



NATIONAL RESEARCH UNIVERSITY
HIGHER SCHOOL OF ECONOMICS

Rodion Y. Belkovich

SECESSION VERSUS SELF- DETERMINATION: SOME CRITICAL REMARKS ON CONTEMPORARY THEORIES

BASIC RESEARCH PROGRAM

WORKING PAPERS

SERIES: LAW

WP BRP 50/LAW/2015

Rodion Y. Belkovich¹

SECESSION VERSUS SELF-DETERMINATION: SOME CRITICAL REMARKS ON CONTEMPORARY THEORIES*

From the beginning of the 1980s the problem of secession has become one of the most discussed topics among the political theory scholars in Western academia. Two main groups of theories which accept secession as a legitimate and morally permissible form of political action have emerged since then: remedial (or just-cause) theories and “liberal” theories. The remedial theories regard secession as a remedy which can be used against the injustices a group suffers within a state. The liberal theories grant any territorially organised group a right to secede and form a new state if the latter complies with the requirements we usually demand of a contemporary democratic regime. What is common for both theories is their open acclaim of the right of self-determination. The study seeks to show that a theory of secession based on a self-determination principle must adopt a substantially wider understanding of secession than both of these theories can offer – a one which does not require a creation of a new state as a result.

JEL Classification: Z19.

Keywords: secession, self-determination, sovereignty, remedial theories, independence

¹ National Research University Higher School of Economics. Department of Legal Theory and History. Associate Professor. E-mail: rbelkovich@hse.ru

* This study (research grant No 14-01-0084) was supported by The National Research University Higher School of Economics' Academic Fund Program in 2014/2015

This Working Paper is an output of a research project implemented at the National Research University Higher School of Economics (HSE). Any opinions or claims contained in this Working Paper do not necessarily reflect the views of HSE.

From the beginning of the 1980s the problem of secession has become one of the most discussed topics among the political theory scholars in Western academia. Secessionist conflicts the world has seen since then, continue to fuel the scholarly debates. Three main types of theories of secession have gained prominence. The first one is nothing more than a theoretically articulated contempt any state has of separatist movements – any secession is forbidden as it breaches the obligation of obedience which citizens have towards their state and poses a threat to the territorial integrity of a state.² This point of view is of the least interest for the purpose of this study as it does not purport (at least expressly) to promote the principle of self-determination. The second one can be defined as a remedial or “just-cause” theory, which regards secession as a remedy which can be used against the injustices a group suffers within a state.³ The third type is what can be called a “liberal” theory, which grants any territorially organised group a right to secede and form a new state if the latter complies with the requirements we usually demand of a contemporary democratic regime.⁴

The two latter theories more or less openly proclaim the existence of a right of self-determination. A remedial theory is more restrictive in a sense that it regards the existing state (at least *prima facie*) as a legitimate form which self-determination of the people has already taken. Therefore the territorial integrity of the state must be respected unless it fails to act justly towards some group of citizens (usually a minority). In that case the state loses its legitimacy as it does not represent the group anymore and the group has a right to change its political affinities and form a new state.

A liberal theory stipulates certain conditions for a secession to be legitimate (establishment of a democratic regime, protection of human rights within a new state, economic viability of the latter), but generally it holds that citizens retain their right of self-determination even within a just state. The right of self-determination therefore appears to be a main argument in favour of secession for both theories.

This article argues that both theories wrongfully address the concept of self-determination through restrictions they impose on the groups willing to secede. Secession thus circumscribed should not be regarded as a form of self-determination at all.

² For an overview of this “legalistic” approach see MG Kohen (ed.) 2006, *Secession. International law perspectives*, Cambridge University Press.

³ See Brilmayer, L 1991, „Secession and self-determination: a territorial interpretation”, *Yale Journal of International Law*, vol. 16, no. 1, pp. 177-202; Buchanan, A 1991, *Secession. The morality of political divorce from Fort Sumter to Lithuania and Quebec*, Westview Press; Christiano, TA 2006, „Democratic theory of territory and some puzzles about global democracy”, *Journal of Social Philosophy*, vol. 37, no. 1, pp. 81-107, and others.

⁴ See Beran, H 1984, „A liberal theory of secession”, *Political Studies*, vol. 32, pp. 21-31; Catala, A 2013, „Remedial theories of secession and territorial justification”, *Journal of Social Philosophy*, vol. 44, no. 1, pp. 74-94; Wellman, CH 2005, *A theory of secession*, Cambridge University Press, and others.

We shall commence with remedial theories which stress the priority of territorial claims of a just state over the right of self-determination. The authors who adhere to this view regard the state as the only effective institution capable of promoting justice in human society. A just state is a state which (i) is just in a sense that it protects human rights (including the rights of minorities); (ii) is just in a sense that it exercises its control legitimately or, in other words, which rules on behalf of the people. In a state which fulfils these criteria the secession should be regarded as illegal and not morally permissible. Therefore, the only possible reason for secession might be a severe injustice a group suffers within a state with no effective intra-state mechanisms to remedy this injustice. In this case the state apparatus loses its authority, and its former subjects become justified in their pursuit of independence. To sum up, there is a “moral presumption in favor of the current territorial boundaries of democratic states”, which “can be defeated only when the alteration of those boundaries is necessary to remedy serious injustice occurring within the democratic state”.⁵

But before we answer the question “when does the state lose its legitimacy and its valid claim to the territory it currently occupies and controls?” we should try to answer the question “when and how exactly does the state obtain its legitimacy and its territorial rights?”. The main problem is not with some specific state which can be democratic enough and engage in a meaningful dialogue with its cultural, ethnic, religious and other minorities. Even if all these criteria were present, it would still not be clear why the state as a concept should be tacitly accepted.

If we agree with the premise the remedial theory puts forward that the legitimacy of the state relies on people’s sovereignty which they delegate to the chosen authorities, then it is of no use to concentrate on the practices the state engages in. The basic test we must perform is not the evaluation of state policies - first we have to check whether we can say beyond any doubt that the state in question is actually founded on the consent of the governed. A band of robbers doesn’t magically turn into the representatives of the people just by the virtue of their effective performance as a state. The government either is based on the consent or it is not.

Here we get into the realm of the problem of political obligation which is too challenging to be discussed in detail here⁶, but what is important is that the existence of the discussion itself

⁵ Christiano, TA, op. cit., p. 82.

⁶ Political obligation is an obligation to obey the law. From the 1970s and onwards a tremendous amount of scholarly works has been written pro et contra the existence of such an obligation. See, for example: Beran, H 1987, *The consent theory of political obligation*, Croom Helm; Gilbert, MA 2006, *Theory of political obligation: membership, commitment, and the bonds of society*, Oxford University Press; Green, L 1988, *The authority of the state*, Clarendon Press; Klosko, G 2005, *Political obligations*, Oxford University Press; Simmons, AJ 1979, *Moral principles and political obligations*, Princeton University Press; Wolff, RP 1970, *In defense of anarchism*, University of California Press.

witnesses to a lack of common agreement on whether there is an obligation to obey the law (and hence the state authority in general). We can conclude that in order to argue convincingly in favour of strictly remedial nature of legitimate secession, one should first take pains to prove the legitimate nature of any existing state. That is why many authors prefer simply to declare their belief in the impossibility of enforcement of justice in a stateless society. But as we remember, the remedial theory requires legitimation of any specific state through the people's consent. Therefore, it does not even matter whether the statements about the justice in a stateless society are true – as long as any *specific* state is not able to show that the population is totally content, we don't have any reasons to acknowledge this specific state as a legitimate institution even if we agree with the premise itself. There are no *abstract* states in existence and therefore it is to no avail to prove the *possibility* of a legitimate state as in practice this possibility discredits all the actual states which will never live up to our expectations.

The remedial theories of secession do not subvert the state, but reinforce it as a concept and as a political phenomenon. They require too much of the secessionist groups and too little of the state. They leave aside the fundamental flaw every state has – the lack of verifiable rationale behind the state's claim to legal and political monopoly over all other social institutions. To be really remedial these theories should be able to show that secession somehow provides remedy for the initial breach of personal borders any state in existence is culpable of.

The “liberal” theories stand in opposition to the remedial ones. They acknowledge a seemingly absolute value of self-determination. But there is a condition that even the most liberal authors usually regard as a necessary one for a secession to be legitimate - an economic viability of a new-born state. A new state should be equipped with enough resources, means of production and a legal system which would guarantee its citizens adequate living standards and provide them with social conditions which would not be detrimental to the protection of human rights. The secession should not also have a devastating effect on the remainder state for the same reasons.⁷

Although these considerations are understandable, they remind of the logic the Southern slave-holders put forward against the abolition of slavery – if the whole economic system which feeds both free and enslaved people is currently based on forced labour, then the immediate abolition will ruin the life of many citizens. It is quite probable that a substantial reduction of size of the basic political units will weaken the productive capacity of humankind in general and lower the living standards. But it is not at all obvious that this loss is unbearable in comparison

⁷ Catala, A, op. cit., p. 79.

with the fruits of independence people gain in the process. As Thomas Paine wrote in the times of War for Independence: “Those who expect to reap the blessings of freedom, must, like men, undergo the fatigues of supporting it”.⁸ It seems that if we agree on self-determination being morally right and the forced obedience being wrong, it is difficult to explain how the economic considerations may alter this scheme of things?

This economic viability requirement is evidently discriminative towards the poorest countries – it is obvious that the secession of Scotland or Texas would leave these entities with a much healthier economic situation than any Indian region were it to secede because of the general economic well-being the United States or the United Kingdom enjoy. But it is quite strange to require of the secessionist group to help their respective state get better off before they can demand their independence from it.

The same somewhat discriminatory logic appears in discussion over the possibility of a peaceful secession. Those reluctant to grant non-remedial right of secession point at the perils a secessionist conflict may bring along. The liberal authors argue that it depends on the general level of political culture the society has achieved. As Amandine Catala puts it: “Though any political transition by definition brings with it some degree of political instability, it seems likely that political transitions in states that have had a *long-standing* democratic tradition and commitment to peace would take place successfully”.⁹ The other side of this logic is that in the states which lack a long-standing democratic tradition and commitment to peace the secession will inevitably have some drastic consequences. This notion might be true, but it raises another question – doesn’t it seem that the minorities *within* such “undemocratic” states are most in need of independence? Otherwise, the ideal pattern of secession we shall strive to achieve in practice will take place in a country, which provides all its citizens with all possible forms of political participation, protects their cultural identities, etc. But it seems to be the least likely country to have a secessionist problem.

The non-remedial versions of secession theory usually propose a plebiscite within a territory about to secede for a separation to take place. But the plebiscite itself is a procedure too much embedded in the logic of repression which secession tries to overcome. It may be true that a majority rule is more democratic than any other principle of government, but it is not clear why we shall approach the problem of self-determination from this democratic perspective. The idea of democracy combined with territorial control is exactly what gives birth to the repression of minorities by forcefully keeping them within the existing borders.

⁸ Paine, T 1878, „The crisis. No.IV“, in The great works of Thomas Paine, D.M. Bennett, p. 54.

⁹ Catala, A, op. cit., p. 79.

The whole majority rule agenda is based on the utilitarian philosophy – the social world must serve the interests of the largest group present. Even when the authors who belong to the “liberal” secessionist tradition speak in favour of unilateral separation, they invoke the same logic. For example, Amadine Catala has mentioned that “...it would be preferable to have ninety percent of the group be happy in the new state, even if ten percent might initially be unhappy with secession, than to have ninety percent of the same group be unhappy in the old state in order to preserve the happiness of the ten percent that are against secession”.¹⁰ Although this statement has been made in favour of secession, it is based on an assumption that all the social processes require the satisfaction of the most numerous group. It is not clear however why one should adopt this method of decision-making. The mere fact of individual existence makes it impossible to combine the idea of self-determination with belief in the right of others (in virtue of being numerous) to determine someone else’s future.

One of the conditions which both remedial and non-remedial theories generally consider necessary is territorial concentration of the group wishing to secede. The authors even most generous towards the secessionist sentiments are not willing to offer political independence for those minorities, which do not constitute a recognisable territorial entity.¹¹ This is due to technical impossibility of dividing the territory of the state in a patchwork manner. The secession loses its appeal to a significant amount of repressed minorities – essentially to all those minorities, which do not constitute an ethnic group. Secession thus becomes an instrument of transforming “stateless” groups (existing within a state but not actually represented by it) into political nations.

As Christopher Wellman puts it: “It is no mere historical accident that states are territorially defined; they are territorial because this is the only way for them to perform their functions”.¹² While it is certainly true that the state requires a territory to be effective as a state, this statement does not prove that this territorial mode of social interaction is a universal and necessary one. Before we try to prove that the states may or may not be able to perform “their” functions, we should first prove that these functions belong to the state. Moreover, it would be naïve to assert that the only order known to a mankind is an order provided by the state – the whole mediaeval period has known a pluralistic system of legal and political relationships which has been destroyed by the growth of the nation-states in XVI-XVIII centuries.¹³

¹⁰ Ibid., p. 92.

¹¹ Ibid.

¹² Wellman, CH 2005, p. 14.

¹³ C Tilly (ed.) 1975, *The formation of national states in western Europe*, Princeton University Press.

This tells us a lot about the nature of secession as defined by contemporary theories – essentially it requires the circumstances most comfortable for a birth of a new state. Therefore the secession is not a radical measure against the oppression, it does not question the idea of a total control over a land by a sovereign body politic, it is only a shift in political realm which leaves the root of the problem intact. When we regard secession as a most explicit form of self-determination, we refuse to accept the possibility of an individual or group action which transcends the idea of territoriality and the monopoly of the state. It is difficult then to talk of self-determination as the only conceivable form this process may take has already been determined.

The real self-determination, it seems, might not only change the form of political existence for a group, but also its substance. Self-determination which takes place within the existing framework of power relationships could be plausibly better called “choice” in a sense that we are allowed only to choose between the options which fit into the contemporary concept of authority. This “choice model” is what makes it possible to discuss the requirements for a secession to be legitimate. As I have tried to show above, all these requirements presuppose the creation of a new state as an aim of a separatist group. More specifically, the potential state must be democratic and it must guarantee adequate human rights protection. Therefore, the secessionists are expected to be persons of certain political beliefs – otherwise their cause will not be supported by even the most liberal authors. The reliance on a number of concepts such as human rights, democracy, etc., automatically forces the authors to put their statements into the context of these values as if the latter were not a part of a world order which creates the problems a secession is trying to solve.

The concept of secession as used by contemporary authors is thus connected with the principle of self-determination in a very restricted way – the main question within this paradigm is “when is it allowed to create a new state?”. That is why even those political theorists, who try to break with legal approach to secession as to a matter of international law, become inevitably bound with this approach as they tacitly conform with the same ethos.

If a theory of secession professes self-determination as its foundation, it must break away with all the theoretical and practical restrictions which are not derived from the empirical fact of individual human conscience. So, for example, we can avow our belief in self-determination and at the same time refuse to accept the human rights concept altogether. It might be argued that self-determination is also a right and therefore we cannot simultaneously accept and deny the existence of the same object. But the phrase “right of self-determination” is nothing more than a speech habit – we can certainly leave the “right” part aside because I do not need a “right” to

have individual conscience, I simply have it. Individual conscience is what makes self-determination a reality. In other words, I do not need a *concept* of self-determination to resist someone's attempts to forcefully establish power relationships.

To speak of rights (even of natural rights) is to resort to some external agent for their protection and provision (because otherwise it is not necessary to speak about them at all), but to look for protection in case of self-determination is to engage in self-contradiction. Self-determination cannot be guaranteed by some third party because the nature of the process requires (at least conceptually) alienation from the circumstances an individual is thrown into. This process makes absurd any attempts to delineate the possible results of self-determination – and one of the possible outcomes may very well be breaking away with the state as a form of political organisation.

The paradox we face in the case of secession is that despite the almost universal refusal of the existing states to grant their citizens a right to unilaterally redraw the borders, secession as a concept is what reinforces the states and their practices. By contesting the existing boundaries it strengthens the system which creates this boundaries. It happens because every state is in a sense a result of secession – there is not and there has not ever been any “natural” map of the world, and therefore any borders represent the current stage of permanent political struggle. The only reason why contemporary states and international organisations generally abominate secession is because it leads to the shifts of power between the elites and challenges the *status quo*. Therefore a theory based on a self-determination principle must adopt a substantially wider understanding of secession – a one which at least does not require a creation of a new state as a result.

Belkovich R.Yu.

National Research University Higher School of Economics (Moscow, Russia).
Department of Legal Theory and History. Associate Professor.

E-mail: rbelkovich@hse.ru.

Any opinions or claims contained in this Working Paper do not necessarily reflect the views of HSE.

© Belkovich, 2015