The Veil, The Scales And The Sword: Moral And Legal Argument On Secession

Abstract

To build legitimate and successful secession claims and strategies, both moral and legal arguments are important. As regards moral reasoning, a nuanced primary theory of secession with remedial features is presented. With respect to the legal field, the remedial logic of general international law is distinguished from that of constitutional law. Constitutionalizing a qualified primary right to secede is then defended with the aim of fostering multinational accommodation and, ultimately, consensual secession. Although the legal regulation of secession is often partial and defective, legality must be taken seriously in liberal-democratic settings.

Legality and Morality as Sources of Legitimacy

"Without conformity with the Constitution there is no legitimacy to be claimed", argued the Spanish Constitutional Court in the seminal Judgement 259/2015 concerning the 2015 Declaration on the start of the Catalan process of independence. Although legality is a main source of legitimacy in liberal democracy, legitimacy is a broader notion encompassing other ideas such as morality, democracy, charisma, tradition, obedience and effectiveness. Yet the Court insisted that "under a democratic conception of power there is no legitimacy beyond that founded on the Constitution", since this fundamental law preserves the popular will expressed by the sovereign, constituent people (clearly to be understood here as the Spanish people).

In contrast to this constitutional fundamentalism grounded in demotic monism, distinct societies may live under the same constitution and form legitimate democratic majorities, as contended by the Supreme Court of Canada in the renowned Quebec Secession Reference of 1998. Constitutional law should thus open channels to negotiate constitutional change when a clear democratic majority expresses a clear desire to secede. Otherwise, a strict observance of the current constitution could become a straightjacket for minority nations such as Catalonia and Quebec.

While codified and rigid constitutions may secure internal self-determination, territorial autonomy and federalism, they often raise practically unsurmountable legal barriers against external self-determination and secession (and even referendums on these latter matters). A harmonic interpretation of this constitutional architecture (legality) and multinational fairness (morality) could require qualified pro-secession majorities within the minority nation rather than the whole state. Essentially, a constitutional right to secede is a special type of constitutional amending procedure.

Moral Theories of Secession

Since laws concerning secession are often biased and deficient, moral argument is especially important. Moral theories of secession can be classified as follows:

1. *Remedial theories* conceive the right to secede as a remedy against injustices.
2. *Primary theories* defend a non-remedial right to secede.

   Ascriptive theories allocate this primary right to special groups such as national communities or federated units.

   Choice theories grant this primary right to any territorially concentrated group of people.

The moral debate on secession focuses excessively on these pure types. Conversely, more eclectic, complex and attenuated theories should be contemplated. As I argue in *Morality and Legality of Secession*, the more 'just' the state treatment of minority nations is, the greater the requisites to secede ought to be. In contrast to remedial right only theories, making secession difficult is more reasonable than making it impossible, especially in liberal-democratic contexts. Unlike most primary right theories, I contend that the right to secede should be qualified when the seceding group suffers no flagrant injustices. This novel approach to secession is therefore more gradual, nuanced and adaptable than others. Morality, like legitimacy, is a matter of degree.

I call this approach *Justice as multinational fairness* because it follows a contract methodology of Rawlsian inspiration in which nations under a veil of ignorance are hypothetically convened to create a multinational state. These nations would agree a hypothetical multinational contract whose second article would grant a primary right to secede to minority nations. This article would nevertheless subject this right to several procedural, substantive and material requisites encapsulated in the following principles:

1. Principle of democracy
2. Principle of agreement and negotiation
3. Principle of need for liberal nationalism
4. Principle of respect for human rights and protection of minorities

5. Principle of territoriality
6. Principle of viability and compensation
7. Principle of avoiding serious damage to third parties

Although these principles attempt to regulate secession in liberal-democratic settings, they offer some guidance to deal with non-ideal scenarios. In this vein, Justice as multinational fairness introduces remedial features. In particular, requisites for secession disappear or diminish if the parent state has committed or is committing an injustice against the seceding territory such as military occupation, economic exploitation, and serious violations of human rights and the right to internal self-determination.

International Law and Constitutional Law

Colonialism and forceful annexation are injustices that generate an international right to secede under the external dimension of self-determination of peoples. Since there is little likelihood of a primary right to secede being granted under general international law, this law should recognize a right to external self-determination as a remedy for serious and selective violations of human rights and for systematic violations of internal self-determination.

Instead of institutionalizing secession under international law as many philosophers have envisioned, Justice as multinational fairness is intended to be fully institutionalized under the constitutional law and practice of liberal democracies. Given that these democracies have proven capable of establishing *cracies* from reflection and choice, they should allow the formation and transformation of the *demos* through deliberation and vote. Although contemporary constitutions do not generally recognize any right to secede, there are several historical and current constitutional acts enshrining such a right and an interesting collection of constitutional rules and doctrines on secession referendums.

We should note that the Canadian Supreme Court held similar views in the Quebec Secession Reference. Despite considering Quebec as a distinct people, the Court noted that international law operates with a remedial logic and set out why Quebec suffered no serious injustices that could justify a right to external self-determination. By contrast, the Court embraced a moderate primary approach when interpreting constitutional law. Rather than a unilateral right to secede, the Court held that, after a clear democratic expression in favour of secession, a constitutional obligation to negotiate constitutional change would emerge based on the principles of democracy, protection of minorities and (multinational) federalism.

This reference is, therefore, an influential instance of domesticating secession through constitutionalizing a primary right to self-determination, which includes secession among other legitimate constitutional options. In general, instead of making secession impossible, high courts and political bodies should make it difficult by imposing reasonable requirements. Since liberal democracies cannot survive through coercion alone, domesticating secession becomes a strategy of persuasion and (re)conciliation. In this line, a properly qualified constitutional right to secede may well foster:

1. Recognition and accommodation of national pluralism
2. Respect for the status and powers of minority nations
3. Cooperation and compromise between majority and minority nations
4. Multinational federalism, integration and stability
5. New forms of shared sovereignty and constituent power
6. Negotiated and consensual secession

Renewed Meanings of Legal Barriers to Secede

Most states tend to establish legal obstacles to secession, which can be classified depending on how difficult they make secession in legal terms:

1. Express eternity clause
2. Implicit eternity clause
3. Constitutional revision to secede
4. Constitutional revision to hold a referendum
5. Legal requisites to hold a referendum
6. Qualified constitutional right to secede
7. Legislative requisites to secede

As in the case of many others, the Constitution of Spain does not expressly forbid secession but a prohibition is deduced from the constitutional principles of national sovereignty, indissoluble unity and territorial integrity (Articles 1, 2 and 8). A first problem is that this prohibition is conceived as a categorical rule rather than a principle to be balanced against others. A second problem is that the Spanish Constitutional Court requires the especially rigid constitutional revision to secede as well as for a referendum to be called on this matter. Yet, in general, if both unity and secession are taken seriously, new legitimate meanings can be given to constitutional barriers to secede:

1. To prevent undue threats and vain secessions
2. To require the expression of a genuine constituent people rather than simply of a secessionist leadership or unreflecting secessionist masses
3. To give time for any potential unionist majority to emerge
4. To wait for negotiation and agreement between the seceding unit and the parent state
5. To promote deliberation among factions
6. To prove the presence of a sovereign, cohesive and enduring people
7. To protect individuals and minorities
8. To guarantee, overall, the fulfilment of the principles of Justice as multinational fairness

In liberal-democratic settings, only after a long path has been followed seeking negotiated and constitutional ways may unilateral democratic routes legitimately overcome constitutional barriers. Unilateral secession requires a seceding nation to emerge as a constituent people. A long, deep and broad public deliberation, participation and mobilization is necessary for the old constitution to retreat and give way to the new constitutional order. A constituent phase characterized by extended, serious and intense popular involvement shall rise above constituted rules and authorities.

Legality as Feasibility and Responsibility

An appropriate democratic mandate should precede the legal break, particularly in liberal democracy. In other words, legitimacy should lead to constitutional transformation, rather than the other way round. Yet greater democratic legitimacy tends to be necessary when legality is missing or opposed. Indeed, a democratic mandate sought unlawfully needs to be more intense and extended over time than one sought lawfully. What is more, illegal action may be problematic in terms of feasibility and responsibility. While feasibility is more concerned with the likelihood of achieving a particular political objective, responsibility rejects certain goals and strategies that imply excessive costs or risks for justice and social order.

Let us return to the Catalan case to illustrate these thoughts. Since the Self-Determination Referendum Act that called the referendum on independence of 1 October 2017 was unconstitutional, this statute was immediately suspended and its implementation banned. This illegal action impeded proper public deliberation. Most unionist parties and voters did not participate. There was also a lack of legal and democratic checks. Internal and external recognition and legitimacy were deficient. Unlawfulness, together with the rest of these issues, paved the way for central coercion. All these ills reinforced one another forming a vicious circle.

The referendum was held nevertheless and a declaration of independence was made afterwards. Unsurprisingly, the *prima facie* legitimacy of the referendum soon eroded, the declaration was not implemented, most secessionist leaders are, at the

time of writing, in prison or abroad, and hasty unilateral secession seems to be losing considerable support both among politicians and citizens in Catalonia. Once again, the lesson is clear: both legality and morality are significant sources of legitimacy. While morality is more about ultimate ends, lawfulness has more to do with feasibility and responsibility, especially in stable liberal democracies. Even if the secessionists have strong arguments to claim a moral right to secede, the creation of states is rarely, if ever, determined by morality.

Epilogue

In liberal-democratic contexts, moral and legal argument is and ought to be important from both internal and external perspectives. Externally, since international law neither authorizes nor prohibits secession, much depends on seceding entities obtaining international recognition as new states. If international recognition keeps evolving into a constitutive, collective and principled practice as it should, normative claims will gain relevance. Since the rule of law is a founding principle, European Union law seems more concerned than general international law about the internal legality of secession. This principle should indeed be praised in a society of liberal-democratic states. Hence, future works may address whether this supranational integration makes and should make secession more difficult by elevating legality over morality in questions of secession. It may be the case that where democracy and liberalism have a greater degree of realization, legality puts moral argument somewhat into the shade.

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