WHAT'S LAW GOT TO DO WITH IT? DEMOCRACY, REALISM AND THE TINA TURNER THEORY OF REFERENDUMS

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Almost twenty years ago the American political scientist Stephen Krasner wrote a book entitled *Sovereignty*. But what was most telling about it was the sub-title, "organised hypocrisy" (Krasner, 1999). Analysing international relations from a largely *realist* perspective, the scholar broadly concluded that, all things considered, arguments dressed up in idealistic rhetoric were manifestations of power politics. References to laudable principles tended to fall down when tested against the "national interest".

The argument to be tested in the following is if the recognition of independence referendums follows legal principles, democratic norms or merely the political interests of the strongest powers.

Before making this argument it is worth looking at the "official" theory of state recognition and the supposed "right" to hold a referendum.

The legal argument

The black letter law of the "right" to self-determination referendums is, in a sense, very simple. In the words of James Crawford, "there is no unilateral right to secede based merely on a majority vote of the population of a given sub-division or territory" (Crawford, 2006: 417). Those who espouse a similar legal positivist approach will further stress that this is consistent with the jurisprudence of international counts. Thus in an *obiter dicta* in the Kosovo case Judge Yusuf held that,

A radically or ethnically distinct group within a state, even if it qualifies as a people for the purposes of self-determination, does not have the right to unilateral self-determination simply because it wishes to create its own separate state (Yusuf, 2010: 1410).

Thus, the general rule is that referendums have to be held in accordance with existing constitutions (such a provision exists in Art 39(3) of the Ethiopian constitution but in few other states) or following an agreement between the area that seeks secession and the larger state of which it is

part (this is what happened in the very different cases of East Timor in 1999, South Sudan in 2011, Scotland in 2014, and *a fortiori* Bougainville 2020 [Radan, 2012]). Following this logic, it would seem that the referendums in both Catalonia and Kurdistan were both illegal and unconstitutional.

Based on this reasoning the Soviet leader Mikhail Gorbachev was well within his right to claim that the Latvian, Estonian and Lithuanian referendums on independence in the spring of 1991 were illegal and that he was the guarantor of *Pravovoe gosudarstvo* – the equivalent of the rule of law in Soviet jurisprudence.[1] As, respectively, the Iraqi and the Spanish constitutions do not allow for independence referendums, the two referendums held in these two entities were, ipso facto, unconstitutional.

Yet matters are not that simple. Yes, all other things being equal a country only has a right if it follows the rules. However, when a region is part of an undemocratic constitutional order matters are a bit more complex. Antonio Cassese has argued,

When the central authorities of a sovereign State persistently refuse to grant participatory rights to a religious or racial group, grossly and systematically trample upon their fundamental rights, and deny them the possibility of reaching a peaceful settlement within the framework of the State structure … a group may secede – thus exercising the most radical form of external self-determination – once it is clear that all attempts to achieve internal self-determination have failed or are destined to fail (Cassese, 1995: 119–120).

As Iraq is not a well-functioning democratic state, it could be argued that Kurdistan meets these criteria. Again the comparison with the Soviet Union is illustrative. Notwithstanding Gorbachev's reforms, the USSR was not a democratic regime, which consequently provided the Baltic states with a justification for holding referendums.

But, given that Spain is a democratic state, this rule hardly covers Catalonia. While the Spanish government arguably acted in a way that appeared grossly disproportionate, the legal argument remains the same. Catalonia is not currently part of a non-democratic state. Based on the situation as it stands now, the referendum was, from a purely legal perspective, extra-constitutional. In a legal system under the rule of law, the powers of state institutions have to be enumerated in law. The basic principle of *L'état de Droit* is that citizens can do anything unless it is expressly prohibited. Public bodies or "emanations of the state" can only do things that are expressly allowed. Thus, the latter cannot *legally* speaking take actions that are not prescribed in enabling legislation. To pass legislation outside the boundaries of the constitution or enabling legislation is the very definition of being *ultra vires*.

But does the law have to be that inflexible? Not necessarily. In Canada, the two referendums held in Quebec in, respectively, 1980 and 1995, were not strictly speaking within the powers granted to the provinces by the Canadian Constitution (Sen, 2015).

Technically speaking, the referendums were *ultra vires.* Yet, the Canadian judges, realising that legality ultimately rests on a modicum of legitimacy, followed a more pragmatic logic. In the celebrated case, *Re Quebec*, the court was asked the question, "Under the *Constitution* of Canada, can

1. Of course, some would say that, previously, under the so-called Stalin Constitution of 1936, individual Soviet states did indeed have the right to self-determination referendums under Art 48. But this provision was dropped from the Khrushchev Constitution of 1956. Consequently, the Baltic republics were in breach.

the National Assembly, legislature or Government of Quebec effect the secession of Quebec from Canada unilaterally?"

The court held that while the "secession of Quebec from Canada cannot be accomplished…unilaterally", a referendum itself was not unconstitutional but a mechanism of gauging the will of the francophone province. Consequently, a referendum, provided it resulted in a "clear majority", "would confer legitimacy on the efforts of the Quebec government" (*Re Secession of Quebec*, 1998: 385).

In other words, a result in favour of secession would require the rest of Canada to negotiate with Quebec. Needless to say, this ruling does not apply in Spain. But the Canadian example suggests that other countries' courts have shown a flexibility and appreciation of nuances that is conducive to compromises.

These examples would seem to suggest that the international law pertaining to independence referendums is clear and simple. Alas, this is very far from being the case (for a more general discussion see Sen, 2015: 77ff).

While governments may confidently cite principles, the practice of independence referendums seemingly owes more to national interest than to adherence to principles of jurisprudence. For example, the states of western Europe readily recognised the secessions of several former Yugoslav republics in the early 1990s – although these new states did not adhere to the aforementioned legal principles. And yet, in other cases international recognition has been less forthcoming even if the countries have seemingly followed the established norms.

No state has to date recognised the outcome of Nagorno-Karabakh's referendum in 1991, in spite of Azerbaijan being very far from a democratic state (the country has a Freedom House score of 7 – the same as North Korea!) and the greater freedoms enjoyed by the citizens/inhabitants of the break-away republic. Similarly, no state recognised the referendum in Somaliland even though this enclave is considerably more democratic, peaceful and respecting of the rule of law than Somalia, which at the time of the referendum was an archetypal failed state. For all the legal arguments, acceptance of referendum results is ultimately a political rather than a legal decision. In other words, are all these arguments just examples of the aforementioned "organised hypocrisy"? Are states actually recognised if they follow the rules of the game? Or it is simply a matter of power politics?

When are referendums on independence recognised?

Lawyers are interested in what is – or is not – legal and in accordance with more or less rigid rules. Political scientists, by contrast, are interested in what actually happens.

Are there from a political science – or International Relations – point of view causes and tendencies associated with the recognition of referendum results? Or are independence referendums simply recognised when the rules are followed?

Alternatively, do we now live in a democratic age in which the gold standard of legitimacy is popular support? And, if the answer is in the affirmative, do independence referendums tend to be recognised when secession is supported by a large majority of the new *demos* on a large turnout? Or is it all down to power politics?

My hypothesis is that the latter is the most important factor. Can we find statistical evidence for this?

Statistical analysis

Since the 1990s there have been 34 successful referendums on independence.[2] Of these 15 have resulted in the establishment of a new state (see: Qvortrup, 2014, for a further discussion). What are the factors associated with the establishment of these new states?

Factors associated with recognition are the legal one "the seceding entity was part of a non-democratic state". But there are also more political ones, e.g. a high turnout and a massive yes vote. And then there is the factor – which I think is the most important – of whether the new state has the support of the international community, or, more specifically, the three "democratic" permanent members of the UN Security Council.

In the analysis below we have measured some of the factors that statistically could be conducive for when states are recognised using what is known as a multiple logistic regression analysis. Without going into technical detail, this analysis measures the strength of the different given factors behind a phenomenon.

The dependent variable is whether the state was recognised and took up a seat in the UN. The independent variables are the official yes vote, the turnout, the Freedom House score of the country from which the entity sought to secede and lastly a dummy variable for whether there was support for secession among the five permanent members of the Security Council (in practice the USA, Britain and France).

<table>
<tr><td colspan="2">Table 1: Logistic regression: Determinants of recognition of successful independence referendums</td></tr>
<tr><td>Variables</td><td>Model 1</td></tr>
<tr><td>Security Council Dummy</td><td>4.258***</td></tr>
<tr><td></td><td>-1.778</td></tr>
<tr><td>Freedom House Score</td><td>-.298</td></tr>
<tr><td></td><td>(.742)</td></tr>
<tr><td>Turnout</td><td>.100</td></tr>
<tr><td></td><td>(.90)</td></tr>
<tr><td>Yes-Vote</td><td>.055</td></tr>
<tr><td></td><td>(.065)</td></tr>
<tr><td>Negotiation/Constitutional Provision</td><td>1.054</td></tr>
<tr><td></td><td>(2.35)</td></tr>
<tr><td>Constant</td><td>-15.134</td></tr>
<tr><td></td><td>-9.709</td></tr>
</table>

R;Squared: .72 (Nagelkerte): .52 N: 38 *: p< .1, **: p< .05, *** p< .01

2. This analysis is based on the referendums held since the breakdown of the Soviet Union. Before that date there had been relatively few independence referendums (only a handful in each decade). The first independence referendums were held in the US Confederate States of Texas, Virginia, Tennessee and Arkansas, where narrow majorities voted for independence in 1861. Other independence referendums include Norway (1905), Iceland (1944) and Malta (1964). For a discussion of these referendums see Qvortrup (2014) and Sen (2015).

As the table shows, Security Council support from the three permanent Western powers is the key determining factor (statistically significant at $p<0.01$). All the other variables were not statistically significant.

Whether the country is part of a democracy or not (i.e., if the vote was held under the rules prescribed by the legal norms) was completely irrelevant.

Likewise, whether the turnout was high or low did not matter one jot when it came to recognising states. Some countries with low turnout became independent (e.g., Bosnia), others did not, (e.g. Tartarstan). Whether the support (the yes vote) was high or low was equally academic. Indeed, the yes votes in Somaliland (1999) and Krajina (1992) were both very high and both countries remain unrecognised.

The factors that determine the success or otherwise of an independence referendum are not whether the entity is part of a non-democratic regime, or the turnout, but above all if secession is supported by (and in the interest of) Britain, France or the USA.

It was not in the interest of these democratic countries to recognise Kurdistan, Tartarstan, South Ossetia – or Catalonia. The great democratic powers' arguments for not doing so might be legalistic or even philosophical but the statistical evidence suggests that these factors are rarely adhered to in practice; ultimately, what matters is the elusive and yet very real "national interest".

One is tempted to paraphrase Tina Turner and say, "what's law got to do with it?"

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Re Secession of Quebec (1998) 161 DLR (4th) 385.

Appendix: Successful Independence Referendums 1990-2017				
	Parent Country	Seceding Entity	Year	Turnout %	Yes Vote %
1	United Socialist Soviet Republics (USSR)	Lithuania	1991	91	84
2	USSR	Estonia	1991	77	83
3	USSR	Latvia	1991	74	88
4	USSR	Georgia	1991	98	90
5	USSR	Ukraine	1991	70	85
6	Georgia	South Ossetia	1991	98	90
7	Georgia	Abkhazia	1991	99	58
8	Yugoslavia	Croatia	1991	98	83
9	Croatia	Serbs	1991	98	83
10	Yugoslavia	Macedonia	1991	70	75
11	USSR	Armenia	1991	95	90
12	Bosnia	Serbs	1991	90	-
13	Serbia	Sanjak	1991	96	67
14	Serbia	Kosovo	1991	99	87
15	USSR	Turkmenistan	1991	94	97
16	USSR	Karabakh	1991	99	82
17	USSR	Uzbekistan	1991	98	94
18	Macedonia	Albanians	1991	99	93
19	Moldova	Transnistia	1991	97	78
20	Russia	Tartarstan	1992	82	67
21	Yugoslavia	Bosnia	1992	99	64
22	Georgia	South Ossetia	1992	NA	NA
23	Bosnia	Krajina	1992	99	64
24	Ethiopia	Eritrea	1993	99	98
25	Bosnia	Serbs	1993	96	92
27	USA	Palau	1993	64	68
28	Georgia	Abkhazia	1995	96	52
29	Indonesia	East Timor	1999	78	94
30	Somalia	Somaliland	2001	99	97
31	Yugoslavia	Montenegro	2006	55	86
32	Sudan	South Sudan	2011	97	98
33	Iraq	Kurdistan	2017	99	72
34	Spain	Catalonia	2017	90	42