Constitution Brief

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Summary

This Constitution Brief provides an overview of trends and approaches in the treatment of secession in the world's constitutions. The major design choices of allowing, prohibiting, or staying silent on the issue of secession are each discussed.

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Secession

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1. Secession: origins and rationale

From Spain to Tanzania to Ukraine, the idea of secession is a critical issue for constitutional design, and has been since the first modern constitution was adopted in the United States in 1789. Secession involves a subunit of a state breaking off, usually to form a new state, but sometimes to join an existing neighbour. In many countries, demands for secession from one or more regions are a major issue in constitutional design, and can trigger further demands for constitutional drafting. Once a constitution is in place, secessionist demands can put great pressure on the constitutional bargain thereafter. If constitutions are devices to keep countries together, they can also provide for orderly processes of separation.

This Constitution Brief summarizes the treatment of secession in the world's constitutions. There are essentially three approaches: constitutions can (a) prohibit secession; (b) remain silent on it; or (c) allow secession for one or more subunits under various conditions. If this latter approach is taken, a number of further questions arise, including: who can initiate secession, whose approval is required, and what procedures are to be followed. No matter what approach is taken, it is critical to identify how disputes over territorial governance will be resolved.

A right to secession means that a subunit has the right to leave the parent state, typically to set up a new one (although in some cases it may involve a right to join another existing state). Secession debates occur against two background rules of international law. First, states have rights to territorial integrity, and cannot be dismembered. Second, peoples—including national minorities—have the right to self-determination. This does not mean that there is a right to secession under international law (outside the context of decolonization from European powers) but that secession is one way in which states can meet their obligation to provide self-determination to subnational groups. However, the underlying idea is that mutual consent is required for secession to be permissible. Constitutions can provide frameworks for determining this consent.

In recent years, there has been some suggestion that international law can tolerate unilateral secession under certain conditions. In 2008, the province of Kosovo declared independence from Serbia after nearly a decade of separate administration under the auspices of the United Nations. Kosovo had been the site of a major war in 1998 and 1999.

A case about the declaration of independence came before the International Court of Justice, which in 2010 issued a vague decision that said the unilateral secession was not by definition illegal. Some have argued that this case indicates an exception to the general rule prohibiting unilateral secession, namely that when there have been severe violations of human rights, a subunit might be able to secede without the permission of the larger state. More recently, while the facts were less persuasive to many observers, this argument was used to justify the secession of Crimea and its subsequent integration into Russia.

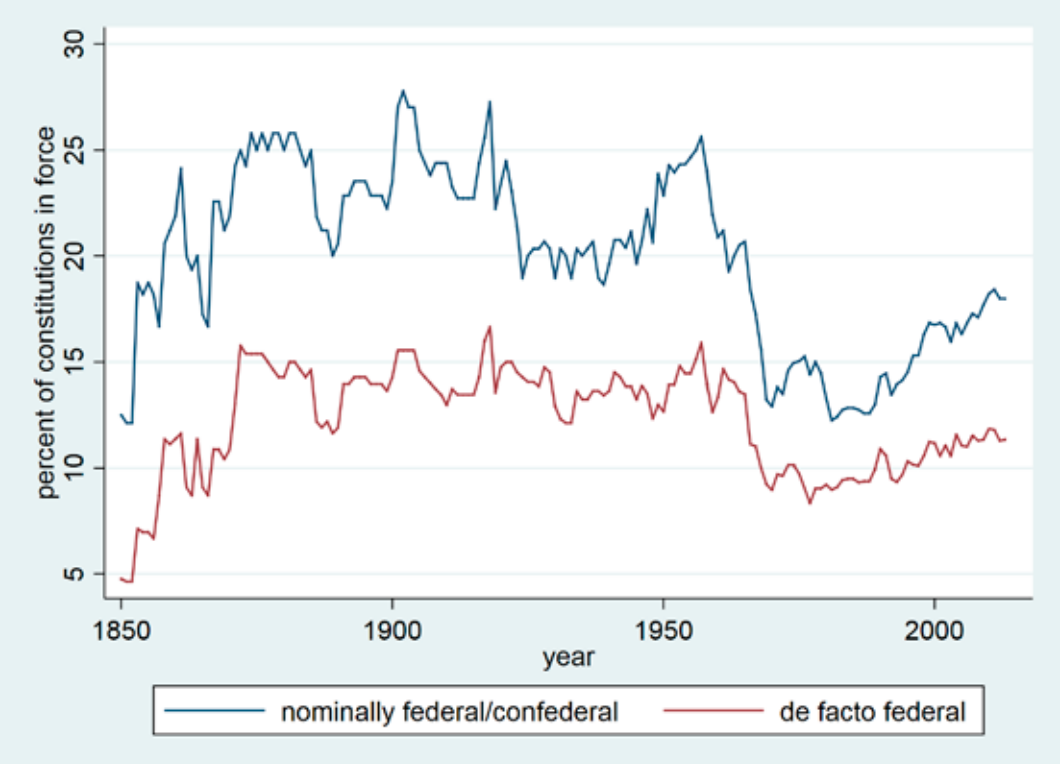
Besides helping to structure mutual consent processes, constitutions also play a role in helping keep states together. In some cases, a territorially-concentrated minority may only be willing to join a state with some guarantee of good treatment. Some have argued that providing a right to secession will serve as a guarantee to a territorial minority that they will be well treated. Others have argued that rights to secession are dangerous because they will lead political forces to demand secession as a way of obtaining more benefits from the central government. For this reason, many governments explicitly deny the possibility of secession. Raising the costs of secession, it is argued, makes it more difficult to mobilize support for secession.

However, if support for secession is very strong, an explicit prohibition will make the process more difficult and perhaps more violent. The fact is that the potential for secessionist demands is ever-present. Constitutional design can play a role in whether these demands are actually made and if so, how they play out.

2. Trends and approaches

The analysis in this Constitution Brief considers instances in which a subunit has the right to formally withdraw from a central authority. Overseas colonies are excluded from the analysis, as are dependencies and territories, which have a different status in international law.

Figure 1. Constitutional treatment of secession, 1850–present



Source: Data from the Comparative Constitutions Project (2014).

Setting those cases aside, constitutional treatment of secession is increasing in frequency. Figure 1 provides data. While only a small number of constitutions allow for secession, a larger and increasing number explicitly prohibit it. Figure 1 counts 15 current and historical constitutions adopted in nine countries as allowing secession. A further 60 constitutions have a fairly explicit prohibition against secession. A total of 204 constitutions have broader references to territorial 'indivisibility', while the great majority are silent on the issue.

Allowing secession

An explicit constitutional clause allowing secession is relatively rare. Rights to secession were part of Leninist ideology, which emerged around the same time as the idea of self-determination in the early-20th century. The Soviet Union thus included rights to secede for its component republics, and other communist federalisms, including Yugoslavia, followed. It must be made clear, however, that the break-up of these countries had very little to do with a theoretical right to secession; rather, the end of the Cold War was the main factor.

Even if drafters decide to include a secession clause, there are subsidiary design decisions that must be made. First, should a right be granted to all or just some subunits? In St. Kitts and Nevis, Sudan and Uzbekistan, constitutions have contemplated the idea of secession of specific subnational entities only (Nevis, South Sudan and Karakalpakstan, respectively). Chapter 10 of the 1947 Constitution of the Union of Burma allowed for secession, excluding Kachin and Karen States, but these rights could not be exercised for 10 years. Of course, there was a good deal of controversy about the meaning of these clauses.

Second, what are the procedures for demanding secession? Relatedly, who must approve the secession decision? Is it only the subunit seeking to secede or must the entire country vote on a change to the territorial integrity of the state? Finally, who resolves disputes about secession? These and other issues can become critical in how secessionist movements run their course, whether they experience success or failure, and whether the process is peaceful or violent.

In some cases, constitutions stipulate procedures to be followed if a subunit seeks to secede. Typically these will involve, at a minimum, the consent of the population in the subunit as expressed through a referendum. Once this step is taken, the decision might require approval by the national parliament or some other step. The 1996 Ukrainian Constitution (article 73) stated that '[i]ssues of altering the territory of Ukraine are resolved exclusively by an all-Ukrainian referendum', implying that the Crimean decision to leave and join Russia was illegal.

Prohibiting secession

A far more common practice is for the state to prohibit secession. One implicit way to do this is simply to declare the territorial integrity or indivisibility of the state, but some prohibitions of secession are more forceful. For example, in setting out a system of decentralized autonomous governments, Ecuador's 2008 Constitution (article 238) states quite clearly that 'under no circumstances shall the exercise of autonomy allow for secession from the national territory.' Similarly in neighbouring Bolivia, subnational autonomy of indigenous peoples is guaranteed 'within the unity of the state', while Ukraine's Constitution (article 134) explicitly declares Crimea 'an inseparable part of Ukraine', thus seemingly prohibiting the secession of Crimea (although this was not sufficient to prevent it).

Statements about unity and territorial integrity are very common; explicit mention of secession, with the goal of prohibiting it, is less

common, but has the same effect. Myanmar's 2008 Constitution explicitly forbids secession in article 10, which states: 'No part of the territory constituted in the Union such as Regions, States, Union Territories and Self-Administered Areas shall ever secede from the Union.'

One particular variant is to place on citizens a duty to uphold the unity and territorial integrity of the state. For example, Afghanistan's Constitution (article 59) states that no individual can 'act against independence, territorial integrity, sovereignty as well as national unity'. Bhutan's 2008 Constitution (article 8) imposes a duty on citizens to 'preserve, protect and defend the sovereignty, territorial integrity, security and unity of Bhutan'.

Requiring citizens to commit to the territorial integrity of the country can mean that anyone who advocates secession might be violating the constitution. This would require an explicit exception to rights to freedom of expression or association. Of course, such exceptions should be narrowly drawn so that advocacy for greater autonomy (or simply minority cultural expression and pride) within the state would not be considered violations. For example, the Bulgarian Constitution of 1991 grants freedom of association, so long as the activities are not 'contrary to the country's sovereignty and national integrity, or the unity of the nation'. In 2000, Bulgaria's Constitutional Court banned the United Macedonian Organization Linden-Pirin, which advocated that Bulgaria's Pirin region should belong to a separate Macedonian entity.

Many constitutions prohibit political parties organized on ethnic or religious lines, or parties that seek to undermine the basic democratic order or existence of the state. A total of 50 countries, including Brazil, Bulgaria, France, Germany and India, have an explicit ban on political parties that threaten either the territorial integrity of the state or national unity and sovereignty. For example, Bhutan's Constitution (article 15) also mentions territorial integrity in the conditions for registering political parties. Presumably this means that a party that was organized around a secessionist platform could not be formed. In many democracies, the ultimate decision about the legality of political parties is made by the constitutional court. Ukraine, for example, has twice banned parties since 1991, on the grounds of advocating secession (among other things).

Silence

A third option is simply to remain silent. Some have argued that it is best not to bring up secession in the constitution, as this might lead to political mobilization around the issue. Others believe that it is better to have an explicit statement, either allowing or prohibiting secession, so as to be clear on the topic. Many of these arguments turn on assumptions about the relationship between constitutional language and political mobilization, and these may vary a good deal across different contexts.

Of course, secessionist movements do sometimes develop even when there is silence on the matter. In the USA, the lack of a clear clause about secession generated constitutional confusion and political crises for many decades, eventually leading to the Civil War in the 19th century. In the United Kingdom, Scotland held a referendum on independence even though there was no explicit clause allowing for secession. In this case, the referendum had its legal basis in an Act of the UK's parliament but was triggered by the electoral victory of a secessionist party in Scotland's regional parliament. This issue remains alive and uncertain.

Does it matter?

One might ask whether constitutional language can really prevent secession if there is a determination to undertake it. Empirical evidence is limited, but it seems to be the case that constitutional language tracks reality. Until the recent case of Crimea breaking away from Ukraine to join Russia, no country with an explicit constitutional prohibition against secession had ever experienced a loss of its territory. Of course, this was a case of forcible removal of Ukrainian territory by Russia, and so is not representative. In addition, there is some evidence that countries that do offer a right to secession tend to have less violent conflict over breakups that actually occur.

3. Resolving disputes

Because secessionist movements are very emotive and can easily turn violent, there is a need to monitor and adjudicate issues of territory with care. The question of who can resolve disputes is very important. If a secession process is being undertaken in accordance with an explicit constitutional provision, someone must ensure that the requisite conditions have been met, and that the process is conducted properly. Supervising any required referendum might require the support of a national electoral commission; and secession claims can also end up being considered by a constitutional court. Indeed, disputes over territorial authority have played a major role in the jurisprudence of the German Constitutional Court, the US Supreme Court, and counterparts in other federal systems.

Because courts in both federal and unitary systems are frequently involved in resolving territorial cleavages and in preserving national integration, their decisions can affect the incentives to secede or not. In the Philippines in 2008, the Supreme Court ruled unconstitutional an initial agreement to establish an independent judicial authority in the putative Bangsamoro region. This was viewed by some as hindering an attempt to keep a restive region in the country. Although the court decision proved to be only a minor hiccup in the process of coming to a comprehensive agreement, it suggests that external monitors can sometimes exacerbate rather than resolve cleavages.

Courts have played an important role in setting out the legal framework for secession in both international law and comparative constitutional law. Constitutional courts in Canada and Spain have found themselves confronted with questions of secession, and have come to very different conclusions. In Canada, the Supreme Court held that Quebec could not unilaterally secede, but that the federal government would be obligated to negotiate secession if there were a clear majority in the territory were in favour, as determined by a clear expression of will in a referendum (Canadian Supreme Court 1998). In Spain, by contrast, the Constitutional Court has rejected Catalonia's attempt to hold an independence referendum, and firmly sided with the national government in the political crisis of late 2017.

4. Conclusion

Constitutions are important devices for allocating powers across territorial units. In general, they place great weight on national unity and territorial integrity, while remaining silent on the question of secession. However, in a small number of cases they confront questions of secession directly by either granting or prohibiting secession. Some countries that have granted rights to subunits to secede, including the Soviet Union,

South Sudan after 2005 and Yugoslavia, have actually broken apart but it would be wrong to attribute this fact to the secession provisions per se.

The major design choice that most countries face is whether to prohibit secession explicitly or to remain silent on the matter. The best approach may depend on the particular historical and geographical context. For countries without a history of territorial cleavages, there is little need to make reference to secession at all, and silence is an appropriate choice. In other countries, a reference to territorial integrity, perhaps adding a duty of citizens to uphold the same, can help to emphasize the indivisibility of the country.

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About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with a mission to support sustainable democracy worldwide.

About MyConstitution

The MyConstitution project works towards a home-grown and well-informed constitutional culture as an integral part of democratic transition and sustainable peace in Myanmar. Based on demand, expert advisory services are provided to those involved in constitution-building efforts. This series of Constitution Briefs is produced as part of this effort.

The MyConstitution project also provides opportunities for learning and dialogue on relevant constitutional issues based on the history of Myanmar and comparative experience.

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