

The Political Economy of Secession in the European Union

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ABSTRACT

This paper argues the case for the right of secession in Western democracies. I suggest that the winners gain more than the losers may lose. Indeed, the external effects of secession may well be positive. However, the political economy of secession is highly problematic. Ideally, the rules for secession should be set at the international level but international organizations have a vested interest in preventing secession. It is easier to establish the right of secession at the national level. The opinion of the EU institutions that Catalonia and Scotland, after seceding, would have to re-apply for EU membership, has no basis in the European treaties. Nor has this question been settled in any UN agreement or Vienna Convention. There are merely practices, and they vary among international institutions. The paper concludes with suggestions on how secessions from EU member states and withdrawals of EU member states might be implemented.

1. Introduction

Secession may on balance have positive or negative consequences. This is true even if a majority of the people of the seceding region have voted for it. If people in the seceding region are overwhelmingly in favour of secession and if people in the other regions of the state are hardly affected, the overall consequences are likely to be positive. If, however, the seceding region includes a large ethnic, racial or religious minority which will be ruthlessly suppressed or if the seceding state is going to start aggressive wars against its neighbours, secession may have negative consequences. Thus, it cannot be correct to reject or welcome all secessions (Lockwood 2008). Whether secession is desirable or not depends on the circumstances.

Is there a case for a “right of secession” nevertheless? If the answer is to be based on some sort of consequentialist ethic or economic cost-benefit analysis, the right of secession may be justified in two ways. It can either be made subject to certain conditions. This would raise the difficult question who is to decide whether the conditions are satisfied. Or the right of secession can be confined to a group of countries – say, the Western democracies or the European Union – where the conditions are very likely to be met. The right of secession would be based on the argument that it is more important to have an operational legal rule permitting secession than to insist in each particular case that the secession has to be proven to be harmless.

In this paper, I shall start by explaining how the right of secession can be justified (section 2). In section 3 I address objections to the right of secession. Section 4 deals with the political economy of secession. In this context, I criticize the current practice of the United Nations and the legal position of the European Union. Section 5 explains how the secession from an EU member state and the withdrawal of an EU member state might be implemented.

2. Justifying the right of secession

Political philosophers derive the right of secession either from the right of self-determination or from the right of resistance against injustice. The choice between these two justifications makes a big difference. While the right of self-determination may justify an unconditional right of secession, the right of resistance presupposes that the government has violated its legal obligations. Allen Buchanan (1991, 1997, 1998, 2006), for example, accepts the right of secession only as “a remedial right”:

“A group can have the requisite valid claim to territory:
 (a) by reclaiming territory over which they were sovereign but which was unjustly taken from them (as with the Baltic Republics’ secession from the Soviet Union in 1991) or
 (b) by claiming sovereignty over the territory as a last resort remedy against serious and persistent injustices, understood as violations of basic human rights” (2006: 140).

Derivation from the right of resistance is unsatisfactory because it excludes fundamental differences in preferences from justifying secession. Derivation from the right of self-determination is not convincing either because the decision to secede will hardly ever be unanimous. It will be taken by a majority against the wishes of a minority that is denied the right of self-determination. The classical right of self-determination is an individual right – not the right of a majority. The classical right of self-determination merely establishes an individual right of secession (Herbert Spencer).

The right of self-determination is not sufficient but necessary to justify the right of secession. Simplifying assumptions have to be added. If it is assumed on a preliminary basis that, in the seceding region, each adherent of secession benefits as much from secession as each opponent of secession loses due to secession and if people in the other regions are not negatively affected by the secession, the secession causes a welfare gain. This will even be true if the majority is narrower in the seceding region than in the predecessor state. If, for example, ten million people lived in the predecessor state, of which one million in the seceding region, and if in the seceding region 600.000 are in favour of secession and 400.000 against, the secession reduces the number of outvoted persons by 200.000 (= 600.000 - 400.000).

Since there is no scientific way of conclusively comparing the cardinal utilities of different individuals, it is important to ask whether secessions are likely to be Pareto-improvements. Given that, in practice, the decision to secede will hardly ever be unanimous, the answer must be in the negative. This raises the question whether a *right of secession* might be unanimously agreed at the constitutional

level. In a realistic setting¹, such an agreement would probably require side payments: the prospective minority would have to compensate the prospective majority. This presupposes that the constitutional right of secession is worth more to the minorities which may wish to secede than it is expected to cost the prospective majority. Whether this condition is satisfied cannot be answered without a cost-benefit analysis. Of course, for the problem at hand, such an analysis can only be qualitative. It requires an appraisal of the objections which have been put forward against the right of secession.

3. Objections to secession

3.1. *The suppression of minorities in the seceding state*

One and a half centuries after the American Civil War, this is still the main objection which American anti-secessionists tend to use². Abraham Lincoln claimed in 1861 that he was using military force not to abolish slavery in the South but to maintain “the unity of the union”. This was probably a legal pretext or an attempt to weaken resistance in the South. But the unity of the union was not an aim that motivated many Americans in the North – given that the American republic itself had been created by secession from the British motherland.

In contemporary discussions about the right of secession, slavery is not an issue, and it would certainly have been abolished sooner or later even if the civil war had never happened. Even apartheid in South Africa could not persist. There is no reason to assume that the majority of people in the seceding region will tend to be less tolerant than the majority in the predecessor state. On the contrary, since the seceding state is smaller than the predecessor state, minorities in the seceding state find it easier to leave and are likely to be treated more tolerantly than minorities in the predecessor state.

If the minority in the seceding state is spatially concentrated and commands a local majority, the right of secession enables it to secede as well. Thus, the process of secession may continue on a lower level – for example, in the Kosovo. Even if the local strongholds are not connected, they may cooperate in a new and common state.

The protection of minorities in the seceding state is even less of a problem if the predecessor state and the seceding state belong to an international organisation that enforces human rights in its member states. The European Union, for example, has adopted a Convention for the Protection of Human Rights and Fundamental Freedoms, and the EU Court of Justice has decided quite arbitrarily that these rights are not limited to the application of EU law but are valid in the whole domain that is subject to EU law (C-617/10, 26 February 2013). According to Art. 7 TEU, the European Council may “decide to suspend certain of the rights ... including the voting rights of the representative of the government” if it “determines the existence of a serious and permanent breach by a Member State of the values referred to in Article 2”. These include “the respect of human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.”

¹ As James Buchanan (1975) has emphasized there is no point in assuming a contractual situation that is necessarily fictitious, as, for example, Rawls (1971) does. Assumptions which are necessarily fictitious cannot have legitimizing power.

² See Bollick (1993) but also Cremer, Palfrey (1996), Ellingsen (1998) and Bjorvatn, Cappelen (2003).

No human rights problems would be encountered if Scotland, Catalonia, the Bask country, Galicia, Flanders, Corsica, Southern Tirol or Greek Macedonia decided to secede. Art. 2 TEU would protect minorities more effectively if it obliged the member states to grant the right of secession to their regions just as Art. 50 TEU assures the member states of their right of “withdrawal from the Union”.

Finally, the rights of minorities are respected by many European countries which owe their existence to secession: Switzerland (1291), Sweden (1523), the Netherlands (1579), Greece (1827), Belgium (1831), Norway (1905), Finland (1917), Ireland (1922/1944), Iceland (1944), the Baltic states (1990), Slovenia (1991), Croatia (1991), Macedonia (1991), Bosnia Hercegovina (1992) and Montenegro (2006).³ There is even an example of part of a province seceding from the province and establishing itself as a new and separate province: in 1979, the French-speaking and the catholic parts of the Swiss canton Berne decided to leave that canton and establish their own “Canton Jura”.⁴ Both parts of the original canton Berne agreed to the separation in referenda. The Swiss constitution obliges all cantons to respect human rights.

3.2. Negative spillovers from the seceding state to the rest of the state or to third states

External effects which are not “internalised” through negotiations may lead to inefficiencies.⁵ Such “Pareto-relevant” externalities have to be distinguished from redistributive spillovers which do not affect efficiency. Secession may cause both Pareto-relevant and redistributive spillovers. Several examples have been suggested in the literature.

3.2.1. Abandoning defenseless members of the minority in the rump state

David Miller (1998: 70) objects that, if a minority secedes, it usually leaves behind some of its members in the rest of the country and that these are now exposed to even more reckless suppression by the majority. He implicitly assumes that a small minority is more badly suppressed than a large minority. That is possible but the reverse may be true as well because a small minority is considered to be less of a threat. However this may be, the secession improves the lot of the left behind minority insofar as it offers them the opportunity to emigrate to a nearby state where the majority shares their preferences. If they are net contributors, the availability of an attractive alternative improves their bargaining position in the rump state. For them, the external effect of secession may well be positive.⁶

3.2.2. Interregional public goods

³ The Swedish case is special in that secession ended a personal union with Denmark and Norway.

The separation of the Czech Republic and Slovakia in 1992 is usually not classified as a secession because Meciar’s proposal to separate was willingly accepted by Vaclav Klaus.

It is true that Belarus and Ukraine, since seceding from the Soviet Union, have not respected human rights but the same was true for the Soviet Union and is still true for Russia.

⁴ See Thürer (1976) and Dominicé (2006).

⁵ They do not lead to inefficiencies if they are „intra-marginal“. Thus, free-riding may ‘not be inefficient’.

⁶ See the model of Anesi and de Donder (2011).

If the predecessor state has produced interregional public goods, the secession of a region may cause negative external effects elsewhere. For example, the seceding region and the other regions may be jointly using a lake or river and controlling its pollution. Then, pollution control is an interregional public good. Each region, by restraining pollution, generates positive external effects for the others. If it secedes, it may prefer to allow more pollution – more than is efficient. However, as has been stressed by Lülkesmann (2002) in accordance with the Coase Theorem, the seceding state and the rump state may easily enter into bilateral negotiations and agree to maintain the efficient level of pollution control.⁷

3.2.3. *Interregional economies of scale*

To the extent to which the predecessor state has produced goods and services subject to economies of scale, secession raises average cost and the per capita tax burden in the remainder of that state. This, too, is a negative spillover. However, the seceding state is negatively affected, as well. Thus, both states have a strong incentive to continue joint production and use. Secession does not have to cover all functions of government. Cooperation among jurisdictions may be differentiated on functional lines (Frey, Eichenberger 1999).

Usually, a minority decides to secede from the majority. It follows that the seceding state loses more economies of scale than the rump state. Average cost and the per capita tax burden rise more in the seceding region than they do in the rest of the country. If, nevertheless, the minority decides to secede, its discontent must be intense. The minority is dissatisfied because it has been outvoted many times. As James Buchanan and Gordon Tullock (1962) have emphasized, to be outvoted is to suffer from a negative externality. Thus, secession may not only cause negative externalities – it also removes negative externalities. Most authors on secession overlook this.⁸ We do not know which of the two negative externalities is larger.

Allen Buchanan (e.g. 1997: 48) complains that secession lowers the quality of political discourse in the rump state. He draws on Albert O. Hirschman's argument (1970) that "voice", i.e. protest, may be more efficient than "exit". This, too, would be a negative spillover caused by a loss of economies of scale. The diseconomies concern quality rather than cost. However, the spillover is likely to be small. What tends to disappear is the discussion about issues on which the majority and the minority have different opinions. If the minority secedes, there is little need for such discussions.

Economies of scale are also at stake if the seceding state restricts trade and capital movements with the rump state. Moreover, by introducing its own currency and its own internal regulations, the seceding state may raise the cost of information and transaction in cross-border business.⁹ Again, these diseconomies do not only affect the rump state but also the seceding state. Thus, they will be taken

⁷ While the transaction cost will be low, there may, however, be strategic problems unless the polluter-pays principle is upheld. Thus, international rules for secession ought to contain this principle.

⁸ The most notable exception is Tullock (1969).

⁹ See the models of Casella (1992), Alesina, Spolaore (1997) and Casella, Feinstein (2002).

into account, and both successor states have a strong incentive to avoid them, if this is efficient. Again, the smaller states are more interested in free trade, capital movements, predictable exchange rates and regulatory approximation than the larger states are. A small country is more dependent on imports, and since it cannot affect world market prices, its “optimum tariff” is zero. For example, trade and capital movements are much freer in Singapore than in Malaysia from which it seceded in 1965. While the maintenance of free trade and capital movements is clearly efficient, a common currency and common regulations may not because preferences may differ. Such differences may be precisely the cause and justification of the secession.

3.2.4. *Distributional spillovers*

In the majority of cases, the seceding state has a higher per-capita income than the rest. This is no coincidence. The most prosperous regions are net contributors. They subsidize the other regions through the tax and transfer system. Thus, they develop a strong interest in secession.¹⁰ For instance, the break-up of Yugoslavia began with the secession of Slovenia and Croatia; in Western Europe Flanders and Catalonia are good examples; and the Scottish independence movement received strong popular support only after large oil and gas fields were found in Scottish waters. Collier and Hoeffler (2006) show that, in a sample of 47 civil wars in the period 1960-99, the probability of a secession war was significantly higher if oil and other natural resources accounted for a large share of the country’s exports and if the population was large.¹¹

If the more prosperous region secedes, the rest of the country is negatively affected because it receives a smaller amount of transfers. As median income in the rump state is lower than median income in the seceding state, the secession alters the distributive position of the upper middle class in the rump state from net recipient to net contributor.

Many authors assume that the reduction of interregional transfers which secession is likely to bring about has to be criticized. However, the right of secession does not stop interregional redistribution. It merely limits it. The right of secession will not be used unless the interregional transfers exceed the benefits of belonging to the larger state. Thus, the right of secession merely limits redistribution to the gain from cooperation. Is this unreasonable?

To the extent to which the interregional transfers were voluntary, they are likely to be continued in the form of development aid.

If the secession is motivated by ethnic differences, the successor states are ethnically more homogeneous than the predecessor state has been. Migration, i.e., self-selection, will add to ethnic homogeneity (Tiebout 1956). In a more homogeneous population, the bonds of solidarity are stronger. People are more willing to give and help. A multivariate cross-section analysis for 22 OECD countries in 1990-97 has shown that social expenditure as a share of GDP is positively affected by ethno-

¹⁰ See the models of Buchanan, Faith (1987), Feinstein (1992), Bolton, Roland (1997) and Lülkesmann (2002).

¹¹ As Sorens (2008) shows, the size of the population of the predecessor state also has a significantly positive effect on the vote share of separatist parties.

linguistic homogeneity (Vaubel 2000, Table 4). The effect is significant at the 10 per cent level. Secession may permit more redistribution.

David Miller (1998: 74f.) fears that the seceding state may be benefitting from public infrastructure that has been financed more than proportionately by the taxpayers of the rump state. However, since the seceding region tends to be more prosperous, it is more likely to have financed infrastructure in the rest of the country than the reverse. Alternatively, he warns that the rump state may be unable to survive. In which western industrial country would one region's secession cause a famine in the others?

3.2.5. *Political spillovers*

History leaves no doubt that federal states tend to centralise.¹² A major cause of this tendency is that politicians and bureaucrats aim to increase their power by establishing tax and regulatory cartels. Moreover, bureaucrats and organised interest groups try to escape the attention of voters by shifting political decision making away from the local or provincial level to the central government or international organisations. At present, the share of central government expenditure in total government expenditure is lowest in Canada. This is because Quebec is powerful enough to prevent centralisation. Thus, Quebec confers an external benefit on the citizens of the other Canadian provinces. If Quebec left, it would cause a negative spillover.

The UK is Europe's Quebec. If it left the European Union, the dynamics of ever closer union would accelerate. However, recent European experience shows that if one or more members are opposed to a centralising move and cannot be outvoted, the others may do it on their own. The Euro, the European Stability Mechanism, Banking Union, the Financial Transaction Tax and Schengen are cases in point. To this extent, British withdrawal from the EU would not make a difference for the political integration of the other EU countries.

Each secession strengthens the competition among governments. By putting the politicians and bureaucrats of different countries under competitive pressure, secession improves their performance. They grant more freedom to their citizens, and they are more efficient and innovative. This insight goes back to David Hume, Charles Montesquieu and Immanuel Kant.¹³ With regard to democracy and the protection of minorities, however, Lord Acton (1877/1985: 21, 13) has made this point most forcefully:

“If the distribution of power among the several parts of the state is the most efficient restraint of monarchy, the distribution of power *among several states* is the best check on democracy ... It is the protectorate of minorities and the consecration of self-government ... It is bad to be oppressed by a minority but it is worse to be oppressed by a majority.”

¹² For the empirical evidence see Popitz (1927), Pommerehne (1977), Krane (1988) and Vaubel (1996, 2009). The political economy of centralisation is the topic of Vaubel (1994).

¹³ For a history of thought on intergovernmental competition see Vaubel (2008).

Competition among democratic governments limits the burden of taxation and regulation because people have more alternatives (“exit”) and more scope for comparison (“yardstick competition”). An analysis of 125 civil wars by Sambanis (2000, Table 6) shows that the democracy index “Polity 98” improves significantly after secessions and partitions.

I conclude from these theoretical considerations and the empirical evidence that the spillover effects of secession on others are on balance more likely to be positive than negative. In western democracies, the expected value of secession is positive, and the risks are not too large. If the right of secession is desirable, how can it be implemented? This raises a host of issues related to Political Economy.

4. The Political Economy of Secession

The Supreme Court of Canada (1998) has affirmed the right of secession but only under the condition that all other provinces agree to the secession. As in a divorce, both sides have to find agreement on how the common assets and liabilities are to be shared. From a public choice view, this is not an efficient procedure. The required agreement should not be about each specific secession but about a constitutional right of unilateral secession. For it is easier to agree on rules at the constitutional level, behind a veil of uncertainty about how each person will be affected, than in each specific case of attempted secession.

In a divorce, husband and wife negotiate in the shadow of the law. If they fail to agree the decision will be taken by an impartial arbiter, the judge. Can a similar procedure be found for secessions – as an alternative to the constitutional right of unilateral secession?

The rules of secession may be agreed and enforced at the international level.¹⁴ An international framework may contain the condition that the seceding state or province is obliged to respect minorities and maintain free trade and capital movements.¹⁵ It may also contain rules on how the country’s assets and liabilities are to be divided. Yet there is a crucial difference: in the case of secession, there is no impartial arbiter because international organisations have a vested interest in centralisation. They are biased against secession.

There are two reasons for this. First, the bureaucrats in international organisations expand their power and prestige by preaching the virtues of political centralisation. Second, the representatives of the member states are representatives of the majorities in their countries. Hechter (1992: 278) has made this point:

“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”.

¹⁴ This has been suggested by Bucheit (1978: 245).

¹⁵ See, e.g., Boykin (1998: 66): „The secessionists must, first, be able to establish a viable political order, and second, protect private property and the market”.

The United Nations do not recognize the right of secession. A seceding state usually ceases to be a member. It has to file an application if it wishes to become a member.

The Treaty on European Union (in Art. 50) explicitly mentions the possibility of leaving the EU after a period of notice of two years but the EU institutions do everything they can to discourage secession not only of but also within member states.

In Scotland and Catalonia referenda on independence are to take place before the end of 2014. Responding to these plans, José Manuel Barroso, President of the EU Commission, declared in November 2012 that “a region which secedes from a member state, automatically ceases to be part of the European Union” (Die Presse, 17 November 2012, my re-translation). He repeated this in a letter to the House of Lords in December 2012. Barroso’s predecessor as president of the Commission, Romano Prodi, had said the same in response to an MEP’s question in 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” (2004 OJ C 84E/ 422).

Viviane Reding, Commissioner in charge of Justice and Vice-President of the Commission, wrote a letter to the Spanish government insisting that “Catalonia, if it seceded from Spain, could not remain in the European Union as a separate member” (dpa, eu-info.de on 30 October 2012, citing the Spanish newspaper “El Pais”, my translation). Herman van Rompuy, President of the EU Council, said the same about Scotland:

“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” (The Observer, 3 November 2012).

Martin Schulz, President of the EU Parliament, expressed concern as well:

“I am very worried about divisive tendencies due to separatist movements in the member states – especially at a time of crisis” (Basler Zeitung, 17 October 2012, my translation).

Finally, Elmar Brok, chairman of the EU Parliament’s committee on foreign affairs, calls regional disintegration “poison to Europe” (ibid.).

The legal position taken by Barroso, Reding and van Rompuy¹⁶ has no basis in the European treaties. Nor is there a precedent in EU law. Nor has this question ever been settled in any UN agreement or Vienna Convention.¹⁷ There are merely practices, and they vary among international organisations.

¹⁶ By the end of February 2013, five EU member states, among them Her Majesty’s Government (2013), had declared support for this legal position.

¹⁷ Art. 34 (1) of the Vienna Convention states that when a part of a state separates to form a state, any treaty in force at the time continues in force for both states. However, according to Art. 4, this is “without prejudice to the rules concerning acquisition of membership” in an international organisation. Art. 34 (1) is also inapplicable if “it would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation”. Crawford and Boyle (2013: 93) suggest that this might be the case if Scotland seceded from the UK. They do not substantiate this surprising claim. The Vienna Convention has been in force since 1996 but it has not been ratified by the UK and Spain.

The UN almost always demands a new application for membership from the seceding state. However, there is an exception: when Syria seceded from the United Arab Republic (the union with Egypt) in 1961, both Egypt and Syria were automatically counted as UN members. But sometimes, as in the case of Serbia-Montenegro, not even the rump state was automatically recognised as a member.

The International Monetary Fund and the World Bank kept the Yugoslav successor states, the Czech Republic and Slovakia as members under certain conditions which happened to be satisfied¹⁸. The World Meteorological Organization (WMO), the Universal Postal Union (UPU) and the International Atomic Energy Organization (IAEO) kept them without any conditions.¹⁹

The World Intellectual Property Organization (WIPO) asked the former Soviet Republics Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan to confirm their membership.²⁰

5. Implementing secession

5.1. Secession from a member state

When a part of a state unilaterally secedes from the rest or if two or more parts of a state agree to separate, two internally consistent solutions exist with regard to succession. Either 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 predecessor state. Or each of the parts succeeds in the interest of maintaining law and order. Subsequently, of course, each successor state is free to withdraw. The UN practice of usually recognizing one of the parts – the larger one – is unsatisfactory from a legal and economic point of view. The explanation is probably political: the members of the UN Assembly and Security Council represent the majority of people in their home countries.

For good reasons, Art. 34 of the Vienna Convention opts for the second solution: treaties in force at the time of secession remain in force in all successor states. How would this second solution work if membership in international organisations were not excluded (by Art. 4) from this principle? If, say, Catalonia seceded from Spain or Scotland from the UK, both would remain members of the European Union. The seceding state and the rump state would have to negotiate an agreement on how they wished to share the rights and obligations of the predecessor state. If they did not meet their joint obligations, both could be expelled by the international organisation. If they did not agree on how to share their rights – for example, how they wanted to be represented in the European institutions, possibly on a rotating basis, they would be unable to exercise these rights. Subsequently, of course, they would be free to renegotiate their rights and obligations with the other member states. As all this is reasonable and feasible, all member states of the EU (including Spain and the UK) ought to join the Vienna Convention. The European Union itself cannot ratify the Vienna Convention because it is not a state but an international organisation.

¹⁸ Bühler (2001: 205) and Zimmermann (2000: 632-35).

¹⁹ Bühler (2001: 208, 262).

²⁰ Bühler (2001: 180).

For all practical purposes, the secession of a part of a state may only be legitimised 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. In the first referendum, people would be asked whether their constituency ought to secede. In the second referendum, when it is known which constituencies would secede, people would be asked whether their constituency ought to secede together with the other constituencies in which a majority wants to secede. This two-step procedure has two advantages. First, in the final vote, each citizen would know what the seceding region would look like. Second, 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 is likely to 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 of holding a referendum on secession but that the secession itself must be negotiated, is wiser than may appear at first glance.

Negotiations with the seceding part ought to be conducted by the other provinces – not by the central government. This is because the anti-secession bias is more pronounced among the national politicians, who would lose power, than among the other regional politicians who may want to be able to secede as well, if necessary.

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 reflecting the preferences of the people.

5.2. *Withdrawal of a member state*

In February 2013, David Cameron announced that, if reelected, he would hold a referendum on British EU-membership in the first half of the next parliament. According to Art. 50 TEU,

“any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement ... shall be concluded by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.”

Art. 50 TEU further refers to the procedure of Art. 218 (3) TFEU:

“The Commission ... shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or head of the Union’s negotiating team.”

Thus, the British government would not negotiate with the Commission but with a representative or a negotiating team of the Council, i.e., with the other governments. The other governments would be less biased against secession than the Commission (as has been explained). However, the agreement would require the assent of the European Parliament. This would be the main stumbling block.

If Council and Parliament could not agree or if the Council could not muster a qualified majority or if the UK could not agree with the EU, Art. 50 (3) TEU would apply:

“The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification ... unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.”

Thus, each side could terminate the negotiations after two years or later.²¹ If one of them did, the separation would take effect.

Before accepting the EU offer, the British government could submit it to another referendum. Indeed, in the course of the negotiations, it could hold as many consultative referenda as it wished. They might strengthen its bargaining position – especially during the first two years when the EU would be unable to terminate the negotiations.

Would the UK be entitled to withdraw its notification of withdrawal if the EU offer turned out to be unattractive? According to Art. 50 (3) TEU, the EU may decide that the notification takes effect after two years or later. However, if both sides agree, the negotiations may go on indefinitely as if the notification had been withdrawn. Since the European Union is unlikely to be interested in ousting the UK, this game could continue forever. However, if after all, the UK preferred to stay, its bargaining position would now be weaker than before the notification.

Art. 50 TEU is defective because it does not secure the freedom of trade and capital movements between the EU and the withdrawing state. Compare this with the proposal of the European Constitutional Group (2006, Part I, Art. 9 (5)):

“... the Union and the seceding state shall maintain in force the free exchange of goods, services, capital and the free movement of people unless the seceding state introduces a policy against the four freedoms”.

However, eight rounds of trade liberalisation under the GATT and the prospect of a North Atlantic Free Trade Area have reduced the problem, improving the bargaining position of any government that might be considering withdrawal from the EU.

²¹ The period of notice of two years has been introduced by the Treaty of Lisbon (2009). Previous European treaties did not contain a period of notice. The possibility of withdrawal was not even mentioned. But it is a general principle of the *ius gentium* that each signatory to an international treaty may withdraw from it.

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