawal from, the European Union

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1. Introduction

The following European countries owe their existence to secession:

> Switzerland (1291), Sweden (1523), the Netherlands (1579), Greece (1827), Belgium (1831), Norway (1905), Finland (1917), Ireland (1921), Iceland (1944), the Baltic States (1990), Slovenia (1991), Croatia (1991), Macedonia (1991), Bosnia Herzegovina (1992), Czech Republic (1992), Slovakia (1992) and Montenegro (2006).

With the exception of Norway, none of these secessions have been constitutional. Even the secession of Slovakia from the Czech Republic, which many consider a consensual "separation" rather than a unilateral secession, began with a breach of the Federal Constitution of Czechoslovakia when, in July 1992, the Slovak government issued a unilateral declaration of independence – long before, in November 1992, the constitutional amendment required for the dissolution of the Federation was adopted by the Federal Assembly of Czechoslovakia.

2. The Political Economy of Secession in the European Union

2.1. Constitutional Issues

When a minority asks for independence, the majority is likely to be opposed unless the minority has been a financial burden to the majority. The majority would lose its power to overrule the minority and extract resources from its economy. Since political power rests primarily with the national government and parliament, it is the politicians at the national level who are most opposed to secession. They may even fight the secession although the majority of the people is willing to accept it. The national government and parliament are also more opposed to secession than the governments and parliaments of the non-seceding regions because the national politicians lose more power than these regional politicians. If the predecessor state is a federation or federal state, it is meant to be based on a contract among its provinces. Thus, secession is a matter for negotiations among the provinces.

It is easier to agree on the right of secession at the constitutional level, behind a veil of ignorance about how each person or region would be affected, than in each specific case of attempted secession. However, no constitution seems to expressly permit secession from the state. The Swiss constitution recognizes the right of seceding from a canton (province) and founding a new canton within the Swiss

confederation. This constitutional amendment was adopted by popular referendum in 1979 when the new canton Jura seceded from Canton Bern – also by referendum.

When the constitution is silent about secession, the issue is usually brought before the Constitutional Court. Since the majority (or all) of the constitutional judges have been selected and appointed by the political majority, they will not support the right of secession. The US Supreme Court in 1861 and the Supreme Court of Canada in 1998 are cases in point. The Canadian Court argued that Quebec must not secede without the consent of the federation. But unlike the Spanish Constitutional Court, the Supreme Court of Canada acknowledged that the parliament of each province may consult the voters on the issue of secession. According to Art. 149, Nr. 32, the Spanish state has the exclusive competence to approve the organization of a (formal) popular referendum.

The Spanish constitution asserts "the indissoluable unity of the Spanish nation"; it calls Spain "the common and indivisible homeland of all Spaniards" (Art. 2). This clause goes back to the Franco regime: according to Art. 2 of the Spanish State Organizational Law of 10 January 1967, "the national sovereignty is one and indissoluable".[1] This raises the question of whether the Catalans consider themselves part of the Spanish nation or a nation of their own. From a philosophical perspective, a constitution is a social contract, and as a fundamental principle of law, there is no contract that cannot somehow be terminated by a contracting party. Catalans also point out that the International Covenant on Civil and Political Rights which Spain has ratified in 1977 affirms that "all peoples have the right of self-determination" (Art. 1.1).

The United Kingdom does not have a written constitution, even though there are some quasi-constitutional documents ("habeas corpus" etc.). Constitutional matters are ultimately decided by Parliament. Parliament has recognized Scotland's right to secede if a simple majority votes for independence. Thus, in a civilized country, the right of secession may be recognized even by the national government and parliament. However, the British government tries hard to discourage the Scots from voting for independence.

2.2. International Aspects

Secession has often been compared to divorce. Divorces are regulated by law. If the partners cannot agree on the terms of separation, a judge will decide how claims and debts have to be settled. As the partners negotiate in the shadow of the law or the court, they have a strong incentive to settle on their own.

When a region secedes from the rest of the country, there are also claims and debts that have to be sorted out. Thus, it is not surprising that, for example in the view of Bucheit (1978, p. 245), secessions ought to be supervised by an international arbiter, say, the United Nations or in Europe by the European Union or the Council of Europe. The international organization may set up a framework of

[1] Similar clauses can be found in the constitutions of France (Art. 2) and Italy (Art. 5).

rules how rights and obligations are to be assigned among the successor states, how minorities are to be protected within the seceding state[2] and how free trade and capital movements are to be maintained.

A first step in this direction has been taken by the United Nations when in 1978 it adopted the Vienna Convention on Succession of States in respect of Treaties. Art. 34 states that when a part of a state separates to form a new state, any treaty in force at the time continues in force for the new state and the rump state. However, according to Art. 4, this principle does not apply to the acquisition of membership in international organizations. It is up to the international organization to decide whether seceding states are automatically retained or automatically excluded or whether this is a matter of negotiation. The convention has not been ratified by Spain, the UK or the EU.

Unfortunately, there is a crucial difference between a judge in a divorce case and an international organization considering a secession. International organizations are not impartial arbiters but biased against secession for two reasons:

1. The representatives of the member states are representatives of the majorities in their countries.
2. The bureaucrats, parliamentarians and judges of international organizations expand their power and prestige by preaching the virtues of political centralization.

Hechter (1992, p. 278) has put it this way:

> „Almost all host countries themselves face potential secessionist movements. It is not difficult to conclude that supporting secessionist movements elsewhere might help stir up unpleasant problems at home. This provides leaders of states with an incentive to collude by universally discouraging secession. In the second place, support for a secessionist movement necessarily comes at the expense of relations with its host state".

The United Nations does not recognize the right of secession. A seceding state usually ceases to be a member and has to file an application if it wishes to remain a member. There has been only one exception: When Syria unilaterally seceded from the United Arab Republic (the union with Egypt) in 1961, both Egypt and Syria were automatically kept as UN members.

The European Union does not recognize the right of secession from a member state either. It merely recognizes the right of withdrawal of a member state (Art. 50 TEU). As the following quotations show, the Commission, the Council and the Parliament of the European Union oppose secessions from member states and try to prevent them:

- Romano Prodi, President of the EU Commission, March 2004: „When a part of the territory of a Member State ceases to be part of that state, e.g., because the territory becomes an independent state, the treaties will no longer apply to that territory“.[3]
- José Manuel Barroso, President of the EU Commission, November 2012: „A region which secedes from a member state, automatically ceases to be part of the European Union“[4]; and in February

[2] This was the key issue when the southern states seceded from the US in 1861.

[3] Answer given by Mr. Prodi on behalf of the Commission, European Parliament, Official Journal of the European Union C 84/E, 422.

[4] Letter from José Manuel Barroso to Lord Tugendhat, 10 December, available online from House of Lords,

2014: “Of course, it will be extremely difficult to get the approval of all the other member states to have a new member coming from one member state”.[5]

- Viviane Reding, Commissioner for Justice and Vice-President of the EU Commission, October 2012: „Catalonia, if it seceded from Spain, could not remain in the European Union as a separate member“.[6]
- Joaquin Almunia, Commissioner, September 2013: “If one part of a territory of a member state decides to separate, the separated part isn’t a member of the European Union”.[7]
- Herman van Rompuy, President of the EU Council, November 2012: „Nobody has anything to gain from separatism in the world of today … How can separatism help? The word of the future is ‚union‘ … Scotland will need to re-apply for EU membership.“[8]
- Martin Schulz, President of the EU Parliament, October 2012: „I am very worried about divisive tendencies due to separatist movements in the Member States – especially at a time of crisis“.[9]
- Elmar Brok, chairman of the EU Parliament‘s Committee on Foreign Affairs, October 2012:
- „Regional disintegration is poison to Europe“.[10]

McLean, Gallagher and Lodge (2013, p. 28f.) believe that the EU institutions want to renegotiate the terms of Scottish membership, Scotland joining the Euro and abandoning its share of the Thatcher rebate.

The Commission's legal position has been echoed by British Foreign Secretary William Hague:

> "People should be in no doubt: if part of a member state leaves the EU, it has to reapply for membership, and that will be a process of uncertain length and unknown outcome."[11]

The legal position taken by Hague and the quoted EU representatives has no basis in EU or international law. There is no such rule in the EU treaties, nor is there a precedent (Algeria and Greenland did not want to stay in the EEC). There is no such rule in the UN Charter nor in any other UN agreement. As mentioned, the Vienna Convention on Succession of States in respect of Treaties does not cover membership in international organizations. There are merely practices, and they vary among international organizations[12]:

1. The International Monetary Fund and the World Bank kept the Yugoslav successor states as well as the Czech Republic and Slovakia as members under certain conditions which were satisfied.
2. The World Meteorological Organization, the Universal Postal Union and the International Atomic Energy Organization kept them without any conditions.

Committee on Economic Affairs, Scottish independence, Scotland and the EU.
[5] Interview with BBC, 15 February 2014.
[6] El Pais, 30 October 2012.
[7] Wall Street Journal, 17 September 2013.
[8] The Observer, 4 November 2012.
[9] Basler Zeitung, 18 October 2012.
[10] Basler Zeitung, 18 October 2012.
[11] Interview with BBC, 16 January 2014.
[12] See Zimmermann (2000, pp. 632 ff.), Bühler (2001, pp. 180, 201, 208, 262).

3. The Council of Europe asked both to reapply.
4. The World Intellectual Property Organization merely asked the seceding Soviet Republics of Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan to confirm their membership in the organization.
5. When Montenegro seceded from Serbia, both had to reapply for membership in the UN while the Council of Europe kept Serbia and asked Montenegro to reapply.

The Commission's view has been challenged by Sir David Edward, a former British judge at the European Court of Justice[13]:

> „Looking to the presumed intention of the Treaty-makers, I do not believe they can reasonably have intended that there must be prior negotiation in the case of withdrawal (Art. 50 TEU) but none in the case of separation. They cannot have intended the paradoxical legal consequences of automatic exclusion … The EU institutions and all the Member States (including the UK as existing) would be obliged to enter into negotiations, before separation took place, to determine the future relationship within the EU of the separate parts of the former UK and the other Member States."

Similarly, Matas I Dalmases et al. (2011), a group of Catalan legal scholars, have argued that automatic exclusion is incompatible with the values of the European Union (notably respect for democracy, the regions, cultural diversity and the rights of people belonging to minorities). Notification of secession has to be followed by negotiations within the European Union and ultimately treaty amendment.

More recently, Yves Gounin, chief of staff of the French Minister of European Affairs until 2012, has suggested that, since the European Court of Justice has declared citizenship of the European Union to be separate from, and additional to, citizenship of a member state, EU citizenship may not be automatically lost by losing national citizenship (Gounin 2014, p. 21).

From a contractarian perspective, there are two internally consistent solutions for succession when a part of state unilaterally secedes from the rest or when parts of a state agree to separate.

1. None of the parts takes over the international rights and obligations of the predecessor state because the population of each part differs from the population of the entire predecessor state. (As mentioned this was the UN position with regard to Serbia and Montenegro and the Council of Europe position with regard to the Czech Republic and Slovakia).
2. Initially, each of the parts succeeds in the interest of maintaining stability and predictability but is subsequently free to withdraw. (This is the general principle of succession enshrined in Art. 34 of the Vienna Convention). If the parts do not meet their joint *obligations* to the international organization, they may be challenged in its court or be expelled. If they cannot agree how to share their *rights*, they are unable to exercise those rights. Subsequently, of course, they can renegotiate their rights and obligations with the other members of the international organization.

[13] Quoted from Edward (2012). For the same view see Edward (2013, p. 17).

The UN practice of usually recognizing one of the parts – the larger one – is unsatisfactory from a contractarian point of view. It can be explained by the fact that the members of the UN Assembly represent the majority of people in their home countries.

2.3. Referenda and Self-Determination

For all practical purposes, a secession may be legitimized only by a referendum. Thus, the constitutions of the member states ought to provide for such referenda and for popular initiatives demanding referenda. Ideally, there would be two referenda:

1. People would be asked whether their constituency ought to secede.
2. When it is known which constituencies are ready to secede, people would be asked whether their constituency ought to secede together with the other constituencies considering secession.

This two-step procedure has two advantages:

1. In the final vote, each citizen would have an indication of what the seceding state would look like.
2. The double referendum would make sure that the preference for secession is stable and well-considered.

In most Western democracies, such a double vote in favour of secession would be sufficient to convince the central government and the other provinces that they have to accept the secession. Seen in this light, the opinion of the Supreme Court of Canada (1998) that Quebec has the right to hold a referendum on secession at any time but that the terms of secession must be agreed with the other provinces is wiser than may appear at first glance.

As the decision to secede is taken by majority rather than unanimously, it cannot be based on the *individual* right of self-determination. The right of secession is a collective right. It is based on the insight that secession reduces the number of people who can be outvoted: even if a minority in the seceding region is against secession, the majority in the seceding region is no longer outvoted by the other regions. If the minority in the seceding region is suppressed no more than the majority of the seceding region has been suppressed by the other regions prior to the secession (as is likely in European democracies), people in the seceding region are on balance made better off by the secession.

The present-day states of Europe are the result of centuries and millennia of arbitrary and coercive rule. Accidents of dynastic succession and brutal military conquests have shaped most of their current borders. The right of secession is necessary to arrive at political units in line with the preference of the people.

Moreover, secession is a form of decentralization. Decentralization constrains the powers of government. It is the political foundation of freedom.

3. The Political Economy of Withdrawal from the European Union

The right to withdraw from the European Union has always existed – any international treaty may be terminated even if the procedure is not specified. Art. 50 of the Treaty on European Union (TEU) has merely made this right explicit, and it has introduced a period of notice of two years.

If the British referendum and notification of withdrawal take place in the first half of next parliament (as envisaged), the withdrawal could follow in the second half. After the notification of withdrawal, the UK and the rest of the EU are to negotiate. The negotiations would not be about whether the UK leaves but how – on what terms. The Commission has no say in these negotiations. It may submit recommendations to the Council but the Council is free to reject them. The Commission may be nominated as negotiator by the Council but the Council is free to nominate some other negotiator. The Council decides by qualified majority. The Council has to attain the assent of the EU Parliament. Since the negotiations are not about whether but how the UK will withdraw, the UK may not revoke its notification of withdrawal if the negotiations turn out badly. The UK may only propose to prolong the negotiations after the two years are over. However, prolongation could be precluded by the referendum.

Prolongation requires the unanimous assent of the Council. Most members are likely to agree because they prefer to keep the UK in the EU on present terms for at least three reasons:

1. The UK is a net contributor to the EU budget.
2. They benefit from free trade and capital movements with the UK.
3. They can outvote the UK on most issues, e.g., imposing their level of regulation and taxation on the UK so as to improve their competitiveness vis-à-vis the UK.

However, the *people* of the other member states would benefit from British withdrawal to the extent that it would raise the competitive pressure on their governments, inducing them to grant more freedom to their citizens. Since the Council prefer to keep the UK in the EU on present terms, they are unlikely to negotiate in earnest before the UK has actually left – unless the referendum has precluded any prolongation of the negotiations.

In view of these intricacies, David Cameron wants to avoid Art. 50 TEU. He will try to amend the European treaties – either by renegotiating the terms of British membership or, failing that, by altering the procedure of withdrawal which Gordon Brown has settled for. By choosing treaty amendment rather than withdrawal according to Art. 50 TEU, the UK can evade control by the European Parliament. If the governments of the Eurozone countries aim to build additional institutions, as Wolfgang Schäuble, the German minister of finance and strong man of the German government, has suggested, the price of British assent will a new deal for Britain without reference to Art. 50 TEU.

Britain‘s bargaining power will also depend on its outside options. Its outside options would be improved by a successful conclusion of the negotiations about the Treaty on Trade and Investment Protection (TTIP) with the US. This may explain why David Cameron has initiated these negotiations. It is not entirely clear whether TTIP would continue to apply to the UK once the UK had left the EU. However, a working party at the World Trade Organization has recommended this interpretation. It

would be in line with the provisions which the Vienna Convention (Art. 34) contains with respect to secession from a state. But even if the EU rejected this interpretation, the UK could easily preserve TTIP bilaterally with the US.

Eight rounds of worldwide trade liberalization under the GATT have reduced EU external tariffs for non-agricultural products to an average of about 3 per cent. EU „anti-dumping“ policy has never been directed against West European non-members. The common agricultural policy of the EU has essentially shifted from variable import levies to direct transfers. All these liberalizing reforms have strengthened, and will continue to strengthen, the bargaining position of countries considering withdrawal from the EU.

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