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Legitimacy: Yugoslav Lessons for Ukraine

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ABSTRACT

Examples from the breakup of Yugoslavia and state-building in the successor states are used to highlight the political and constitutional choices facing Ukraine. The main lesson is that legitimacy is needed for constitution-building, which is needed for long-term state stability. Ethnic and other diversities are not crucially important except if they are used as a means for external interference.

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1. Legitimacy and constitution

INTRODUCTION

There are various attempts to draw a parallel between the crisis in and over Ukraine and the dissolution of Yugoslavia and, more specifically, between the constitutional set-up of Bosnia and Herzegovina and the possible political outcome in Ukraine. These were or are artificial states, they were or are multi-ethnic, and history has not been on their side – these are some of the reasons given to justify these comparisons. Perhaps a simple argument might be useful to see why these comparisons do not make sense.

MISGUIDED GEOPOLITICS AND ARTIFICIAL STATES

In fact, the only similarity between former Yugoslavia or Bosnia and Herzegovina (B&H) on the one hand and Ukraine on the other is the role of Serbia and Russia, respectively, in their attempt at territorial extension and at the destruction of their neighbours, what can be called a misguided geopolitics (the use of ethnicity, of ethnic identity and loyalty, to claim and acquire territories or strong cross-border influence or even veto power). That of course is no different to many such attempts at territorial expansions.

As for internal reasons for a constitutional failure or for the resort to constitution-building, there are no useful similarities between the crisis in Ukraine and the Balkanisation of Yugoslavia, and, certainly neither Yugoslavia, in all its incarnations, nor B&H can serve as a model for a constitutional settlement in Ukraine. For two reasons:

- › first, because it is a mistake to believe that ethnic or other types of homogeneity is needed for countries to have constitutions (from the constitutional point of view, all states are artificial), and
- › second, because B&H does not have (as Yugoslavia did not have either) a constitution in the proper sense of that word.

In fact, rather than being impeded by ethnic heterogeneity, constitutions are the way to deal with deep, comprehensive, and persistent differences and conflicts between people living within the borders of a state (Rawls, 1971).¹ The key requirement for constitution-building is legitimacy, not social or any other homogeneity (Mueller, 1996). I elaborate.

CONTENT AND PROCEDURE

There is the content of a constitution and the procedure of adoption. The content is about protecting individual and collective rights. The procedure has to be legitimate and legitimising. If the latter is not the

¹ How particular states as territorial units come to being is also an issue in constitution-building. For more on self-determination within the Yugoslav context see Gligorov (1994). From the point of view of international law, the opinion of the International Court of Justice in the case of Kosovo and the legal arguments presented to the court are the most important ones.

case, the results are so-called façade constitutions (Max Weber's Scheinkonstitutionalismus, Weber, 1994, 1995). On the former, there are significant differences depending on the understanding of the meaning of rule of law (e.g. Hart, 2012, third edition). In general, legitimacy is constitutive of the rule of law at this fundamental level.

So, constitutions need to be adopted through a legitimate process, e.g. in a legislative assembly by, as a rule, qualified majority, and they are often required to be approved in a referendum (which also may have a qualified majority requirement; the USA, to take the most important example, is different from the UK, to take the major exception, when it comes to constitution-building (though not in the substance of the procedure, which has to be legitimate and legitimising).

Constitutions are often adopted to constrain (in earlier history) or rule out autocratic or other types of discretionary power (e.g. in post-totalitarian cases). So, taking two examples: the Spanish and Yugoslav ones. In the case of post-Franco Spain, there were elections for the constitutional convention that drew up and adopted the constitution. In Yugoslavia, that did not happen (Gligorov, 1994), even though an attempt was made at the very beginning of the existence of the state, and many times after, but not at the moment of the needed systemic change in the late 1980s and before the dissolution of the country in early 1990. The experience of the post-Yugoslav states differs, though the constitution-building process has been protracted in most cases.

However, no legitimacy, no constitution – would be the lesson one learns from these examples and experiences.

CONSTITUTIONS AND PEACE SETTLEMENTS

Bosnia and Herzegovina (B&H) stands out because its constitution-making process failed. What came out of the war and the interventions by the neighbouring countries was the internationally imposed constitution as part of the peace settlement. It neither was written by the representatives of the country nor was it put to a referendum (though the decision to secede from Yugoslavia was put to a referendum). Legitimacy was not the aim of the Dayton constitution and its aim is not the protection of individual and collective rights, which is the primary motivation of a constitution.

The whole exercise was arguably in violation of international law and the UN Charter, except that it was approved by the Security Council. Otherwise, it would have presented an instance of foreign interference in domestic affairs, which is the basic prohibition in the international law (except if the Security Council says otherwise as in this case). This exercise has left B&H without a constitution and, even worse, without a viable process of constitution-building, which is arguably the main obstacle to political stability and economic development of that country.

This is not what can be either expected in or recommended for Ukraine. In that respect, if comparisons are to be found in the post-Yugoslav states, the Ukrainian case could be compared to that of Croatia. However, the differences are too large for Croatia to serve as a model for Ukraine. In any case, an internationally imposed constitution for Ukraine is not only undesirable, it is also infeasible.

NATURAL STATES AND ETHNIC CLEANSING

Now, the common misunderstanding is that constitution-building often fails, when it fails, because of the lack of ethnic homogeneity e.g. in Bosnia (and previously in Yugoslavia), which claim then leads to (or is supported by) a general idea (or prejudice) that only homogeneous communities, or societies, that is natural as opposed to artificial states, can have legitimate constitutions.

This is in fact inimical to the very idea of constitutionalism. Constitutions in the modern (from Magna Carta onwards) sense are in fact the way to deal with deep, comprehensive, and persistent differences and conflicts. And, not just social and political, but more often than not religious, ideological, ethnic, and moral (the point that motivates inter alia liberal constitutionalism all the way to Rawls). Therefore, it is not only what is written in the document that matters, as it does, but also whether legitimate representatives adopted it in a legitimate way, it is not only the content that matters, but the procedure of adoption too (e.g. Buchanan and Tullock, 1961).

If, however, a lesson is needed on why constitutions are instruments of pacification of inevitable social heterogeneity, e.g. an ethnic one, B&H indeed provides a good example (but those are abundant across the world and can be followed in real time so to speak) because if ethnic homogeneity is a precondition, ethnic cleansing is needed, and not just as a one-time affair, but either periodically or constantly, e.g. by the erection of ethnic borders. Indeed, current Bosnia and Herzegovina is the product of ethnic cleansing on a very large scale, which is the underlying reason why constitutionalism there has been failing, while multi-ethnic Bosnia (pre ethnic-cleansing one) could have been constitutionalised, with the process of democratic legitimisation, save for aggressions from outside (from Serbia and Croatia). Of course, the legitimate, democratic, process of constitution making is still the most desirable and feasible political solution there, one that ends the need for permanent ethnic cleansing.²

More important is that democratisation has proved to be a precondition for constitutionalism and the introduction of the rule of law as well as for social and economic reforms in European post-totalitarian transitions too. So, they clearly exemplify the connection between legitimacy and constitutionalism. The experience in the post-Yugoslav states varies in this respect and lack of legitimacy contributes to the explanation why some of these countries have had difficulties with constitution-building.

DEMOCRACY FIRST (AND PATH DEPENDENCY)

So, if Ukrainian constitution-building is to be compared to some particular other case, the Spanish one would be a good example, not the Yugoslav one or that of B&H. But, of course, there are quite a significant number of countries with short historical duration and multi-ethnic population that have managed the legitimate process of constitution-making. Any post-totalitarian state that managed to

² Theoretically, the fallacy of artificial states is the assumption that one can solve the problem of gerrymandering (i.e. redrawing borders in order to achieve the desired population, by some criteria, e.g. an ethnic one, whatever is in any particular case meant by ethnicity). It is, however, a corollary of the Arrow Theorem that this is impossible. The point was initially taken by Rawls (1971); also by Buchanan and Tullock (1961), though it is not followed through consistently by these and most other authors. Clearly, that applies to Ukraine in particular – so there is just no other but the non-B&H process that can be used as a model. Obviously, if sufficient force is applied from outside, as was the case in B&H, the process of democratic legitimisation and constitution-building will fail. But that would happen because of foreign interference and not because of ethnic heterogeneity of the population of a country. By the way, the preamble of the Russia 1993 constitution starts with, 'We, the multi-ethnic people of the Russian Federation' – see Gligorov (1997).

democratise and go through a legitimate process of constitution-building would be a good model. Without the adoption of a democratic procedure of decision-making, a legitimate constitutional set-up can hardly be achieved.

It would of course make sense to look at the constitutional history of Ukraine, Poland, Lithuania, Sweden, Soviet Union, and Russia among others because constitutional history establishes path dependency in a rather strong sense. In the Yugoslav case, there is a history of failed or façade constitutions; primarily because the process of legitimisation of the country to its peoples failed during its whole history (from 1918 to 1991; Gligorov, 1994). That, however, is not the case in Ukraine, which is why democratic constitution-making is still the preferred recommendation.

FEDERALISATION

When it comes to the degree of centralisation or decentralisation, i.e. of federalism, that degree depends on the agreement that could be achieved in the constitutional convention or in the parliament. Most people who give advice in this respect (e.g. Meyerson, 2006) attempt to predict what is the optimal distribution of internal sovereignty of a country in order to achieve certain desirable goals, whether those are public goods or public services. It is a mistake, however, to believe that those will provide legitimacy and stability and thus sustain the constitutional arrangement. Legitimacy is the input, not the output of the process of constitution-building.

Of course, there are various ways to secure legitimacy, but in the case of putting up a constitution, those boil down to representative republicanism or democracy. Representatives need to be elected to write the document, which then needs to be adopted by the population (referendum). Indeed, in the case of post-socialist transitions, democracy was the requirement both for constitution-making and for the reform process. But, in general, this is the canonical case for constitutionalism and for systemic reforms.

In addition, the process of legitimate federalisation and even of dissolution of a state is the same as that of adopting a constitution – because that is the preferred way to achieve autonomy or secession which satisfies the requirements that it will not change the distribution of rights in an unfavourable manner for one or the other minorities, of one type or another, that are bound to exist in the seceding states. Again, Yugoslavia provides an example of federalisation that was introduced to achieve stability, but proved destabilising because it was not arrived at through a proper process of constitution-making. Some kind of revolutionary process did take place after 1943, but the legitimacy was not democratic and indeed was not considered to be needed anyway.

CONCLUSION

The model for the Ukrainian constitution-making is the one that was successfully used in post-totalitarian transitions in Europe: democratic legitimacy and constitutional consensus. The Yugoslav and B&H examples failed on both counts and are both not applicable to the Ukrainian case and undesirable to follow.

2. The endgame in Ukraine

The Croatian case, as mentioned above, provides one possibly relevant comparison with the Ukrainian crisis. Apart from that outcome, there are three other endgames, which reflect the fact that different players are involved and that a better procedure and outcome is available, but is rather unlikely to be adopted. The implication is that the conflict will be a protracted one with no endgame in sight.

THE EXAMPLE: CROATIA

In summary, once Croatia declared independence (in mid-1991), the Serbian minority seceded, attempted to ethnically cleanse the territories that they took control of, all with the help of the Yugoslav (basically Serbian and Montenegrin) army and a score of paramilitaries. Within about half a year, international intermediation forged an agreement which stopped the intervention, some occupied (effectively annexed) Croatian territories were eventually returned, overt military support of the Serbian secessionists was discontinued, and UN presence was established in the territories controlled by the Serbian separatists. Indirect and direct negotiations were held over the next close to four years with no success. In the end, Croatian forces reclaimed the territories in the campaigns in the spring and summer of 1995. There was a mass exodus by the Serbs.

The outcome was predictable, though not the details of how it would come about. Once the direct and sizeable support for the separatists was discontinued and UN presence was established, there were only two possible outcomes: negotiated settlement or a takeover of one kind or another. Why did the former not work and why was the latter to be expected?

Before that, why only these two alternative outcomes? The reason is that once the UN gets involved, the Security Council would have to agree on an outcome that runs counter the territorial integrity of a state. Barring such an agreement, the UN can only keep the peace and cannot support any territorial changes (except if agreed by the parties involved). So, once the UN is on the border and is keeping the peace in the contested territories, reintegration is the only possible outcome, except if the parties in conflict agree otherwise.

Now, why did the Serb leaders in Croatia reject any agreement short of secession? The reason is that they would have to sever their ties with the outside supporter, Serbia in this case, to stop acting as their exponent, and would have to face a legitimacy test, which eventually would lead to their replacement. So, it is in the interest of these leaders to maintain the cease-fire, but not to make peace. This can change if external support is completely discontinued in the face of the government's military assault (which eventually came about in 1995).

Of course, if the external support disappears, the other outcome, the other type of reintegration, becomes more probable. But, that outcome becomes ever more probable with the passage of time in the circumstances established by the UN peacekeeping presence because the state will keep getting stronger, while the separatists will keep getting weaker. In Croatia, the state-building process took few

years and so did the process of the build-up of its military. The separatists, on the other hand, became ever more dependent on Serbia for just about everything with military support being increasingly inadequate to resist the coming Croatian assault.

In these circumstances, the UN cannot stand in the way of the activities of the state, even military ones, to reclaim the control over its territory. Again, a decision by the Security Council would be needed to take a collective action to stop the government's forces. Individual countries or coalitions can support the government, but not the insurgents, at least not under the UN mandate. Of course, permanent members of the Security Council can choose to act differently because they have veto power. This is an important caveat that did not apply to Croatia, as no veto power was used.

Thus, one can see on the Croatian example that once cease-fire is agreed on, external support is discontinued or limited, and the UN's presence is established, there is either a consensual reintegration or a coercive one. Put differently, there are three conditions for the Croatian-type outcome:

- (i) external support is discontinued or limited (gradually),
- (ii) UN (and OSCE, EU, and other multilaterals) presence is established, and
- (iii) the central government strengthens (politically and militarily).

OTHER EXAMPLES

Other cases with different outcomes can be understood by looking at whether these conditions are satisfied. In the case of Cyprus, external presence is permanent. Basically, Turkey keeps military presence in Northern Cyprus. The UN is present there, but the Security Council would have to agree to collective action to forcefully reintegrate the country, which does not seem to be a decision anybody wants to make.

In the case of Abkhazia and South Ossetia (and Transdniestria), in addition to the permanent presence of external military forces, there has been some (explicit or implicit) UN support for the Russian military, i.e. peacekeeping presence. So, a military takeover by the government is infeasible and also will not get the support by the UN given Russia's power to veto. These types of situations are mostly possible in the case of a permanent member of the Security Council being directly involved or indirectly by supporting a client state.

Finally, the centre may not hold, in which case the UN can come up with a solution, which either means secession or an imposed constitution. These would be the cases of Kosovo and Bosnia and Herzegovina respectively. These solutions could either be called forth due to internal disintegration, or could also be triggered and sustained by external interference, which leads to a state failure, or both (more on that in Gligorov, 1995). Of course, the requirement is that the Security Council can agree and the parties themselves cannot. Otherwise, internal settlement trumps imposed solutions while lack of agreement in the UN may lead to protracted civil war or other types of entrenched conflicts.

ON TO UKRAINE

There are more than few similarities between Croatia and Ukraine.³ There is external intervention, an annexation of part of territory by Yugoslavia (Serbia and Montenegro) and Russia respectively, external military and every other (e.g. propaganda) support for the secessionists, but also the resilience of the government, the process of democratic and military strengthening, and growing international concern. The difference is that UN and other multilateral involvement is difficult to forge because the mandate would have to be to secure the border, keep the peace, and facilitate negotiations with the aim of a political solution. That, however, would lead to one or the other of the possible outcomes as in the case of Croatia: peaceful or coercive reintegration. Even the former outcome would be increasingly unfavourable to the secessionists with the passage of time, and, of course, it would end the political career of their leaders. But, such an outcome would also be unacceptable to Russia, which has to agree to any UN action in Ukraine. It is hard to see that it would do that before it can be sure that it will get the outcome it prefers. And that cannot be the one that makes its political and military involvement unjustified *ex post*.

So, it is unlikely that Russia will agree to discontinue the support for the separatists and to invite the UN presence with a mandate similar to the one in the Croatian case.

One can assume that the preferred outcome for Russia would be the one that is similar to the frozen conflicts in which it has been able to keep military presence with or without the consent of the Security Council. That will lead to a protracted internal and external conflict in and for Ukraine and long-term strained relations in Europe and globally. That will also test Ukrainian political, economic, and military capacities and the commitment of the EU and the USA to its stability and integrity. Their direct military involvement is inconceivable, but political and economic support will certainly have to be quite significant and enduring.

The collapse of Ukraine as a state, however, its Balkanisation so to speak, does not seem likely from within, and is certainly not the preferred outcome for almost anybody in the EU (and also in the USA).

RUSSIAN INCENTIVES

In the case of Croatia, a country being initially rather weak in military terms, Serbia had about four years to mull over its incentives to keep the territories or to let them go. In the Ukrainian case, the time is in all probability much shorter and indeed, it may already have expired. So, the Russian decision cannot be postponed for too much longer. What are the incentives that may determine it?

One is internal politics that may on balance favour deeper and more explicit involvement. This issue is complex, but clearly decisive. The main consideration, in all probability, is the risk to the government's legitimacy if it is seen as losing in a conflict that is otherwise almost impossible to justify. Victory is the only justification, which is why the government and the leadership are in a bind in Ukraine.

³ There are similarities between Croatia and Ukraine when it comes to their ethnic divisions in numbers, territorial dispersion, and in cultural characteristics too, but those should not be made too much of. The countries are vastly different in size and population.

The other issue is about economic incentives. The costs to open intervention in Ukraine in terms of the access to EU markets and world financial services are hard to estimate. There is an equilibrium condition somewhere out there, but it is not easy to define. Taking the gas and oil markets as an example, clearly higher involvement that will be a long-term one will have adverse effects for the Russian oil and gas business (beyond that of the variation of their prices). So, the conflict and Russian involvement in it need to be set at a level that does not risk Russia's position as a major supplier of oil, gas, and raw materials to Europe with the stability and predictability which do not induce investments in alternative sources of energy and in alternative technologies. Russia has invested a lot in the monopolisation of these markets in Europe to give up on them hastily.

On balance, the incentives seem to work for persistent Russian support for the separatists and a protracted conflict that may be as open as domestic and economic incentives warrant.

BETTER ALTERNATIVE

A better strategy and endgame that would avoid Croatian-type ethnic cleansing and protracted conflict and which one could recommend is that of strengthened legitimacy of all the actors (through democratic procedures) in Ukraine and of constitution-building. This is, in principle, the only process that leaves all the possible outcomes open. It also allows the parties to reach a consensus. One example is Macedonia, which again highlights the role of the external intervention and of the international response, which led to internal constitutional adjustment, supported by democratic legitimisation of the parties to the constitutional agreement. The stability of the agreement is an added issue, but the way to deal with it is the same.

Beyond the examples from Yugoslavia, the experience of post-totalitarian constitution-building is quite rich in Europe and provides for a variety of models that can be usefully tested in the Ukrainian case. All totalitarian states were like cease-fires in civil wars, so the situation is comparable to open internal conflicts, except for the external intervention. The important lesson is that once a legitimate process of putting together a constitution is initiated, the history of wars, civil wars, or deep differences, e.g. religious or ideological ones, cease to be insurmountable obstacles to a consensual agreement, whatever it might be.

Even if there is a persistent interest for a region to secede, this process allows for that outcome. The example of the secession of Montenegro is the relevant one here. It seems to be the case, however, that there is no clear democratic and legitimate support for secession in the East of Ukraine, which is why it is not in the interest of the secessionist leaders to give up arms and engage in politics of constitution-building.

CONCLUSION

The Croatian outcome is not the one that Russia seems content with in Ukraine, which makes it probable that it will continue to intervene in Ukraine with more or less open military support for the secessionists – the aim being to either (i) informally occupy parts of Ukraine creating a frozen conflict type of a set-up, or (ii) work for the failure of the Ukrainian state. Otherwise, there is a democratic way to work out a constitutional set-up in Ukraine, which could be supported by international cooperation and

avoid these other clearly inferior outcomes, but though ‘the solution “exists”; the problem is how to “find” it’, to quote Paul Samuelson.

APPENDIX ON THE EFFICIENCY OF SANCTIONS

The direct answer (to the question of whether the sanctions have had an effect on Russia’s behaviour) is yes, and mostly as intended, in as much as the sanctions have increased the costs of Russia’s policy choices. Though it is not easy to quantify these effects, their sign is not in doubt. Similarly, Russian sanctions have increased the costs of the European Union’s policy choices (this will not be commented on here). It can also be safely maintained that the costs to Russia have been higher than those to the EU, as a consequence of the asymmetric economic interdependence, which suggests that Russian countersanctions can hardly blunt the impact of the EU sanctions.

Before assessing whether sanctions have also impacted Russian policy choices, it is important to be clear about the aims of the sanctions. For this, the sequence of the events is important. The initial conflict was over Ukraine signing a free trade agreement with the EU or joining the customs union with Russia. The EU was not contemplating trade policy measures if Ukraine decided to enter into a customs union with Russia. Russia, however, resorted first to sanctions and then to claims on Ukrainian territory in retaliation for the political process that would have led to the signing of the free trade agreement with the EU, which Ukraine eventually did sign. Only after the Russian annexation of Crimea, the EU started imposing sanctions, with the aim to deter Russia from further annexations of the territory of Ukraine.

So, have the sanctions had that desired effect on Russia’s policy choices? Looking at the developments so far, the answer is yes. Russia has refrained from outright claims on the territory of the so-called New Russia, which is to say large parts of South-eastern Ukraine. This, of course, only establishes that the sanctions have proved costly to Russia and that, perhaps temporarily, further annexations of Ukrainian territories by Russia have not happened. The causal or policy effect remains to be determined.

To assess whether it were the EU (and US) sanctions that deterred Russian territorial claims on Ukraine, it is necessary to determine what would have happened had the sanctions not been applied. The difference with what actually happened would be the policy or causal effect. One way to answer that question is to match the case of the Crimean annexation, when sanctions were not yet in place, with that of the other contested territories. This is appropriate because the developments in Donetsk and Luhansk match quite well with those in Crimea prior to the actual annexation. With that counterfactual in mind, it is clear that sanctions made a difference in the outcomes observed and that suggests that they indeed deterred Russia from annexing Donetsk and Luhansk, at least so far. For permanent effects, permanent changes in policy choices are needed.

That leads to the final question on what Russia’s policy aims are. One way to get an answer to this question is to make sense of Russia’s reaction to the free trade agreement of Ukraine with the EU. It is clear that Ukraine’s free trade agreement with the EU is not in conflict with the Ukrainian free trade agreement with Russia. It is also clear that Russia does not worry that the so-called deep free trade agreement is detrimental to the economy of Ukraine and thus supports the opponents of that agreement on that ground. That we know because Russia’s complaint is that Ukraine will in fact benefit from that agreement in part by becoming a platform for EU investments targeting the Russian market that can be

accessed free of tariffs from Ukraine. So, the argument for pushing Ukraine into a customs union with Russia is that it is a measure that protects the Russian economy.⁴ That suggests that the cooperative path, often proposed as an alternative, e.g. a three-way free trade agreement (between the EU, Ukraine, and Russia), is not the alternative favoured by the Russian government, at least not as of yet.

That extends to Russia's overall political choices. Here, it is necessary to make the assumption that Russia makes its policy choices autonomously, which means that it chooses the targets and the instruments independently, and does not just react to decisions taken in Kiev, Brussels, and Washington. The alternative assumption would mean that the actions of the Russian government are made, or rather manipulated, in these other three capitals. With the assumption that the Russian government makes its own decisions with a view to its own targets given the instruments at hand, it is reasonable to conclude that Russia has turned away from cooperative, trade and other market, solutions and towards geopolitical ones in Europe.⁵ The regime of sanctions can certainly not reverse this policy choice in Moscow.

To check that, it is important to notice that the sanctions have deterred Russia from annexing additional Ukrainian territories, but not from intervening militarily in Ukraine and from using geopolitical means to influence the political developments in Ukraine and beyond. So, Russia's turn towards geopolitics in Europe is an enduring one.

⁴ See e.g. Putin's press conference on 4 March 2014: <http://eng.kremlin.ru/transcripts/6763>

⁵ Geopolitics stands for the use of control over a territory to increase political power with a view to gaining political or economic advantages often going under the name of national interests. The term carries negative, almost racist, connotations because ethnic minorities have often been used to justify territorial claims and, in extreme cases, to dismantle a country after declaring it to be an 'artificial state' due to its lack of ethnic homogeneity or strong identity (in terms of blood, language, culture or civilisation) or due to lack of a long history of statehood. European security and stability has been increasingly based on post-geopolitical premises, i.e. on the respect for existing borders (with orderly integrations and secessions) and a high level of human rights with the aim of enduring pacification of the continent after the Second World War.

3. Getting legitimate: the case of Macedonia

In 2001, an Albanian rebellion broke out in Macedonia. It was, in part in any case, a spill over from the conflict in Kosovo (there was a similar uprising by the Albanian minority in the south of Serbia, in the border region with Kosovo, at roughly the same time). Civil war threatened, with the government being ready to use force against the insurgents. The conflict was, however, resolved in less than a year in the following way.

For one, cross-border activities were gradually stopped. Gradually, because there was initially a misunderstanding, on the part of the international (military and civilian) personal present in Kosovo, whether there was a justification or lack of one for the uprising. In addition, international peacekeeping forces were deployed.

Two, it became clear that Macedonia was not Kosovo and the position of the Albanians in Macedonia were not the same as in Kosovo. They were participating in the democratic process, had representatives, and were part of the governing coalition since the country became independent and democratised in 1991. The leadership of the insurgents made it clear that they did not challenge that fact and were not seeking a military or a unilateral solution.

Three, the EU signed a Stabilisation and Association Agreement, the first of that kind (ahead of the one signed with Croatia), with Macedonia without hesitation and very early after the conflict broke out (at the beginning of 2001). That sent a strong signal to the more radical among the insurgents.

Four, the need to review the political set-up was recognised by the Macedonian public, with the issue of legitimacy of the parties to negotiations being an open one. The insurgents set up a party, negotiated an agreement with the government, with international intermediation, which, the Ohrid Agreement, contained a number of constitutional revisions.

Five, parliamentary elections were held in order to have legitimate representation to discuss, adopt, and implement the Agreement. The political party representing the insurgents won the majority of the Albanian votes and the then Macedonian opposition party won the majority of the Macedonian votes. Then the Ohrid Agreement became the basis for constitutional changes.

Six, the stability of the solution has been tested quite a few times and has proved enduring until the present time in any case. The current legitimacy crisis in this country is unrelated to constitutional issues and is about the quality of democratic governance, which has been declining in recent years.

There are at least three points to make drawing on the experience with the Macedonian case.

One is that it is hard to justify an armed rebellion in a democratic country, however imperfect the democracy; the democratic process is the way to achieve reforms, even constitutional ones. Otherwise,

a democratic government will be justified in defending its internal sovereignty against the challenge by a violent uprising by military means.

Second, numbers give power, but not legitimacy (and the same goes with greater force for guns and physical power of any kind); numbers are powerful to question the legitimacy of the government, but do not legitimise the protestors; a political process is needed for legitimacy, preferably via general rather than local and in any case free and fair elections.

Third, external (military) support for insurgency can be justified primarily on grounds similar to that of the colonial status or on humanitarian grounds (and not by invoking ethnic, cultural or those of a separate civilisation, or historical justifications). Both, colonialism and gross violation of human rights as the bases of civil disobedience, as the reasons to question the legitimacy of the state's power, are in accordance with the UN Charter, but are mostly meant to apply to extreme cases (occupation, political exclusion, apartheid, not to mention genocide or severe cases of ethnic cleansing; these are necessary, not sufficient conditions).

The Macedonian case is not an exceptional one. In fact, in most cases, the military wing of a rebellious or revolutionary undertaking has to give in to the political wing in order for the process of the legitimisation of parties to the possible political agreement to take off. That political wing needs to put the military one under control and win elections in order to get involved in a process of political settlement and constitution-building because both have to be adopted by a legitimate political body, i.e. a parliament or a constitutional assembly.

4. Secession in slow motion: the Montenegrin way

The key test for secession is whether the minority in the new state accepts it. That has a constitutional side, but also the procedural side. The latter is crucial. The case in point is the secession of Montenegro.

Montenegro stayed in a federation with Serbia, which kept the name of Yugoslavia. There was, however, never a doubt in the public of both states that Montenegro could secede if it wanted to. It was, however, believed by the Serbian public that that would not be in the interest of Montenegro and thus it would never happen. How did it happen anyway?

The key reason that secession became attractive was the fact that Montenegro, being much smaller than Serbia – the GDP of Montenegro was not much above 5 per cent of the total – could hardly influence the political and economic decisions of the common state. Even if the federal constitution said otherwise, in practice nothing really depended and was conceivably going to depend on the Montenegrin parliament and government. So, as the political and economic situation deteriorated, secession became ever more attractive.

On the Serbian side, the public, and especially the Montenegrin diaspora, thought that secession would never happen because Serbs and Montenegrins belong to the same ethnicity, the Serbian one. Even if it was correctly perceived that separation could be in the interest of the leadership and the government they controlled, there was no way that the population would go along with it.

In such circumstances, a snap decision by the president, the government, and the parliament could be the only way to secede, perhaps with an ex post referendum, which would just be used to ratify the decision already taken. This is not how things went. In fact, in part due to the fact that the military was controlled from the centre, the secession of Montenegro took a long time and relied on mechanisms that are quite instructive.

Basically, there was gradual disintegration, with a prolonged public debate, and finally with a referendum that was designed in such a way that the legitimacy of the outcome could not be put in doubt even by the Serbian and also other minorities (Bosniaks and Albanians). This is how it went in brief:

First, there was fiscal devolution, which is crucial to every political disintegration. This was risky given that Montenegro traditionally depended on transfers from Belgrade's budget, since the start of the common state (in 1918). It took a while, but it strengthened the case for independence because of increased interdependence of Montenegrins paying into the budget and those receiving payments from the budget.

Second, the bold decision to give up on the Yugoslav dinar and adopt the German mark as legal tender enabled significant reforms in the monetary and the financial system. This was supported by the public because Belgrade's central bank relied on a rather high rate of inflation in order to finance wars and

other goals of the Serbian government. Again, this exemplifies the crucial role that runaway inflation plays in disintegrations of monetary systems and states.

Third, an agreement with the military was reached of how to divide the resources and to have Montenegrins serve at home. In other cases in the breakup of Yugoslavia, the separatists tended to overrun the military and confiscate its weapons. Montenegro followed the example of Macedonia, which essentially gave away all the military assets in exchange for the Yugoslav army to leave the country peacefully.

Fourth, international mediation was accepted and various demands by the EU and others who aimed to keep the federation or at least make the secession as hard as possible were heeded. Thus, the EU was instrumental in the transformation of the Yugoslav Federation into the State Union of Serbia and Montenegro, which postponed the referendum for independence by a few years.

Fifth, during all that time, there was an ongoing debate in Montenegro and in Serbia about the costs and benefits of independence, which was increasing the legitimacy of the separatist position. All the concerns were addressed practically daily. The federalists made the predictable mistake of denying the Montenegrin identity and the right to make the decision by themselves. Again, that happens often. It was a strategy used in Croatia, Macedonia, and most aggressively in Bosnia and Herzegovina and proved counterproductive each time.

Sixth, advice from the EU and the Venetian Commission on how to set up and conduct the referendum was accepted. Qualified majority was required for the yes vote to win. There were observers and no significant complaints about the process before the vote, the counting itself, or the outcome.

Seventh, the Serbian minority accepted the outcome, though it opposed it, and Serbia decided to work to maintain good relations with Montenegro. This made it possible for the minority parties to continue to participate in the Montenegrin politics, so political stability was never at risk.

The key characteristic of the whole process was that it was accepted as legitimate by the minorities, primarily the Serbian one, but the other two could not be disregarded either. Serbian external interference did not help the case of the Serbian minority at all.

One additional characteristic is worth mentioning. Often in secessions, the negotiations about the division of assets and obligations come after the decision to secede has already been taken, which tends to poison the relations of the new states. In the case of Montenegro, disintegration happened almost completely before the very act of the declaration of independence, so not many unnecessary bad feelings were inherited.

5. Concluding note on Kosovo

It is often said comparing the case of Crimea with that of Kosovo that in the latter case, unlike in the former, there was no referendum on independence. That is not correct. In fact, a referendum was held in September of 1991, the turnout was high, and there was near unanimity for independence.

The vote had no legal consequence either under international or Yugoslav or Serbian law. Kosovo still elected a President and a government and functioned as a parallel state until 1999. Then it came under UN protection with the Security Council resolution 1244. Eventually, independence was declared in 2008. The legality of that decision was considered by the International Court of Justice, which found that the independence was not in violation of international law.

The Court noticed that the Security Council did not express disagreement with the proclamation of independence of Kosovo. In fact, the Court interpreted the resolutions and the actions of the Security Council over more than a decade as implying an agreement that independence of Kosovo was one possible outcome of the conflict if a different agreement could not be reached by Serbia and Kosovo.

The opinion of the Court did not rely on either the right of self-determination or on any legal argument for secession. In fact, the Court made it clear that international law does not provide for the conditions under which a state can emerge or be set up. What the Court found was that there was no violation of international law and that the independence of Kosovo did not happen against the will of the Security Council or the United Nations. Rather to the contrary it was in accordance with the outcome expected by the Security Council if the parties in conflict failed to come to an agreement.

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