- p- ISSN: 2521-2982
- e-ISSN: 2707-4587
- ISSN-L: 2521-2982

GLOBAL Political REVIEW

URL: http://dx.doi.org/10.31703/gpr.2019(IV-III).07

DOI: 10.31703/gpr.2019(IV- I).07

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The Complex Knot between Sovereignty of States and Secession in International Law: Evidence from Around the World

- Vol. IV, No. III (Summer 2019)
- Pages: 56 – 63

Headings

Abstract *It is interesting to note that international law doesn't talk about the secession of any group from the parent state in express words. However, at the same time, it doesn't deny people's right to self-determination too. Despite all this ambiguity about secession in international law, state dissolution hasn't stopped. This secession is justified on two strands of theoretical arguments. The first one suggests that it is everyone's fundamental right to live or not to live in a particular state by forming a state of their own. The second one suggests that if a state commits atrocities on a particular community, and the victims exhaust all legal and democratic means to emancipate themselves and their community, they can resort to secession and separation from the parent state in the last resort. However, secession on such grounds is covered by norms and provisions of international law in the post-colonial world.*

Key Words: Sovereignty of States, International Law, States' Rights

Introduction

The international legal system in the post-world war II era has steadfastly defended the inviolability of existing nation-states' borders, regardless of how and when they were determined (Carley, 1996). For that reason, the international political community has carefully but deliberately avoided the use of the term 'secession' at the time of codifying laws of states succession, not to allow secession to be considered a legitimate mean to state's division under the norms of international law. Though by the end of colonialism, it was thought that the process of states' dissolution would stop, however conversely, the disintegration of the USSR and subsequent end of the cold war brought about a new wave of secessionist aspirations by reawakening the dormant separatist claims in almost every part of the world (KOHEN, 2006). To this effect, many minorities groups, in recent years, in different countries have invoked their right to self-determination in their demand for maximum autonomy or secession in some cases, often through bloody armed struggle, to end years of subjugation and violation of human rights by majority group or central government. The increase of UN member states from 151 in 1990 to 191 in the first decade of the 21st century bears witness to the fact that secession is, no doubt, a potential way to create new states in the contemporary world.

The exact place of secession in relation to the state's sovereignty in the international legal system has been a source of interests for legal and political experts attached with systems of international law and jurisprudence. The purpose of this research essay is to shed light on the rights of states, being sovereign and independent entities in their internal and external affair with those of secessionist movements under the provisions of international law. In order to present the arguments in a more coherent manner, this

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essay has been divided into three sections. The first part deals with the right of states to sovereignty, part of which is also the right to territorial integrity and national unity. Section two would explore the legal and normative standing of secessionist movements, striving for separation. The final section will have a more critical analysis of the relative weights of these different conceptions in relation to each other to reach a balanced conclusion. In making a balanced analysis, I will argue that the state is entitled to a right of sovereignty in international law, but the sovereignty of the state should never be an excuse or hurdle in the way to people's justified right to external self-determination because the sovereignty of the state is not absolute and unlimited. Government is a sacred trust between governing and governed. However, at times if this trust is broken, with state policies being unjust and people's fundamental rights are not respected, people may stand up in revolt and secede from the state as an inevitable but last option of the resort.

States' Right to Sovereignty in International Law

Sovereignty is about the central authority of the state to exercise control over its territory and people. It is a mechanism by which the state makes it compulsory for the people and any other entity upon whom the state exercises its legitimate power to abide by the laws of the state and also insulates the state from external interference (Agnew, 2005). However, what is more important is to determine whether the sovereignty of the state absolute or limited in relation to recognized fundamental human rights? The early theorists and thinkers of modern times are in favor of absolute authority even over the law and the legitimate rights of the people. Nicholas Machiavelli, Jean Bodin and Thomas Hobbes were the most ardent supporters of this domain of philosophical approach (LENZERINI, 2005).

According to the Classical Approach to sovereignty, international law has no binding force, and a state is free to define and mark its competencies in relation to power exercise (Snyman, 2006). This was more a state-centred approach where greater importance was reserved for state sovereignty. The state's right to monopolize the exercise of power with respect to its territory and citizens was an idea happily harbored by those with a realist approach to state policies (Jackson, 2010). Under the guise of sovereignty, totalitarian regimes claimed that there was no law that could constrain them from exercising their absolute sovereignty/authority. Ironically, much of these state atrocities were directed against their own indigenous people. Minority populations were the worst victims of such state humiliation. Leaving the Nazis' atrocities against Jewish aside, by one account, the Russian government had murdered 60 million of its citizens (WINSTON & AITZA , 2012). This was an area devoid of fundamental human rights. Citizens were more like subjects, subordinated to the will of a powerful sovereign monarch or king. Though it was a time when international law was evolving and establishing, its application was hardly accepted by anyone that could curtail the state's unlimited and unconstrained power. As the idea to subordinate some part of state sovereignty to international law was never accepted, so organizations like the League of Nations found themselves unable to act on many occasions. Under such circumstances, people accepted submission and humiliation instead of revolting for secession.

However, the paradigm shift from the state-centred model to the people's rights model caused the state's sovereignty to erode in favor of international law in the later part of the 20th century. This is evident in the charter of the UN saying 'we, the people of the United Nations are determined. This suggests that it is the people, not the states, that are the ultimate source of sovereignty (WINSTON & AITZA , 2012). This was necessary for reason to avoid the emergence of a powerful dictator/monarch who would direct unlimited state force to suppress any voice for rights. Then on, the concept of sovereignty was progressively modified and circumscribed by the evolution of the principles of international law to put limits on the state's authority by making them subordinate to their human rights obligations. A number of international principles, in particular those related to fundamental human rights and prohibition of the use of force, helped in restricting the scope of a state's sovereignty. Former UN Secretary-General Kofi Annan and his predecessor Boutros Ghali have gone on record to declare that a state's sovereignty is not absolute and can even be overridden and circumscribed in certain situations (Ayub, 2002). Principles of international law

limit the exercise of sovereignty. So sovereignty is the legal status of the country, but it is not above the principles of human rights anymore.

Sovereignty entitles a state to territorial integrity and national unity. This principle has been firmly established in international legal documents. Territorial integrity requires that the existing territorial structure and configuration of a state be respected. According to UN General Assembly Resolution 2625 (XXV), '*any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter* (Žaludová, 2015). However, this essay would maintain that this principle is applied to other states not to interfere or violate the territorial integrity of a state, and it doesn't preclude any group or entity within the state to secede or declare independence. In this regard, the International Court of Justice categorically declared in the Kosovo case that the principles of territorial integrity could only be applied to regulate inter-states relation (Libarona, 2012). The concept of territorial integrity has no internal obligation, at least in international law, as it remains neutral on the issue. I conclude from the ruling that international law somehow considers a movement trying to break away from a state to be her internal matter and so does not interfere or remain neutral. Moreover, a state's territorial boundaries are not religiously permanent and so can be redrawn over the course of time by secessionist movements.

Right to Secession under International Law

Despite the fact that the world at large has lined up to stop or discourage the dissolution or division of states into sub-entities, the creation of new states from existing states has remained the fact that the world finds difficult to deny. Among other methods of state dissolution, secession has been the most common method of creation of states over the years. This essay suggests that if international law doesn't categorically give people the legal right to secede unilaterally from their parent state, it also doesn't deny such a right explicitly. There are a number of legal documents whose interpretation, keeping in view different secessionist movements that ultimately ended in independence, lead to qualified legality of separatist movements.

Right to Self-Determination in International Law

Self-determination has been a political instrument for nations, recognized by the UN Charter and other relevant documents of international law as a legitimate mean to determine their future destiny (Bereketeab, 2012). But the question is: can the right to self-determination be interpreted as the right to secession in certain situations? Though the matter is delicate, I argue that precedents in international law implicitly approve the qualified right to secession in certain situations.

International law recognizes a minority group's that may qualify as 'people' the right to self-determination, which means that they got the right to determine and decide their fate and form a government of their own. It is necessary to make clear that the history of the right to self-determination goes back to the First World War when many territories of the losing states, including turkey, Italy and Germany, were allowed to secede and form independent states of their own. In the same vein, the Kurds in Iraq in 1917 decided through a referendum to separate from the mother state and have an independent of their own (Sterio, 2018).

International law explicitly recognizes colonial people right to secession and independence. This is provided by 1960's UN Declaration on the Granting of Independence to Colonial Countries and People, in several United Nations resolutions, and as such, has developed into a customary rule of international law (BENNETT, 2014). Before moving further to discuss the issue of the legitimacy of separatist movements, it is important to shed light on what contemporary international law says about people's right to self-determination. Article 1(2) of Chapter one of the UN deals with the principles and purposes of the UN, refers to the concept of self-determination. Furthermore, UNGA Resolution No. 1514 also stipulates that all people have the right to self-determination to determine their political status (KOHEN, 2006). The

Declaration on Friendly Relations further strengthened the norms of self-determination by making it a universal human right, not limited to any particular era or time period. This was an important development because the consensus was reached by providing that all people have the right to self-determination (Cop & Eymirlio€lu, 2005). The Charter of Paris and Document of Copenhagen (1990), The Vienna Declaration (1993) and the International Court of Justice has from time to time reinforced the right to self-determination of people in general (KUMBARO, 2001).

Expert and academic opinions differ on the interpretation of the right to self-determination. There are some who limit its application only to a struggle for socio-political empowerment of people within the political and legal structure of their own country. Some scholars apply it to those struggling against foreign occupation. Importantly, a group of legal experts maintain that self-determination as a concept is capable of developing further so as to include the right to secession from existing states (cited in SHAW, 2003). This is called people's right to external self-determination. I argue that their arguments carry moral and legal weight to justify the qualified right of secessionist movements.

According to Kohen (2006), the right to secession constitutes an integral part of the right of self-determination as well as the right of a group of peoples to break away from their state. Dajena Kumbaro (2001) provides a more legal justification for secession in his interpretation of the Declaration of Friendly Relations. According to him, this is a consensus opinion under the Declaration that people under colonial or alien occupation and a racist regime have the right to self-determination in the shape of secession from the parent state. Explaining the Saving Clause of the Declaration, Dajena maintains that if a people are restrained or blocked from meaningful exercise of the right to internal self-determination within their own state, those people can exercise, in last resort, the right of secession. What I conclude from his commentary is that if we consider secession to be even a right available to people, it should be an option of last resort. The reason is that the secessionist movements are often bloody and, if legitimized explicitly, may lead to chaos and many legal and geographical complexities. So, they should be discouraged in such a way as not to be resorted to in the first instance.

Helsinki Final Act (1975) is one more important legal document on secession as a function of self-determination claims. According to Joel (2012), section eight of the agreement clarifies that self-determination includes both internal and external features by recognizing people's right to determine their internal and external political status without any foreign intervention. International Court of Justice, while deciding the legal status of East Timor, ruled that territorial based right to external self-determination is a right erga omnes, even recognized by the charter of the UN and jurisprudence of the court. It must be made clear that the principle of erga omnes mandates that territorial self-governance of a people is fundamentally incumbent on the international community to protect, even perhaps above state sovereignty in some instances (DAY, 2012).

The 2008 unilateral secession and independence of Kosovo presents yet another landmark development in the exercise of the external right to self-determination. By 2014, 107 of 193 states had extended recognition to Kosovo, including the USA, England, Germany and France. In its advisory opinion, the International Court of Justice advised that the independence declaration didn't violate any applicable rule of international law (BENNETT, 2014). As the court didn't declare the Declaration of Kosovo's independence to be illegal, legal experts maintain that a number of secession movements would use Kosovo precedent to justify the legality of their cause.

Theoretical Approach to Secession

Over the years, there has developed of scholarship on the theoretical aspect of secession from the parent state. Legal scholarship looks for moral justifications of secession (BENNETT, 2014). The debate on secession and the development of new states is hot and full of arguments and cross arguments. Theoretical literature answers the question of when and in what circumstances secession may be morally legitimate

and justified. There are two strands of theories justifying unilateral secession; Primary Rights Theory and Remedial Rights Theories.

Primary Right Theories assert that it is one fundamental right to live or not to live within a specific territorial entity. This means that certain groups can have a (general) right to secede even in the absence of any injustice, annihilation or suppression from the state they live in (Buchanan, 1997). A group can secede simply if it prefers to do so (DAY, 2012). The reason for secession can be association or ascription. Rights-based theories are rooted in democratic theory, where the government should be decided by those governed (BENNETT, 2014).

The primary rights theory recognizes people's plebiscitary right in a referendum setting. This theory provides for people's democratic right to decide in a peaceful manner for separation from the parent state through a simple majority. However, it needs to be cleared that such a referendum held with the mutual consent of both the parties, meaning thereby that the parent state must recognize the seceding group the right to secede while the seceding group must exercise this right through a peaceful democratic method. The recent referendum in Scotland (2016) for independence is one such example. Though the referendum failed as a simple majority didn't vote in favor of secession, it forms a good example of people's primary right to secede.

This essay argues that the primary right to secede is procedurally impractical. Even if a sub-national ethnic group is made a standard to deserve the primary right to secede, there are some 8000 identifiable ethnocultural group in a world of 200 countries. If all of them qualify for secession and demand statehood, there would be no end to state fragmentation, leading to greater chaos and instability. The primary right theory is something of an arbitrary standard to secede.

Remedial Rights only Theories is at the heart of the normative right to secession. Allen Buchanan suggests that these theories recognize the right to resist the injustices and suppression committed against a group by the parent state (Mueller, 2012). A racial or religious group may attempt secession, a form of external self-determination when it is apparent that internal self-determination is absolutely beyond reach (cited in SHAW, 2003). The remedial theory revolves around two principles. First, the group resorting to secession must have faced suppression and annihilation from state authorities. Second, the right to secession should be the last choice for the aggrieved peoples before exhausting all other legal options available within the state.

This essay argues that Remedial theory has a greater resemblance to Jhon Lock theory of revolution. According to Lock, people have the right to overthrow the government if and only if their fundamental rights are violated, and more peaceful means have been to no avail (Buchanan, 1997). So the right to secede is the right of people subject to a political authority to defend themselves against the tyranny and injustices of the state. What all remedial theorists have in common is that people have no right to secede against a just state. The reference here may be made to the decision of the Supreme Court of Canada in the*re Secession of Quebec case, which* dismissed the plea on the ground that Quebecers were not subject to denial of human rights by the central government and enjoyed full internal self-determination. The Court of Africa Union, in the case of Cameroon and Katanga, provided two conditions for the remedial right to secession. First, when people are subjected to foreign occupation and exploitation and second when people are not allowed to exercise the meaningful right to self-determination (cited in Žaludová, 2015). I conclude that the right to secession arises when people are barred from exercising their just and legitimate rights within the state**.**

Buchanan gives a detailed account of three kinds of injustices to legitimize a secession; large scale and continuous violation of human rights, illegal occupation of legitimate territories and violation of intrastate mutually agreed agreements (Mueller, 2012). Take, for example, the large scale military operation in East Pakistan by the Pakistani army in March 1971, which resulted in widespread violation of human rights and death of more than a million civilian people. The world recognized the success of secession by granting

recognition to Bangladesh, which became a full member of the UN in 1974 (Martin, 2008). In the case of Kosovo, even the international community intervened militarily to stop any further violation of human rights. The reason for intervention was also that the situation in Kosovo was so grave as to threaten the peace and security of the world. Similarly, the territorial grievance justification explains, for example, the secession of East Timor from Indonesia was the direct result of unlawful annexation of the former by the latter in 1975 (BENNETT, 2014). In my opinion, the recognition extended by a large number of states to these two newly independent states is a recognition of their qualified right to secession from the parent state.

The remedial rights approach is, no doubt, a good addition to the literature on secession, but I argue that it is also subject to certain loopholes. It doesn't say anything about the methods and means to be employed by a secessionist movement to win independence. What if that movement resorts to a bloody campaign like the Tamil separatists in Sri Lanka, though they might have been denied their fundamental right to self-determination. Often, movements are not controversial for their goal but for the means, they adopt to win independence. This theory doesn't address this question.

Critical Analysis

The right to secession from the parent state is a delicate issue in international law. International law takes great care in recognizing the right to self-determination because any such provision allowing for unilateral secession in explicit terms will be resisted and denounced by states openly. States, collectively don't agree on any act or the rule of law that can harm their national unity and territorial integrity. For that reason, the act of secession is always disapproved by the states. In some cases, movements for secession are even condemned, while on many occasions, they have been suppressed by the state with a hard rebuttal. However, as a matter of law, the international system neither authorizes nor condemns secession but stands neutral. As such, precedents of declarations of independence show that secession is not contrary to international law (Libarona, 2012).

It may be argued that secession is a matter of fact in international law instead of principles. A factual event together with other facts, such as firm control over a defined territory and permanent population besides a government to effectively run the affairs of the seceded territory, may be deemed to result, immediately or over time, in the creation of a new state (Libarona, 2012). However, it is important to note that international law and institutions deal with individual cases of independence and secession and avoid framing general rules.

There is a need to develop and maintain balance in the rights of states and individuals in international law in today's world. A state can claim obedience from its citizens only if it fulfils its obligations towards its people. According to American Declaration of Independence, governments are instituted among men to secure people's right to life, liberty and pursuit of happiness. Government derives their just powers from consent of the governed. But if government does not protect the rights of individuals, then individuals may end their allegiance to it. And one form this renunciation may take is secession-a group may renounce its allegiance to its government and form a new government. It is not, of course, the only form. A group can overthrow its government altogether rather than merely abjure its authority over them (Gordon, 1998). One way to argue is that the sovereignty of the state is no more sacred than fundamental human rights. Instead of bearing suppression and annihilation, the people can stand up against the state for a better lifestyle and state treatment.

This essay suggests that secession is a political right available to citizens in the shape of choice of last resort. But the exercise of such a right should not be violent, resulting in bloodshed. The movement must be marked by peaceful means and democratic methods. Because most of the time, secessionist movements resort to bloodshed to highlight their cause and win attention. Such tactics can hurt their just cause, and they may lose international sympathy and support. Moreover, secession must be without any foreign intervention and help because any such act by another state would amount to the violation of the

sovereignty and territorial integrity of that particular state. International law categorically denounces such interference in the internal affairs of another state for whatever reasons.

Conclusion

The foregoing discussion throws light on the issue of secession in international from different legal as well as theoretical angles. Though on the surface, international law stands for state unity and integrity, facts tell a different story. The world at large stands united to ensure that state dissolution on any ground, either religious, ethnic or whatever the reason may be, should be discouraged. However, there is no denying the fact that the creation of new states out of the existing entities has not stopped. It is interesting to note that the norms of international law show that there are no international legal obligations that prohibit people from separatist attempts. However, International law makes such a situation subject to the domestic law of the concerned state. So long as the theoretical debate is concerned, there are two strands of scholars. First, there are those who suggest that secession should be a fundamental right for any group within a given territory. They can secede from the parent state at any point in time. There are other groups of scholars who suggest that people can rise in revolt to secede in cases when the state commits serious crimes against its own people; there are dangers of bloodshed and civil war. Such an armed conflict can any time go out of control and may become a threat to the peace and security of the world. Thus it is extremely advisable to establish a system and procedure to resolve such issues by means under international law instead of switching over to armed conflicts. However, it is highly recommended to develop a consensus on legal injunctions as to when a particular community and under what conditions such a community would be entitled to secession. Moreover, the method of secession must also be made clear so that bloodshed and violence may be avoided.

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