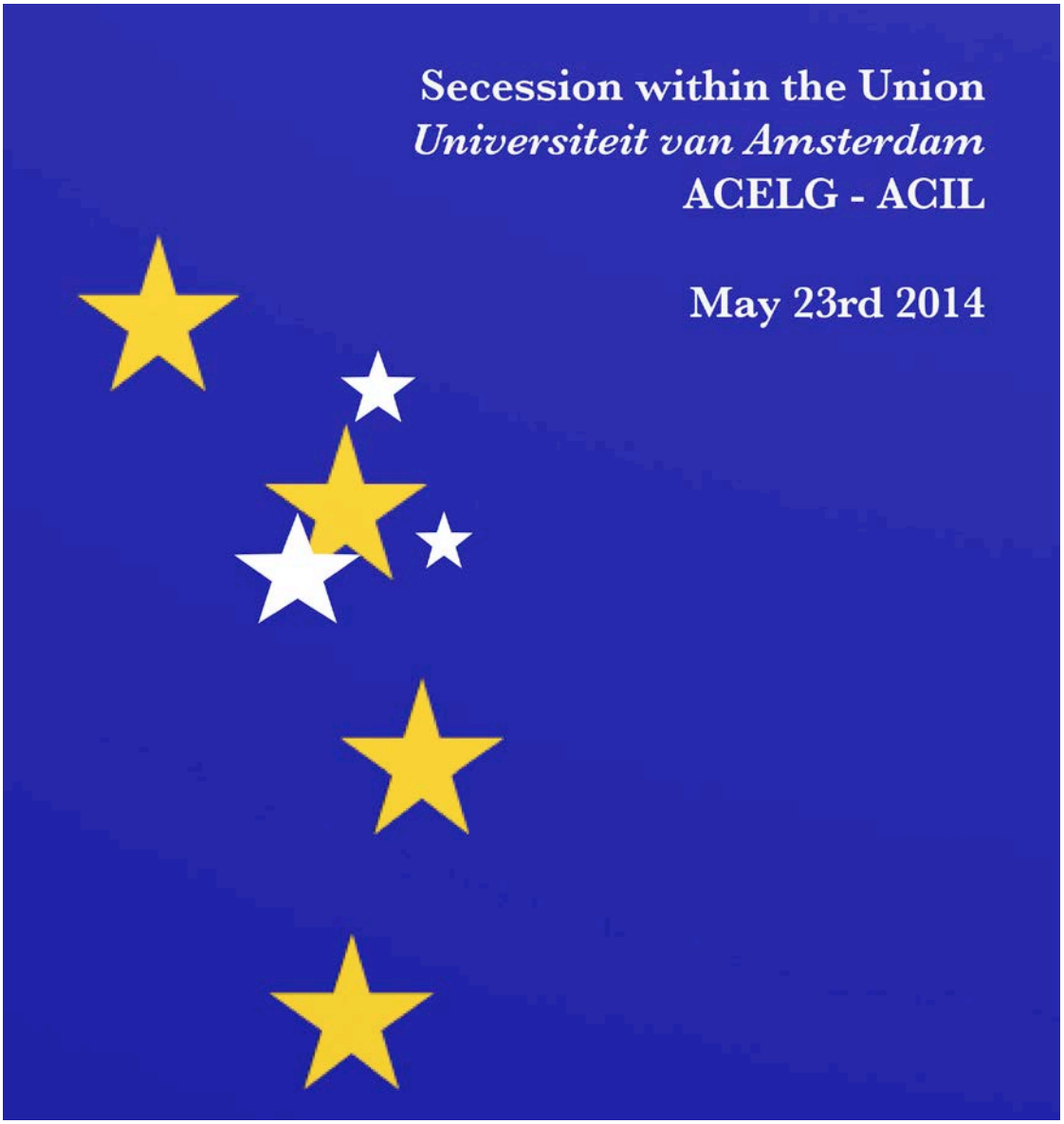

Collected Think Pieces

Mapping the Theme of Secession

David Haljan

Secession within the Union

Intersection Points of International and European Law

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Mapping the Theme of Secession

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> *In other words, maps hold a clue to what makes us human. Certainly, they relate and realign our history. They reflect our best and worst attributes – discovery and curiosity, conflict and destruction – and they chart our transitions of power.*[1]
>
> *A map always manages the reality it tries to show. ... Rather than imitating the world, maps develop conventional signs which we come to accept as standing in for what they can never truly show.*[2]

1. Mapping: Scale, Projection, Perspective

There are three principal parties to a secession crisis whose interests generate legal issues: 1) the secession movement within the state affected; 2) the state affected (including those opposing secession within the territory affected), and 3) the international community which itself is made up of a number of intersecting interests including private international law interests (multinational corporations, foreign investors, ngo's), public international bodies (states, UN bodies, treaty organisations), the EU constellation of institutions (for secession crises within EU member states), and perhaps even the legal academy.

The interactions of these various parties generate an number of issues, many of which cut across perspectives/party interests. They include the right of self-determination; the interaction of international law, national law and EU law; the normative value and character of law; representative and deliberative democracy; constitutionalism and the rule of law; recognition; state succession; EU

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[1] S Garfield, *On the Map: Why the World Looks the Way it Does* (Profile Books 2012) 18.

[2] J Brotton, *A History of the World in Twelve Maps* (Penguin 2012) 7.

citizenship and integration, and the list goes on. All the issues in turn are generally mapped out along a common selection of axes: international–national; internal and external self-determination; legality–legitimacy, and (constitutional/public) law–politics. The underlying *leitmotif* of tension and balancing, of thesis–antithesis–synthesis should not be thought of as wholly unintended. Likewise, the preference or predominance of one axis over another reveals more than just a facility with or interest in a particular area of legal study. From a map maker's vantage point, it is a question of deciding on perspective, projection, and scale. These frame and colour how we examine and resolve the issues and what the horizon of possibilities is, in terms of premises argued and unargued, the measure of arguments, and the range of solutions. "Mapmakers do not just reproduce the world, they construct it."[3] Hence the choice of axis does not merely chart the issues and answers. It constructs and reproduces them in its own image, in its own terms, with its own conceptual strengths and limitations.

Depending on our particular choice of perspective, scale, and projection, it appears therefore that any effort to chart out the issues and solutions to a secession crisis could – and often do – produce significantly different results. And this explains in large measure perhaps the 'tension-reconciliation' approach typical of the law and politics, and national public law and international public law axes, for example. My own view is that for all their complexities, the various issues on the national and international planes have a largely unexpressed common core issue, one that is for the most part as yet unanswered (and perhaps even unanswerable). There is a single, primary, root perspective and basic scale and projection which controls, expressly or impliedly, consciously or sub-consciously, all the other optics on secession. At its broadest, the issue is the nature of political association and the obligations, duties, rights, powers, advantages and disadvantages it generates. What is a constitutionally significant polity? When and how can does it come into existence? Our own reflected or unreflected views on this core issue determine how we analyse and evaluate secession, and the law and politics of self-determination more broadly.

We can begin to get at this core issue – the perspective, projection, scale, by which we map out secession – by considering the following. Assume that, in an independence referendum in one part of an EU member state, 52% vote for independence on a total turnout of 80% of eligible voters. The secessionist party will claim victory and a mandate to negotiate a transfer of sovereignty (and all its trappings)

[3] ibid

and the dissolution of the erstwhile state. The rump state had indeed consented to the referendum, but had made no promises or statements regarding the treatment of the outcome; nor was there anything expressed regarding threshold majorities.[4] Is it inconceivable or indefensible for the rump state to reject any claim for independence (except at an unacceptably high cost and disadvantage to the secessionist party), while nevertheless proposing constitutional amendments falling well short of substantial autonomy?

Now, it seems fairly certain and obvious that an inflamed secessionist party would accuse the rump state of unjustifiably obstructing and denying the legitimate democratic will of the people. It would turn to the EU and the wider international body of states and organisations for support and countervailing pressure, and likely pursue further a declaration of independence. The call and urge to intervene (and perhaps for the EU even before post-referendum discussions begin) will no doubt be unremitting and inescapable. May those third party states and organisations pressure a capitulation and compromise by either of those national parties, either of rejecting any independence claim or of dissolving the erstwhile state?

The point is not whether an independence referendum is merely a defeasible proposal to negotiate some sort of constitutional reform, nor the Montevideo criteria for statehood, but rather: when is a group a constitutionally significant political association, and who decides that? What you think the nature of the relationships are which are constitutive of a polity – if and how they bind, and whom – constitutes your primary conceptual framework which will expressly or impliedly direct how you answer all the other legal and political questions.

The problem for the international legal community and the EU, however, is that there has been no reflection on this critical, fundamental question of scale, projection, and perspective – and this despite calls for their active engagement in state disintegration crises.

2. Self-determination: 'the statement of a problem, but not the solution of it'[5]

Since the first decades of the 20th century after World War I, international law has struggled to express, let alone contain, the political complexity of secession and independence movements in states within its chosen framework of self-determination. True, it has

[4] Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland (Edinburgh, 15 October 2012).
[5] A Toynbee 'Self-Determination' (1925) 484 *The Quarterly Review* 317, 318

never lacked for earnest proponents on its behalf, claiming a deciding – or at least prominent – role in managing secession crises. They champion international law as a guarantor of peace and reasoned compromise. The predominant human rights and humanitarian mindset has amplified their voice. Globalist, transnational perspectives and their attendant receptiveness to a constitutionalism of like scale add not insignificant support.

Yet considerable amounts of ink and effort continue to be spent on situating and attempting to justify in international law a right of independence-driven self-determination (and by extension a right of secession). International law remains notoriously unclear and uncertain about such a right for matters other than decolonisation/foreign subjugation, and perhaps also the more grotesque examples of abuse of power. The uncertainties, all well-known and thoroughly debated, run from anchoring self-determination in the instruments of international law (interpretation, normative effect) or state practice (case-by-case basis not producing a coherent precedent), to giving concrete meaning to the right. This includes the trigger for its operation and the actual content and nature of the right.

But most telling, most significant is the lack of a definition of the rights holder 'people'. International law appears to leave members of a group to constitute themselves as a 'people', if not wholly to ignore the matter, at least until conflict and misery can no longer be dismissed. (This is the downside risk to leaving the situation play itself out and thus effectively generate a place for remedial secession.) But can just any group define itself as a people? Too wide a definition, too fluid and accommodating notions of self-determination and people contain the real potential for political instability, fragmentation into micro-sates and 'selfistans'. Reliance on cultural or ethnic ingredients as the basis for political association may fuel a resurgence of nationalism, which Europe has long struggled to contain and master. Adding further criteria, such as territory and economic viability, draws the definition of self, the governance of self, further away from the will and desire of group members. Self-determination is thus no longer an act of pure volition and choice, tied as it is to mere coincidence of property, resources, and birth-right.

It should come as no surprise, then, to find yourself questioning now what a 'polity' and a 'people' actually are, and indeed whether they are equivalent, or aspects of the same concept. No doubt you will also consider why a self-determining political association may end at the, say Scottish, Catalan, Brittany, or Friesen, border rather than encompassing all of the UK, Spain, France, or the Netherlands. Indeed, this should also lead you to examine your own conception of political

association, and why it should prevail over that of others. Needless to say, of course, international law remains for moment (wilfully) blind to or empty of these conceptual exercises.

3. Recognition: constitutive of whose declaration of what?

Charting secession through the international law of recognition requires us to alter projection and perception. Foreign states have a decisive voice in whether a political association is constitutionally significant so as to be admissible to the club of states, or, indeed, whether that association represents instead an unjustified threat to the integrity of an extant state and to the peace and security of its population. Hence an exercise of self-determination, of political self-definition and self-constitution, is not simply a unilateral act when mapped onto international law. Third party states have a say in whether and how any putative act of self-determination may obtain.

Little wonder then, independence movements will seek out formal and informal, public and private support from other states in advance of any concrete acts towards secession. A failure to achieve recognition does not, of course, necessarily entail a collapse of self-determination. Nor does a lack of recognition by certain states bar recognition by other, more friendly states, or some form of existence in limbo. It simply limits what an independence movement may claim or expect from unilateral organisations and other states. But membership in transnational organisations may carry significant benefits and advantages, such that a denial or inadmissibility for membership may impose significant costs and hindrances in attaining full independence.

But what of recognition over the protests of the erstwhile state? Or the insistence on international involvement in constitutional negotiations between the erstwhile state and the secessionist movement after a pro-independence result to a referendum? Supporting an independence movement absent the consent of the erstwhile state appears at first glance as an undue interference in the internal affairs of a fellow state. Seeking to moderate negotiations or the discussions between the independence movement and rump state gives a presumptive political legitimacy to the secessionist group. The impression given is of acknowledging a constitutionally significant political association to be accommodated in its core demands, whether deserving or not. It may also reflect pressure (political, economic) being brought to bear on either side to force a capitulation on issues, such as perhaps a dissolution of the state with an eye to weakening or destabilising the rump state or its sponsor.

Underpinning the response of individual states are their respective strategic interests, of commercial cost and gain, regional influence, and other, wider geo-political considerations. A state's response will likely talk the language of human rights and international law, but will express in truth that strategic meaning. Certainly we may consider what weight – determinative or significant – the perspectives of the international club of states have and ought to have. Whose perspective should ultimately count?

But recognising that their perspectives are not necessarily contiguous or convergent with those of the independence movement nor of the rump state, we must rescale our mapping of self-determination. Our conception of self-determination and the modalities of its exercise cannot be determined unilaterally by the secessionist group. It must account for input from other stake-holders, public and private: the rump state, neighbouring, trading partner and other states, international organisations, and so on. These parties will therefore have a say in who may qualify for self-determination, whether a group does qualify, how self-determination may be exercised, and when. And this necessarily entails a much wider conceptual framework for what may and will count as a polity, as a constitutionally significant political association.

4. The EU legal order: is EU membership indispensable?

Despite a reluctance by the EU to pronounce on secession in advance, other than to reiterate that membership in the EU is subject to, and not concurrent with or independent of, achieving statehood in international law, many commentators see as inevitable and realistic the EU taking some active/proactive role in a secession crisis within a member state, even to the extent of participating in or regulating dissociation. The intensity and degree of that participation varies from commentator to commentator. But most if not all of these agree that the EU simply cannot afford to react in an ad hoc way. Its objective would be to reduce the costs of uncertainty, dispute, and any transfer of sovereignty, and to maintain the level of membership in and contribution to the EU. The EU constellation has a substantial interest in minimising the potential disruption of social and economic activity in other EU members states. Its role would presumably be voiced in terms of preserving social, economic and human rights.

To put this into better relief, consider that the independence movement in a member state has shown itself desirous of a momentous constitutional and political change. It would remove itself from an otherwise functioning, constitutional, representative

political order within the EU constellation. A population will have voted to leave a state with EU membership and with its particular mix of advantages, disadvantages, costs, and benefits. Why does that removal not carry through to reconsidering membership in the EU as a necessary consequence of that will to independence? If a group wants to strike out alone as a new state, why should it receive treatment preferential to that of other established states seeking to join? Put another way, what is so special about EU membership and citizenship that it ought to survive secession but not emigration? What makes it such an indispensable good? Even Article 50 TEU clearly contemplates an exit option.

Commentators considering a proactive role for the EU characterise this situation as one of "internal enlargement". In effect they draw an analogy to a subdivision of state territories or provinces within a larger encompassing constitutional order, rather than frame a secession crisis as in terms of acquiring membership in a transnational organisation. Their discussions naturally focus on the many technical law points which require settling, not the least of which is the potential opposition by other member states to accession by the putative new state.

Yet underpinning all this, with the prospect of a comprehensive EU law solution, the references to 'EU citizenship', and to the rights and benefits attendant upon membership in the EU is, expressed or not, a conceptual framework of the constitutional signification of the EU. Even though at foundation the EU is an international organisation – albeit a very well developed one – the driving imagery here is of the EU as a supervening, integrated political association of EU citizens, one that subsumes or at least is co-ordinate with the constitutional orders of the other established member states and other political formations within them. Hence it arguably follows that an active role (in the negotiation stage) would be claimed for the EU so as to supervise and condition the creation of a new (member) state, and continue the status of the population as EU citizens even before the new state's institutions, infrastructure, and economic viability have been tested.

But it is not simply the creation of a new member state *ex nihilo*. EU institutions will be supervising the possible dissolution of a member state. Vital, fundamental questions remain unanswered. By participating in negotiations, influencing their course and outcome, does this entail the EU having a say in evaluating/opposing/qualifying/limiting the arguments for dismantling a functioning constitutional democracy and member state? In how the state ought to be reconstituted? The EU arguably is conditioning the

right of self-determination, both of the secessionist movement and the rump state (and that tied to membership in an international body). More important is the concept of political association operative here. The EU will be regulating and managing the dismantling of a functioning constitutional democracy on the basis of views expressed by some majority (50%+1 or more) of voters in only one part of that member state. A minority of a state's population may dictate the political, economic, and social futures of the rest, an outcome that would not be acceptable for any other constitutional or EU treaty change. For all its institutional sophistication, the EU appears to have no developed concept of political association, other than a two-dimensional, positivistic one arising from out of the relevant European treaties.

5. The road ahead

It always possible to legislate solutions: damn the torpedoes and full speed ahead. But given the political nature of independence movements and the unresolved aspects of political association, perhaps discretion here is the better part of valour. A wait-and-see attitude may avoid a misplaced need for legal efficiency. Yes, it may result in uncertainty and cost, conflict and contest. But having unchartable waters may be necessary to impress upon all parties the gravity and seriousness of such an undertaking as discarding an otherwise functioning, democratic, representative constitutional order.