

## **SOME CONSIDERATIONS ON SECESSION AND INDEPENDENCE: THE CASES OF KOSOVO AND GEORGIA**

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It may be said that there are, broadly speaking, two roads to the creation of a new state by way of secession. We might label these as the ‘high road’ and the ‘low road’, or alternatively as the ‘positive’ and ‘negative’ paths to independence. The high road or (as it will be termed in this discussion) the positive path sees secession and independence as a positive right, i.e., as the exercise by a people of its inherent collective right to organise itself into a state. The low road or negative path sees independence not exactly as a free-standing right, but rather as a remedy for a delict committed by what we may call the mother state or the dominant population. A brief explanation of each of these is in order.

Historical illustrations of the negative route to independence in action are not difficult to identify. As an early example from European history, one could point to the Swiss Federation and its secession from the Holy Roman Empire in the Thirteenth Century. More recent, and more pertinent, is the example of American independence, won from Britain by force of arms in 1775-83 – and, significantly, explicitly justified in the famous Declaration of Independence of 1776 as a reaction to alleged misgovernment of the colonies by Great Britain. In the Nineteenth Century, the independence movements of the Latin American states, and of Greece and other areas within the Ottoman Empire could be advanced as illustrations. In the post-World War II period, the independence of Bangladesh from Pakistan in 1971-72 represents perhaps the clearest example.

The positive path to independence is, in essence, the product of liberal and romantic nationalism of the Nineteenth Century. Its principal intellectual progenitor was Johann Herder, writing at the end of the Eighteenth Century<sup>1</sup>, with his insistence on the existence of a sort of collective consciousness of national communities, manifested most obviously in a common language and literature. In a similar vein, J. J. Moser, in 1773, wrote of the (eventual) destiny of the German people to be united in a nation-state of their own.<sup>2</sup> These ideas became increasingly common in the Nineteenth Century, as one ‘people’ after another began, as it were, to discover themselves as a people. The foremost champion of this idea of a right of

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<sup>1</sup> A. Cobban, *The Nation State and National Self-determination*, London: Collins 1969, pp. 118-20.

<sup>2</sup> A. Zamoyski, *Holy Madness: Romantics, Patriots, and Revolutionaries, 1776-1871*, New York: Viking 1999, p. 47.

nations to form themselves into states was the redoubtable Italian idealist and would-be revolutionary Giuseppe Mazzini.<sup>3</sup>

This way of thinking found ready reflection in legal thought. In general jurisprudence, for example, it was reinforced by writers of the historical school, with their view that law should be regarded primarily as an expression of the collective consciousness of particular communities (thereby rejecting the natural-law ideal of law as an expression of timeless and universal principles). Importing this idea of a positive right of independence into the discourse of international law was not overly difficult. The essential idea here was that national communities, or peoples, were more fundamental units than states. States were regarded as accidental, artificial, arbitrary constructions. National communities, in contrast, were seen as self-conscious, organic, continuing entities, existing even without the benefit (or, as the case may be, the incubus) of a political framework. Only a slight intellectual effort was needed to carry this thesis to its logical conclusion: that such a community, or people, had a collective right of its own to clothe itself in a political garment of its own choosing. The principal champion of this notion in international legal circles was Mazzini's fellow national, Pasquale Mancini.<sup>4</sup> He even had some practical experience in liberal nationalism, as a sympathiser with the Revolution of 1848 in Naples and legal defender of some of its participants. His followers, largely fellow nationals, were sometimes referred to as the 'Italian school' of international law writers.

On the whole, though, the idea of a positive right of peoples or nations to form themselves into states did not attract widespread support from mainstream international lawyers. J. K. Bluntschli gave it some cautious and tentative support – but only to conclude that, ultimately, the idea was a political rather than a legal one.<sup>5</sup> International law writers in the vein of doctrinaire positivism were a good deal less supportive than Bluntschli. Mancini's compatriot, Dionisio Anzilotti, for example, was strongly insistent that only states are subjects of international law, and not peoples or national communities or the like.<sup>6</sup>

For present purposes, it is only necessary to point out the basis on which the positive road to independence could be taken, even assuming it to be available. A national community within a country would have a right to independence on the basis, essentially, of the degree of cultural or historical distinction between it and the majority community. If the cultural gulf was sufficiently wide, then the right would be triggered. If the difference was only slight, then the right would not be exercisable. In determining this, the

<sup>3</sup> For a useful collection of Mazzini's writings, see J. Mazzini, *The Duties of Man and Other Essays*, London: J. M. Dent and Sons 1907.

<sup>4</sup> See P. Mancini, *Della nazionalità come fondamento del diritto delle genti*, Turin: Eredi Botta 1851.

<sup>5</sup> J. K. Bluntschli, *The Theory of the State* Oxford: Clarendon Press 1895, pp. 93-108.

<sup>6</sup> D. Anzilotti, *Cours de droit international: Introduction – Théories générales*, Paris: Sirey 1929, pp. 127-28.

expertise of the lawyer would be of little value. The skills of the anthropologist, or sociologist, or historian would be far more useful.

Examples of this positive path to independence in the modern era were not plentiful, outside the colonial context, prior to the 1990s. The 1936 and 1977 constitutions of the Soviet Union both granted the right of secession to constituent Union republics, though this was of no real practical significance.<sup>7</sup> The independence of Algeria from France in 1962 provides perhaps the only arguable case of the Cold War era. And even there, independence was won through the violent efforts of Algerian revolutionaries, not through the force of foreign pressure exerted on the basis of international law. With the end of the Cold War, however, the pace picked up. The break-up of Czechoslovakia into the two states of Czech Republic and Slovakia in 1992-93 is a good illustration. And it may be contended that, with the possible exception of the Baltic states, the break-up of the Soviet Union in the early 1990s falls into the category of the positive route to independence. (The Baltic states could, and did, contend that they were entitled to independence as a reparation for their illegal incorporation into the Soviet Union in 1940 – i.e., by way of the negative path to independence.)

Modern public international law stops pointedly short of endorsing the positive path to independence. Outright independence is supported only for colonies, not for portions of existing states.<sup>8</sup> International law, it is true, contains a right of self-determination of peoples, but it is clear that this does not, as such, entail a right of secession or independence. The most authoritative statement of it, in the UN General Assembly's Declaration on Friendly Relations, of 1970, makes this clear.<sup>9</sup> The right of self-determination, it is there stated, cannot, as a general principle, be construed as "authorizing or encouraging any action which would dismember or impair . . . the territorial integrity or political unity of sovereign and independent States. . . ."

The 1970 Declaration does, however, provide support – if only in somewhat opaque terms – for the negative path to independence. The very sentence just quoted, in fact, goes on to identify an exceptional situation in which secession would be allowed: a case of misconduct or oppression on the part of the majority population. The bar on support for independence, it is stated, only protects the territorial integrity of states which "conduct . . . themselves in compliance with the principle of equal rights and self-determination of peoples" and which are "possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour." The implication is that a state which does not represent the whole of its

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<sup>7</sup> Article 17 of the 1936 Constitution and Article 72 of the 1977 Constitution.

<sup>8</sup> See, most notably, the UN General Assembly Declaration on Decolonisation, UN Doc. G.A. Res 1514 (XV) (1960).

<sup>9</sup> UN Doc. G.A. Res. 2625 (XXV) (1970).

people may, at least in certain circumstances, be regarded as forfeiting the right to include that unrepresented people within its territory.

It may be observed that this negative path to independence lends itself at least somewhat more readily to legal analysis than the positive one does. One must ask whether the state in question is complying with the principle of equal rights and self-determination of peoples – meaning, apparently, whether the state is conceding an appropriate degree of autonomy to the self-determination units (i.e., to the collectivities of ‘peoples’) contained within its borders. One must also ask whether the state possesses a government that represents ‘the whole people’ within its territory, as opposed to functioning as a vehicle for, say, the dominant ethnic group only. It must not be pretended that these will be easy questions to answer in given cases – but at least the questions that are being asked are the sorts which lawyers and judges are accustomed to dealing with. For an excellent illustration of this process in action, one could point to the Canadian Supreme Court judgment of 1998, which considered Quebec’s claim to a right to secession on, *inter alia*, just this basis.<sup>10</sup>

It would appear, on at least a tentative survey, that the people of Kosovo have at least an arguable claim to a right of secession by the negative route – or, more accurately, to a remedy of secession, as a consequence of misconduct on the part of the Serb majority. In support of this contention, advocates of Kosovan independence would point to two matters in particular. First would be the revocation of the autonomy arrangement provided by the 1974 Yugoslavian constitution. This was brought about by the adoption of a new Serbian constitution, in a Serbia-wide referendum, in 1989. Second was the direct oppression of the ethnic Albanian population of Serbia by the Milosevic government of Serbia, which stimulated the NATO military intervention of 1999. Whether these actions actually achieved the level of severity necessary to justify the admittedly drastic remedy of secession and independence is the critical legal question to be answered. It is possible that the World Court may shed some light on this point in the course of its forthcoming consideration of the lawfulness of Kosovo’s unilateral declaration of independence of February 2008.<sup>11</sup> What can be said with some confidence here, though, is that the Kosovo situation is an example – indeed, a veritable textbook example – of the negative path to independence in action. With perhaps slightly less confidence, it may also be asserted that the recognition of Kosovan independence, by some fifty states (as of December 2008), should, in principle, be of no relevance. The question of the existence or the level of severity of Serbian government misconduct would seem to be an objective one, in which recognition of independence by other states would be of little, if any, probative value. (It could be argued,

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<sup>10</sup> Reference re Secession of Quebec, [1998] 2 S.C.R. 217, paras. 131-39; reprinted in 37 *Int’l Legal Materials* 1340 (1998).

<sup>11</sup> See UN Doc. G.A. Res. 63/3 (2008), in which an advisory opinion on this question is sought by the UN General Assembly.

however, that the recognition of Kosovan independence by other states is probative evidence for the existence of the negative path to independence in principle; but that is a rather different matter.)

The case of Georgia, and its would-be breakaway areas of Abkhazia and South Ossetia, is less clear-cut. In August 2008, these areas purported to become independent countries, and have been recognised as such by Russia – though, apparently, by few, if any, other countries. Their case for independence by the negative route (i.e. as a remedy for misconduct by the Georgia government) is not easily assessed; but it seems, on a general overview, to be considerably weaker than that of Kosovo. Only a detailed study of the specific situations in Georgia can provide an answer. It is possible, though, that independence of these two areas is being asserted on positive, rather than negative, grounds. The problem there is that, as noted above, international law does not support the positive path to independence, only the negative one. This would certainly go far towards explaining why the independence of the two areas has achieved so little in the way of international recognition, as compared to that of Kosovo. In fact, we could go further and posit that the starkly contrasting reactions of the international community to the two situations (the Serbian and the Georgian one) provide further strong support for the general thesis that international law supports only the negative route to independence and not the positive one.

One final thought – and a highly tentative one -- may be offered. It will be recalled that, in the early stages of the formulation by the International Law Commission of its draft articles on state responsibility, there was a provision for criminal liability of states. The idea justly drew a great deal of negative comment and was dropped. One ground for criticising that proposal was doubt over what criminal liability could realistically be expected to mean. I.e., how could it be possible to inflict a criminal punishment onto a state as such? Perhaps a fine could be assessed against it. But what tribunal would have jurisdiction to impose such a sanction? It is possible that the case of Kosovo might shed some light in this area. For the specific ‘crime’ of repression of a people (i.e., for the serious infringement of the collective right of self-determination), the punishment would be, not a financial penalty, but rather the permanent loss of the oppressed region from the national territory. To the question of how the sanction would be imposed, the answer would be two-fold. First, the oppressed area in question would be entitled to take self-help action on its own initiative. Second, the international community at large would participate in the sanctioning, in the form of recognition of the independence of the oppressed area as a state.

Whether this analysis of the negative road to independence from the standpoint of criminal liability is of any real value – to say nothing of being persuasive – may, admittedly, be heartily disputed. It may be noted, though, that it does differ in one concrete respect from the analysis of the question in terms of traditional state responsibility (i.e., from the standpoint of,

essentially, civil liability). That is, that the analysis in terms of criminal liability offers a role to recognition of independence by third countries, whereas the analysis in terms of civil liability does not (at least not on the analysis put forward here). There is a widespread view amongst international lawyers that recognition of statehood status is ‘merely’ declaratory, i.e., without any independent legal force. But perhaps recognition can potentially, in the future, play a rather larger and more unexpected role.

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