"We the Territorial People" and the Russia-Ukraine War

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Not enough attention has been devoted to Russia's demands that Ukraine amend its constitution to recognize Crimea as Russian territory as well as accept the independence of the separatist regions in eastern Ukraine – Donetsk and Luhansk. Russia further insists that Ukraine give up its goal of joining NATO and the EU, as expressed in constitutional provisions from 2019.

President Zelenskyy has expressed some amenability to President Putin's NATO stipulation. On the other hand, he announced that "if a pseudo-referendum on pseudo-republics is announced in the temporarily occupied territories in the Kherson and Zaporizhzhia regions, Ukraine will withdraw from the negotiation process." Though it may not seem intuitive, constitutional law and its accompanying methods of holding referenda to amend constitutions is at the heart of the conflict between Russia and Ukraine. Both sides' positions seem bewildering. Is constitutional amendment the way to achieve a breakthrough? What conditions must be met to legitimize secession, which includes the breaking apart of citizens along with the state's territory, on which they reside?

In this piece I argue that contrary to the common narrative, secession is banned by most constitutions and that constitutions go as far as using borderline or even anti-democratic means to fight such efforts. I further argue that secessionists, by their very nature, challenge the sovereignty of "We the territorial People" who authored the constitution, and claim to be a different "We the People" with competing claims to sovereignty. As such, there is no way to legitimize the new People by the very People whose sovereignty they challenge, and a break with constitutional continuity is needed. Two new constitution-making bodies representing the new people and the "remaining" people must ratify the two new entities and come to an agreement to legitimize secession from a constitutional perspective. This constitutional resistance to secession is backed up by international law as well. Thus, Russia's claims and demands cannot be legitimized via constitutional amendment on both empirical as well as theoretical grounds.

The Constitutional Aspect of the War

Typically, regular amendments to Ukraine's Constitution must garner the support of two-thirds of parliament (art. 155). Amendments of the most important constitutional provisions require in addition ratification by an "All-Ukrainian" referendum (art. 156).

Ukraine's Constitution explicitly acknowledges the importance it attributes to Ukraine's territorial integrity and national unity, but camouflages its methods of defending it through use of double-speak, which is a common tactic among democratic constitutions to protect territorial integrity. On the one hand, Article 2 brands Ukraine's territory "within its present border… indivisible and inviolable," and Article 157 forbids constitutional amendments "oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine." These provisions suggest that amending Ukraine's Constitution to allow for secession would amount to an unconstitutional constitutional amendment as a violation of the eternal value of territorial integrity and national unity. On the other hand, Article 73 disguises this by seemingly providing a track for "altering the territory of Ukraine … [albeit] exclusively by an All-Ukrainian referendum." In fact, the Ukrainian Constitutional Court attempted to prevent Crimea from holding a referendum to support secession because this matter can only be decided at the national level. In Ukraine's case, requiring an All-

Ukrainian referendum is a gentler way of impeding secession, because of the low probability that parliament would authorize such endeavor and that most Ukrainians ratify secession. Moreover, the alternative of relying on the Court to declare a constitutional amendment unconstitutional after the fact may come too late to prevent secession.

Reinforcing this interpretation is the fact that the Ukrainian Constitution further hinders secession, by forbidding the establishment of political parties which aim to violate Ukraine's territorial sovereignty (art. 37). Ukraine invoked this clause on a few occasions to ban Communist parties from promoting Russian meddling with Ukraine's sovereignty and territory.

Comparative Constitutional Law's Treatment of Secession

Ukraine's constitutional efforts to fight secessionism align with the prevalent approach in comparative constitutional law to protect territorial integrity. In fact, 79% of the world's countries, including the majority of democratic countries, prohibit secession in their constitutions. As demonstrated with Ukraine above, these countries utilize the most unconventional constitutional weapons to combat this phenomenon. The first weapon is enshrining values of national unity, territorial integrity and the likes in the constitution through eternity clauses. This authorizes the constitutional courts to strike down constitutional amendments as unconstitutional if they facilitate secession. The second weapon is the ban on political parties, which is used to prevent separatist parties from partaking in elections and worming their way into elective bodies and then changing the constitutional system from within. Bans on political parties are the mirror image of constitutional eternity clauses. Both are tools of militant democracy that kick in at different times to protect the most sacred values of the constitutional status quo—in this case, territorial integrity and national unity.

These unconventional weapons run counter to the typical narrative of militant democracy that justifies bans on political parties only for the sake of protecting democratic tenets. The traditional narrative supposedly allows constitutions to be amended and parties to participate in elections as long as all actors strive to change the rules of the constitutional landscape peacefully from within the democratic system. However, this narrative never fitted countries' constitutional provisions and actual practice of fighting against secession with all their might. Rather, Ukraine's practice of non-tolerance towards secession aligns with comparative law.

But why do democracies worldwide use such borderline or even anti-democratic weapons? The reason is twofold. First, there are strategic considerations: Opposition to secessionist forces disincentivizes secessions and aggressive, coercive actions on behalf of its supporters by raising the prices of pursuing secessionist agendas. States have further profound interests to prevent secession as it might threaten their very existence and possibly deny them access to their vital resources. Furthermore, they fear persecution of citizens who oppose secession yet might find themselves an ethnic/religious/cultural minority ruled by secessionists. The total ban on secession also strategically positions secessionists in a weaker bargaining position in any negotiations.

Then, there are constitutional considerations to factor in. Many scholars distinguish between the original constituent power that adopted the initial constitutional document and the derivative constituent power in charge of amending the constitution. The latter power of amendment is considered a constituted power, provided for in the constitution and thus inferior to the superior power of initial constitutional adoption. As such, constitutions may set limitations, including in the form of eternity clauses, on the constitutional amendment power. In contrast, I argue that constitutional amendment power is on par with the original constituent power to provide the same footing for amendments as higher law. Secession, however, is different from any other constitutional amendment since it challenges the very identity of the constitution-making body. Secessionists assert that they don't see themselves as part of the "We the People" constitution-making body, because they identify as a separate "We the People". Thus, secession can't emerge from

within the constitution as a constitutional amendment under a disputed regime. Rather, it must be accomplished through an extra-constitutional act. After all, a People can't gain legitimacy from an enterprise when they deny its very legitimacy.

Thus, though common approaches assert that secessionist referenda should garner support either of the seceding people and/or of the entire people, I argue that neither suffices. Rather, secession requires the reconstitution of the constitution-making body into two new, separate constitution-making bodies with their own independent identities. The separatists as one body, and the rest of the people– rather than the *entire* people – as the other. These new bodies must reach an agreement between them over secession to avoid competing claims over people and territory. This also prevents a situation in which secessionist votes are counted twice, both in a secessionist referendum and in a national referendum. Thus, ratifying secession requires support of both the seceding as well as the remaining people in two separate referenda.

No constitution that engages in nation-building will provide ex-ante for such processes that undermine this very quest for national unity. Secession by its very nature is not a matter for constitutional amendment but for a re-constitution of the state and its people. Constitutions, like Canada's, that allow for secession via constitutional amendment disguise the true revolutionary nature of secession: a break with the past for both the secessionists and the remaining population. Constitutions' total ban on secession thus reveals and reflects the fact that popular sovereignty is a territorial concept. It is a bundle of citizens and territory. If some of the citizens want to depart with some of the territory they undermine the very integrity of the endeavor, thus attesting to the fact that popular sovereignty is a *territorial concept*.

The Backing of International Law

International law reinforces comparative constitutional law on the matter. It is organized around the principle of the protection of territorial integrity of states which is in the interest of the entire international community to promote peace and stability. International law thus legitimizes secession and recognizes the right to external self-determination in cases of decolonization or foreign rule alone. In other cases, it encourages states to promote internal self-determination of minorities within the existing territory of the state through various group rights that fall short of secession. Even in the case of serious abuse of rights, international law, following the *Kosovo* decision, did not recognize the right to external self-determination. The International Court of Justice, however, did not condemn Kosovo's unilateral declaration of independence as a violation of international law either due to their circumstances.

To minimize international condemnation, Russia tried to manipulate the language of both international and constitutional law to promote and justify its imperialistic aspirations in Ukraine. Putin alleged that Ukraine engaged in ethnic cleansing of Russians in the eastern separatists regions. On the eve of the invasion, he recognized these separatist regions as independent based on "humanitarian" considerations as well as out of respect for their autonomous will. He further argued that Ukraine breached its international obligations under the Minsk agreement to decentralize. He labeled the Ukrainian government "Nazi", and President Zelenskyy a western puppet and a neo-Nazi dictator. Putin further challenged the very existence of a Ukrainian People, arguing that Ukrainians were Russians.

Yet, the US effectively combatted Russia's narrative, by exposing its true intentions to the world ahead of the invasion. Before the invasion, the administration used a unique tactic of publicly releasing intelligence and even went so far as to send the Secretary of State Antony Blinken to spell out Russia's anticipated playbook in a UN address. This strategy was effective in undermining Putin's attempts to weaponize the law.

In addition, the Russian aggression could hardly be denied, when 190,000 Russian soldiers in full uniform and combat gear amassed on Ukraine's border. Russia at first set to topple the Ukrainian government or conquer the entirety of Ukraine, which boasts a population of over 40 million and is the second largest country in Europe. The Ukrainians disproved Putin's

narrative of one nation by fighting fiercely to remain independent.

As a result, the international community – including countries with longstanding policies of neutrality – was swayed to sanction Russia in an unprecedented manner for its severe breach of Ukraine's right to territorial integrity and required Russia to withdraw. The clear breach of international law by Russia provides Ukraine more freedom to shape its response to Putin's demands that it will amend its Constitution to allow for territorial concessions. Not only do constitutional amendments assume the free will of people to consent, a condition not met when referenda are conducted at gunpoint, but the essence of Russia's demand is not for constitutional amendment. It means the rebirth of a new diminished nation, not achievable within the contours of the existing Ukraine constitution, or for that matter, by any nation-building constitution.

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