The Right of Secession and the Emerging Constitution of the European Union

Colloquium of the Progress Foundation, Soazza, 6-9 July 2000

Report

Prof. Dr. Jürgen G. Backhaus (Maastricht)
Dr. Detmar Doering (Berlin/Potsdam)

General Remarks

From July 6th-9th 14 participants took part in the Progress Foundation's Collquiumon the „Right of Secession and the Emerging Constitution of the European Union". Initially 15 persons had been invited, but one participant, Professor Vukotic, called off in the last minute. Ironically, this may have just proved the relevance of the topic, since Professor Vukotic is advisor to the Montenegran government. At the time the government was in a crisis, which not only demanded Professor Vukotic's presence in Podgorica, but also may have led to an actual secession! The would-be-participant actually had to face in reality what the participants only confronted in theory.
The colloquium was initially planned to be held with German as the conference language, but during the preparation for the event it became clear that the participation of some anglophone speakers would be vital.
As a preparation for the colloquium the participants had to study a „reader" with texts about the topic of secession. This „reader" was compiled by Professor Backhaus and Detmar Doering and sent to the participants – generally a few weeks before the event. The texts used for this compilation rather tried to deal with the theoretical side of the issue than with the discussion of factual secessions (such as the disintegration of the USSR). However many texts reflected a concrete historical context, in many case the American political situation before the War Between the States (1861-65), which is – in terms of theoretical content – the most thoroughly discussed case of a secession to be found in the books of history. The texts were discussed during five conversions, each with a focus on a specific aspect of the topic. The sessions were chaired alternatingly by Professor Backhaus and Detmar Doering.

1st Conversation: The Classical Natural Law Approach to Secession

The conversation took place on July 7th from 8.45-10.15 a.m.. The only text discussed were excerpts from the new English translation of the „Politica" by the great German jurist Johannes Althusius. The text has to be seen in the context of the Dutch struggle

for independence and had an enormous impact on the restructuring of the German empire after the peace treaties of Münster and Osnabrück which ended the Thirty Year's War. Many participants found the text interesting, although of little relevance for today's problems. Althusius's approach seemed to them fairly old-fashioned in contrast to the ideas of contemporaries or near-contemporaries such as Thomas Hobbes. Althusius still stands firmly in the medieval tradition of natural law. Althusius, therefoe, is not a modern methodological individualist, but – as some participants found – a communitarian collectivist with a collectivistic view of the state. However it was found that the book contains a very thoroughgoing and useful theory of federalism. Although some participants found his collectivist approach „not very protestant", but rather „catholic", Althusius proves to be in strict accordance with his Calvinist creed. His image of the state resembles very much the (very decentralistic) Calvinist idea of the constitution of the church, where the parish community is the source of legitimation for the whole. Thus Althusius evolves his idea of the legitimacy of the state from small communities that delegate power to the „top". Because Althusius believed that this guaranteed some unity in moral terms he rather wanted to defend and support the unity of the empire. Therefore astonishingly little is said about secession in his book. It is only discussed in the context of a right to resistance of the lower tiers of government in case the „central" ruler becomes tyrannical. In this case Althusius principally allows secession (which is entirely in the logic of his subsidiary idea of government), but only as a matter of last resort.
The discussion also went a little bit beyond this. Althusius, in the few instances where he mentions secession, suggests the analogy between marriage and divorce. It was generally held by the participants that there is a difference between these and the question of secession. Marriage and divorce can be settled and enforced within a legal framework, whereas secession would belong to the realm of international law, where neither a clear settlement nor strict enforcement are possible. This already foreshadowed later discussions whether the EU should further rely on the vagueness of international law or whether it should enshrine the right of secession into ist internal constitution.

2nd Conversation:
The Individualistic Theory of Secession

The session took place on July 7th from 10.45-12.15 a.m.. The texts for discussion came from two extreme individualistic libertarian thinkers of the 19th century, namely the British Herbert Spencer and the American Lysander Spooner (the latter one needed some introduction, since only few participants had ever read or heard from him). Both authors derive their theory of secession from an individual „right to ignore the state". Especially Spooner advocates a „literal contract theory" as opposed to a more „hypothetical contract theory", where government is not constituted by the factual consensus of all individual, but rather by representatives (such as the Philadelphia convention of 1787) of a „general will".
Most participants held the view that this approach is only of limited use for a modern theory of secession, which has to deal with the separation of modern territorial states,

and not with the exit of individuals. Also there was some inner contradiction discovered in Spencer's text. His normative appoach (equal liberty-principle) does not harmonise with his evolutionary approach, that society evolves toward more freedom, where – at the end – social relations are entirely based on voluntary individual contract. Indeed, Spencer later in his life became more pessimistic about the latter, since evolution proved him empirically wrong by not producing less government.
However for political science as such, it was found, the individualistic approach of Spencer and Spooner still has major relevance. Possibilities of individual „opting out" may become an important means to reform or dismantle the modern welfare state.

3rd Conversation:
Early Public and Constitutional Choice Theories

The conversation took place of July 7th from 16.45-18.15 p.m.. The texts discussed were by John C. Calhoun, William Lloyd Garrison and Jefferson Davis. This choice of texts clearly laid the focus of the discussion on the years before the American War Between the States (2nd War of American Independence). The discussion almost entirely referred to Calhoun. Especially Garrison (the only non-Southerner and abolitionist) was hardly mentioned. He was the only author who mentioned exclusion (as a complimentary to secession) – a topic therefore not discussed during the colloquium. The (convincing) reason was, that almost all participants agreed that Calhoun was by far the most relevant and most profound thinker on the subject. Especially his theory of „Concurrent majorities" was held to be ingenious. Whereas in classical Roman law the principle of „concurrent majorities" was about groups and not territories, Calhoun extended it to a spatial/territorial dimension. With this he undoubtedly laid the corner stone for any serious modern theory of secession.
Out of this recognition of Calhoun's importance discussions arose over the non-individualistic character of his concept of state sovereignity, which somehow served to reconcile his fairly liberal constitutionalism with his pro-slavery advocacy. Most participants saw the relevance of Calhoun's ideas for the discussion of the further constitutional development of the European Union. There are, it was said, many parallels betwenn the US in the 19th century and today's EU.
This especially lead to an examination of the role of constitutional courts, where Calhoun – even in the light of European experience - was found to be right in saying that they are the main engines for centralisation.

4th Conversation:
The Theory of Secession

The session took place on July 8th from 8.45-10.15 a.m.. Ludwig von Mises and Scott Boykin where the authors of the texts for study. The texts were (as the participants also found out) meant to present the most practically relevant down-to-earth approach on the topic of secession. Mises, in particular, was seen as helpful, because he laid stress on

political coherence, i.e. the consistency of internal and external politics. His plea for the right to secession is based on the assumption that it is in accordance with the liberal principle of self-determination. This attempt to reconcile liberal universalism with particularism was seen as outstandingly original. The issue was also discussed within the historical context of Mises' book. Mises' experience of the decline and fall of the Austro-Hungarian Empire had shown that the issue of linguistic minorities was often used for rent-seeking purposes (i.e. higher subsidies for non-German educational facilities).
Mises, it was critised, somehow tended to ignore the exit costs of secession.

5th Conversation:
Modern Public and Constitutional Choice Theories

The conversation took place on July 8th from 10.45-12.15 a.m. based on texts by Nobel Laureate James M. Buchanan and Swiss authors Bruno S. Frey/Reiner Eichenberger. This session was particularly exciting, because one of the authors, Professor Frey, was a participant of the colloquium. His concept of Functional, Overlapping, Competing Jurisdictions (FOCJ), which offer public services among which citizens could choose was discussed with fervour. On the positive side it was remarked that the concept of FOCJ could defuse the problem of secession, because secession would become obsolete. In case of some discrimination one would not be forced to make a „black&white"-decision for or against staying in a community as a whole. Also it was noted that the FOCJ could solve the question of the alledged problem of the „democratic deficit" in the institutions of the EU, without too much strengthening of the European Parliament (which wouldinevitably enhance centralistic tendencies). On the negative side it was observed, that FOCJs – as a second-best solution - could just prevent politicians from embracing the best solution, i.e. real privatisation. The concept was described as „competitive statism" (In fact, someone noted, that the idea was already developed decades ago in the book „The Socialist Commonwealth in Britain" by the Fabians Sidney and Beatrice Webb). Also the question arose whether FOCJs would not destroy real (local) communities which are, by nature, multifunctional. Since the concept of FOCJ only works if people are all committed or coerced into them, it was also asked whether there is a way to seced from the FOCJ as such.
Off Buchanan's text it was remarked that his advocacy of a constitutional right of secession for the EU was sound, but that his plea for a consolidated federal state (following the pattern of the US) was not a necessary or even desirable pre-condition for this.

6th Conversation:
The Right of Secession and the Emerging Constitution of the European Union

The session took place on July 8th from 16.45-18.15 p.m.. The discussion was not based on any classical text, but was rather a „free discourse" with some references to the Treaties of Maastricht and Amsterdam.
Some participants thought the idea dangerous (because it could inspire destabilise countries outside the EU, some thought it superfluous (because the EU has got not troops to prevent countries from leaving), but the overwhelming majority of the participants advocated a constitutional right to secession in the European constitution. This was seen as the proper antidote to the increasingly centralising tendencies in the EU - tendencies which in the long run may well undermine the freedoms Europeans enjoy today. The inclusion of a principle of subsidiarity, as it is found in the Treaties, was considered as insufficient. Secession – accompanied by generous opting out clauses in specific areas of policy – must be seen as a defence right against centralistic and discriminatory legislation. This did not mean that any of the participants advocated actual secession. On the contrary, it was held that a right of secession, which is formally enshrined in the constitution (or treaties), may just threaten central government in a way, that less discriminatory legislation would occur. A formal right of secession would possibly make real secession less likely.

Final remarks:

The discussions of the colloquium were extremely stimulating and lively. The participants all agreed that the topic was well-chosen and of great relevance and that they had learned a lot. This colloquium, it was also agreed, was not the end but the start . It was discussed that further conferences (the next probably organised by the Friedrich-Naumann-Foundation in 2001) and publications should follow. What has started in Soazza will be of increasing relevance for the future of the EU.
Also the participants thanked Dr.Gerhard Schwarz for the organisation of the event, which left no wish open.