BAR Treffen 31.01.05
Florentina Bodnari Version 27.01.05

Post-Doc Research Project

Secession right – an anti-federal principle? Comparative study of federal states and the EU

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Introduction

It could appear strange to talk about secession in the framework of the EU now, when the enlargements are so successful and the EU has such a strong magnetic effect on other countries willing to adhere. However, with the introduction of the Art. I-59 (I-60 now)[1] "Voluntary withdrawal from the Union" in the *Treaty establishing a Constitution for Europe*[2], this subject became more and more divisive and needs to be discussed. Another reason to discuss the subject of secession is actually the advanced level of integration in the EU, since more the integration process advances, more there are closer political and economic ties among the member states of the EU, more the states feel that they transfer a large part of sovereignty to the EU and are afraid to never be able to get it back. The increase of the areas, where the qualified majority rule is introduced, threatens the member states as well. They are reticent in engaging themselves too much in the integration process and this influences the effectiveness of the EU, of course. On the other hand, if a state has the right to withdraw from the Union when it wants, it will not have any problems with giving as much sovereignty as it is needed to the EU in order to contribute to the integration of the Union. If we see the EU as

[1] From the 29th of October 2004, when the Constitutional-Treaty was signed in Rome by all the 25 member states of the EU, the Art. I-59 became Art. I-60.

[2] Henceforth: Constitutional-Treaty.

just an international organisation based on treaties, then there is no problem that the secession right is included, since in an international organisation or in a confederation, the member states may leave it using the notice of withdrawal, however not unilaterally. The problem is that the EU is more than a confederation and less than a federal state, it is a *Bund* or a federal polity, which Treaties have a constitutional character. Even in this case, one could bring into discussion the *sui generis* character of the EU and allow a *sui generis* secession right, but the new *Treaty establishing a Constitution for Europe* is a Constitutional-Treaty, a legal document that establishes a *Bund* and it is well known that a *Bund* as well as a federal state do not allow the secession right in principle. Duration excludes secession. Here comes the interest for this research. This research has the aim to find out whether the secession right is an anti-federal principle or not. It examines the secession right within federal states and the EU from a comparative perspective. The secession right in the Constitutional-Treaty might fundamentally change the character of the EU. Now, when the EU is on the way to achieve its political supranational integration along with the successful economic one, such a clause might hinder its development. Is actually the introduction of the Art. I-60 just the legalisation of a possibility which existed previously or is it something new? Is it compatible with the constitutional character of the EU? Will this article be used as a political tool by member states to get what they want? The **research question** is: What kind of polity will the EU be if the Constitutional-Treaty including the secession right is ratified?

In my PhD thesis, I took the secession right as one of the fundamental criteria to differentiate between a confederation, a federal state (= federation) and a federal polity (= *Bund*). The others are: sovereignty, legal document and citizenship. In a confederation, the states sign a treaty, but keep their sovereignty. They are allowed to withdraw, just as it is the case in an international organisation, however not unilaterally. In a federal state, sovereignty is divided between the different levels of government and, therefore, there is no secession right for the entities. In a *Bund*, sovereignty is also divided, but remains open, since the *Bund* is more than a confederation and less than a federal state. However, there is no clear possibility of secession. Because the secession is always possible, the confederation is not a viable political society, while the federal state has the solidity of a state (Beaud, 1999).

There are many publications on the issues of secession, unilateral withdrawal and the right of self-determination. Lawyers and political scientists concentrate mainly on questions such as the right of self-determination on the international level, or the right of secession in international treaties and agreements (Dahlitz, 2003; Brilmayer, 1991/2000; McCorquodale, 2000; Moore, 1998; Horowitz, 1985; Akehurst, 1979). Only a few lawyers wrote about the right of secession in the case of the EC/EU prior to the introduction of the Art. I-60 and it was mainly a "would be" case, rather than a real one, i.e. Joseph H.H. Weiler's article "Alternatives to Withdrawal from an International Organisation: the Case of the European Economic Community" published in 1985 in the *Israel Law Review*; Arved Waltemathe's thesis *Austritt aus der EU. Sind die Mitgliedstaaten noch souverän?* (2000), and Friedemann Götting's thesis *Die Beendigung der Mitgliedschaft in der Europäischen Union* (2000). Philosophers talk about the morality of secession, i.e. Allen Buchanan *Secession. The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (1991). There are also many books on the issue of secession compared in international organisations (Widdows, 1982; Feinberg, 1965), confederations (Fischer, 1957), and federal states (Watts, 1999). The scholars on federalism provide a large spectrum of analysis of such issues from an empirical perspective looking at cases such as Quebec (Turp, 2003; Bayefsky, 2000), or former Soviet Union (Wildhaber, 1995), and former Yugoslavia (Andersen, 1993). Others talk about examples of pure secession within states, but not federal states, e.g. Norway which left

Sweden in 1905[3], or Ireland which left the United Kingdom in 1922[4], or Iceland which left Denmark in 1944[5]. There are also historians, anthropologists, geographers and psychologists who work on the issue of secession. Besides all that, there is almost no article about the right of secession in the EU from the political science perspective and mainly after the introduction of the Art. I-60, besides the very recent article written by the lawyers Bruha and Nowak "Recht auf Austritt aus der Europäischen Union?" (2004). This research has the aim to make a contribution in this field from the area of comparative federalism in political science.

This research will not deal with the right of secession as a subject of international law, when a group secedes from a state and seeks international recognition – the right of self-determination. Most of the scholars assume that the right of self-determination is the only justification for secession. This principle is, however, contrary to the principle of international law, which upholds the territorial integrity of existing states. Neither international legal doctrine nor practice recognises a right to secede, except in the case when populations were subject to European colonial rule to constitute themselves as nation-states, but this process is already finished and, thus, the international law is not helpful any longer (cf. Buchanan, 1998). According to Art. 1 of the two International Covenants on Human Rights, all peoples have the right of self-determination and by virtue of that right they freely determine their political status. Secession and disruption of a state are results of self-determination and are in conflict with another fundamental principle of international law, which is sovereignty, and mainly with the territorial integrity of a state. Sovereignty gives to states the right to preserve their existence within the given territorial borders (Murswiek, 1993: 24). The only case today when secession would be admitted is when there are very serious violations of human rights and undemocratic regimes governing a country. While self-determination refers to people, secession refers to territory. The research will not analyse secession in unitary states, but will rather concentrate only on previous and present federal states. There was only one case of secession within a federal state in the XXth century until the 90s. – Bangladesh (1971). Since 1991 many multinational so-called federal states disintegrated - e.g. USSR (1991), Yugoslavia (1991) and Czechoslovakia (1993) - and more than 25 new states have been formed.

This research will not deal with the other ways a state may end up its membership in an international organisation or a union, such as expulsion or dissolution, besides secession. Secession is a voluntary act comparing to expulsion. It can also occur when a state fears the expulsion and prefers to secede rather than to be expelled. Art. 8 of the Statutes of the Council of Europe even obliges the Committee of Ministers to prevent a member state to withdraw if it faces expulsion. The withdrawal is, however, not voluntary, when a state is under pressure to withdraw. This is the reason why Schermers and Blokker point out that there is a "vague border between expulsion and withdrawal" (Schermers/Blokker, 1995: 53; Götting, 2000). The expulsion is conducted by the organisation unilaterally, if a state does not respect the treaty and violates it. It is a unilateral expulsion from the multilateral treaty (Fischer, 1957: 59). The expelled state loses progressively its rights and duties. First, it loses its voting power, but still has to accomplish its duties until the last stage of the expulsion. The dissolution of the organisation means that it loses its legal personality. Either it breaks-up, or other organisations

[3] Norway became part of Sweden as a result of an agreement between United Kingdom, Russia and Sweden in 1813. Sweden was promised Norway as compensation for its loss of Finland to Russia if it helped the allies defeat Napoleon. Norway had a very strong separatism will and a referendum on Norwegian secession in 1905 passed by 368,208 to 184, with a turnout of 84% of the electorate (see on this subject: Moore, 1998).

[4] Ireland was part of Great Britain from 1801 until 1922.

[5] During 1918 and 1944 Iceland was associated to Denmark through the unification of the states. During this period the identity of Iceland was internationally recognised.

are built instead of it, which become, of course, new legal personalities. The issues of expulsion and dissolution are to a large extent treated in the book of Götting (2000) and this research will not discuss these issues in more detail, but will rather concentrate on the secession right.

As far as the EU is concerned, the research will not look at the member states' Constitutions to see if they provide any possibility to withdraw from the Union, but will rather analyse the EC/EU Treaties and the new Constitutional-Treaty from a federal perspective. The latter subject was studied by Waltemathe (2000). He comes to the conclusion that the strict dualistic constitutions allow a unilateral withdrawal from the Union, e.g. Denmark, Finland, Great Britain and Sweden. A weaken form of dualism is present in the Constitutions of Germany, Greece, Ireland and Italy. They can withdraw only if the national constitutional principles are fundamentally violated by the EU law basing their decision on international law. The Constitutions of Belgium, France, Luxembourg, The Netherlands, Austria, Portugal and Spain are moderate monistic and allow in many cases a unilateral withdrawal. It would be interesting to see if the Constitutions of the new ten members allow a unilateral withdrawal as well, but this is a task for lawyers.

The **first chapter** will try to formulate a theory of secession from the federal perspective in the framework of political science. The aim of this chapter is to determine whether there is one theory of secession and to see if the secession right is compatible with federalism.

The **second chapter** will analyse the secession right in confederations and federal states from a comparative federal perspective. Only a few federal states had the secession right in their constitutions: Ethiopia, St. Kitts-Nevis, Malaysia, former USSR and Yugoslavia. Other federal states have faced attempts of secession: USA and Canada. The international organisations and confederations as a rule include the secession right, but there are also exceptions: The Articles of Confederation (1777-1787) and the South Confederate States of America (1861-1865).

The **third chapter** focuses on the secession right and the EU. Secession is not new in the EU, besides the most known case, which is the withdrawal of Greenland in 1985 (Weiss, 1985: 173-185), there were a number of other attempts, which in a way could be considered as attempts of secession, e.g. the French policy of the "empty chair" in 1965 (Weiler, 1985); the plans of withdrawal of Great Britain from 1974-75 and 1981 (Irving, 1975); Greece announcement of secession in 1981 (Waltemathe, 2000); Denmark referendum against the Treaty on the European Union in 1992 (Götting, 2000) and Irish referendum against the Treaty of Nice in 2001. All these cases are to be analysed in detail in chapter 3.1. Even if secession happened, the secession right was absent in all the EC/EU Treaties (Chapter 3.2.). The Constitutional-Treaty provides for the first time in the history of the EU a secession right - „voluntary withdrawal from the Union" under Art. I-60. The inclusion of this article puts into question the whole federal project of the EU. If the Constitutional-Treaty includes a secession right, it cannot be a legal document establishing a federal state, not even a *Bund* (which the EU is after Maastricht). One would say that the legal document of the EU might be considered a *sui generis* one establishing a *sui generis Bund* with a *sui generis* secession right. However, this would be too undemanding and would not require any analysis any longer. This section will discuss the different positions during the European Convention on including this article in the Constitutional-Treaty. It will also discuss the political arguments pro and contra a secession right. The aim of this research is to put these arguments into question and to try to find new answers to the problem of secession right and federalism. The last chapter will

revise the comparative analysis' results and will try to establish what kind of polity the EU could be including a secession right in its legal document.

Article I-60 of the Constitutional-Treaty[6]

1. Any Member State may decide to withdraw from the European Union in accordance with its own constitutional requirements.

2. 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 negotiated in accordance with Article III-325(3). It shall be concluded by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Constitution 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 referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purpose of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council of Council or in European decisions concerning it.

A qualified majority shall be defined as at least 72% of the members of the Council, representing the participating Member States, comprising at least 65% of the population of these States.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article I-58.

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[6] http://euriopa.eu.int/eur-lex/lex - *Treaty Establishing a Constitution for Europe*, Official Journal, C 310, Vol. 47, 16.12.2004

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