

When is Secession Justified? The Kashmir Case

Written by Neera Chandhoke

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NEERA CHANDHOKE, SEP 21 2016

The Empirical Referral

When W.H Auden penned the following lines: “Abruptly mounting her ramshackle wheel, Fortune had pedalled furiously away. The sobbing mess is on our hands today” (1945:3) he could well have been capturing the state of Jammu and Kashmir, or simply the Kashmir valley in India. Though the Valley has been on the boil since 1990, and protested repeatedly against historical injustice through armed struggle, matters have worsened in recent years. On 8 August 2016 a militant commander of the banned outfit Hizbul Mujahadeen, Burhan Wani, was killed by the Indian security forces. Within hours, the ten districts of the Muslim majority region erupted in angry protest. Demands for *azaadi* or independence rent the air. Largely based in rural areas, these protests were driven by a group of young people aged 12 to 16. The uprising was leaderless because existing leaders have been delegitimised and dismissed as of no consequence.

The Government of India responded, as it usually does, by the deployment of immense force. As a result, Kashmiris have been subjected to tremendous harm. Over 70 civilians have died, and hundreds injured and blinded by pellet guns. The Indian government has put down previous uprisings in 1990, 2008, and 2010 ruthlessly, but this time the situation seems to be out of control. Kashmir continues to seethe and demands for independence resound in the Valley, in the rest of India, and in the world. Once again the Kashmir case has thrown secession onto the centre stage of international politics.

International Law and Secession

The breaking and the making of a state are, arguably, significant for the international order, founded as it is on the principle of state sovereignty. Traditionally, however, international law holds that separatism falls within the provenance of politics. If a movement within the state demands a state of its own, the government has to decide how to respond. The matter is for and of domestic politics and, therefore, outside the dominion of international law and the cognizance of international institutions. If a new state (Si) is formed out of an independent state (S), Si will be recognised and admitted into the United Nations (UN) only if: (a) the constitution of S includes the right to secede; (b) if S is in the process of dissolution; or (c) if S recognises Si. But if the constitution of S has no provision that sanctions secession, or if S opposes unilateral secession, secession has attracted virtually no international support or recognition.

That is, until the time the government of the predecessor state either *recognises* the new state, or recognises the demand for a separate state as valid, there is a strong international *presumption* in favour of continuity of a state, and, therefore, against self-determination outside the colonial context. Though the two Vienna Conventions on State Succession (1978, 1983) recognise that factors *other* than self-determination may lead to secession in the future, they also reiterate that the Charter of the UN mandates respect for the territorial integrity and political independence of a member State.

The reluctance of the UN to deal with the problem of secession has bred one anomaly, and one normative problem. The anomaly is as follows. Even if the UN does not recognise a new state born out of secession, individual countries have done so. The Government of India recognised Bangladesh in December 1971; three years before the UN

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admitted the state into its forum. Kosovo was declared a UN Protectorate at the end of the 1990s, but on 17 February 2008, Kosovo's Parliament unilaterally declared independence from Serbia and proclaimed an independent Republic of Kosovo. A number of western countries rushed to recognise Kosovo, despite non-recognition by the UN.

This catapults a serious issue onto the itinerary of international law. De facto states have been established and recognised by other states. But because the UN does not admit states born out of unilateral secession, they lack an essential attribute of the state: membership of the UN. Two, though other states can recognise breakaway states, powerful western states have done so in an arbitrary fashion. Thus, Kosovo has been recognised but the Government-in-Exile declared by the Saharawi Arab Democratic Republic in Western Sahara, the Independent Republic of Somaliland, and right of the Palestine people to the establishment of a state of their own, are not given credence.

This brings us to the normative problem. International law surrenders as Teson suggests, to "the most brutal realities of power politics". This, he continues, has no place in a philosophy of international law. For we want to know whether secessionists are *justified* in their demands, regardless of whether or not they will win the struggle, we want to know their reasons and international law does not provide any, it leaves the decision to the battlefield" (1998: 132).

The refusal of international law to recognise secession, serves to push the reasons for secession under the metaphorical carpet. This does not help anyone to take a principled stand on the issue. We simply do not know which side we should be on. We hardly expect member states, which guard their territorial borders so jealously and so zealously, will participate in any decision that sanctions the dismemberment of their own territory, and results in the division of their populations. But secession is not only about partitions and divisions. Discussions about secession are ultimately about the kind of state that does, or does not provide justice to its people. The paramount need, therefore, is to develop principles that can or cannot justify secession.

The presumption is that there is no essential link between self-determination and the right of secession, only a contingent one. If states do not remedy historical injustices and institutionalise preconditions for the realisation of the right of self-determination, *then* minorities have a right to secede. Two, democracy is not only about majority rule. Democratic governments are obliged to protect the rights of vulnerable groups through devolution of power and regional autonomy. If these two preconditions are missing, a group has the prima facie right to secede.

Kashmir and the Right to Secede

Taking this as our referent it can be argued that prima facie Kashmir has a right to secede. This is *not* because a plebiscite has not been held as promised by the Government of India after the monarch had signed the Instrument of Accession. In April 1948, the Security Council adopted Resolution 47 that directed Pakistan and *then* India to withdraw their troops from Kashmir. The essential precondition; the withdrawal of Pakistani was not met, therefore the lapse. Subsequently, the militarisation of Jammu and Kashmir that accompanied the constant threat of war between India and Pakistan, and the subsequent arrival of 'third parties' in the region in the shape of armed mercenaries in the early 1990s, ensured that the appropriate moment for the holding of the plebiscite simply did not come around.

The Government of India *has*, however, to be *faulted* on another count: the subversion of the special status allotted to the state of Jammu and Kashmir by the Constitution of India, and by contractual provisions. This 'original sin' of the Government of India was rapidly compounded by major infringements of the democratic rights of the people of the state.

Yet, an unqualified right to secede is troublesome. History tells us of the enormous harm wreaked by partitions in South Asia. In Sri Lanka, an estimated 7000 Tamil civilians were killed, and 72,000 civilians were displaced from their homes by the Sri Lankan army, as well as by the Liberation Tigers of Tamil Eelam, in the last phase of the civil war between January 2009 and May 2009 alone (The Guardian 2009). In 1971, an estimated 3 million people died in the war fought for the creation of Bangladesh. About 8 to 10 million were rendered homeless (Bose: 2005).

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More importantly, the right to secede is seriously compromised if minorities within the state that seeks independence resist the demand. The demand for secession has erupted in the valley of Kashmir, and in the two Muslim dominated districts of Jammu. But for Kashmiri Hindus and Sikhs the valley is home as well. The Buddhist community in Ladakh holds that it prefers to be governed directly by the Government of India, or be amalgamated with Hindu majority regions in Jammu, or join East Punjab, or be reunited with Tibet. In Jammu, the predominantly Hindu community urges integration of the state into the Indian Union, and abolition of its special status. Over the years, the regional divide has generated incommensurable voices on the future of the state.

What we see here is a serious moral dilemma between Kashmir's right of secession, and the right of minorities *not* to secede. To prevent the rights of one section of the people from being overridden by another section, we should look for solutions, short of secession. The idea is to address the grievances of secessionists who have challenged the serious miscarriage of justice.

The one alternative to the right of secession which can but benefit one community at the expense of others is to realise self-determination within the existing state. We can think of substantial regional autonomy, special modes of representation, and protection of minority rights. There is an immediate need to restore the special status granted to Jammu and Kashmir by the Constitution of India through Article 370. The rights of all parties in the state will be realised, albeit to a lesser degree than demanded. This measure is *but* the start of a fuller process of restoring and realising justice in the beleaguered state of Jammu and Kashmir. If this happens, fortune might be persuaded to pedal back to the region just as furiously as it pedalled away.

Conclusion

Finally we have to ask whether the alternative to the violence of the nation-state is the setting up of another nation-state. States across the world suffer from pretty much the same malaise; an inherent tendency to accumulate and abuse power, and intolerance towards minorities. State power can be controlled only through constitutions, rule of law, institutionalised rights, an independent judiciary, checks and balances, and, above all, a vibrant civil society. Secession is hardly a solution to the problem that besets groups; it might even be a part of the problem.

Moreover, if coercive efforts to build nations out of plural populations are the source of secessionist movements, the setting up of a state of one's own, which cannot be but a clone of the parent state, is hardly a solution. The problem of the nation-state is not resolved in this way; it is merely *deferred*. If the nation-state has proved one of history's most grievous mistakes, then many nation-states can only reproduce this mistake. Instead of focussing on secession per se, we perhaps need to think out alternatives to the nation-state, figure out how aspirations of minorities can be best realized within the state, and how sovereignty can be diluted through political arrangements within the state.

Allen Buchanan has put this point across well. He argues that secession challenges the ability of the political philosopher to re-imagine the sort of political institutions and practices that govern individual and collective lives. The impulse to secede from an existing state, he alleges, betrays a fundamental lack of political imagination, because, paradoxically, secession is one of the most conservative of political acts. The secessionist tends to assume that his problems are due to the state in which he finds himself, and that the solution is to get his own state. The anti-secessionist tends to be equally unimaginative, seeing in every demand for autonomy a threat to the existence of the state. The imaginations of both are cramped by the narrow horizons of the statist paradigm. What the usual rhetoric of both parties overlooks is that sovereignty can be unbundled in many ways, and that the only choice is not to stay in the state, or get away. Once we take seriously the indefinitely large range of possible regimes of political differentiation within state borders and the rich menu of intra-state autonomy arrangements we liberate ourselves from the confining assumptions of self-determination. There are various inter- and intra-state autonomy regimes that can cope with, or serve to avoid secessionist conflicts. Therefore, international legal institutions should support, and even mandate intra-state autonomy regimes (2004:7).

Buchanan's argument gives us cause to ponder and reflect. Perhaps the political seductions of 'a state of one's own' have to be unpackaged. Perhaps the virtues of democracy and justice and the need to redress injustice need to be stressed more not less. We have absolutely no certainty that a new state will not replicate the problems experienced

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by minorities in the existing state. The history of South Asia bears this out amply.

This is not to suggest that the right of secession should not be taken seriously. The right has to be used sparingly, and justified rigorously. For that I suggest that the right can best be likened to the right of euthanasia. The right to life is inalienable, and no one has the right to take her own life. Yet, when the health of persons is so impaired that they live a life below the threshold of what we consider distinctively human, when their future seems to be ridden with nothing but pain and suffering, some states allow the terminally ill to choose to put an end to their misery. But just because a case can be made out for the right to put an end to one's life, it does not mean that we defend euthanasia *per se*, *except in the very last instance*. What is needed is the investment of more energy into finding a solution to the problem, more funds for medical research, and more energy into preventive medicine. Euthanasia might be a last option when everything fails, but easy resort to premeditated and intentional death is best avoided. Similarly, even though secession might become a necessary course of action if injustice is irrevocable; it is best that the invocation of this right is forestalled through the realisation of self-determination in another avatar (Chandhoke 2012: 214-215).

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Neera Chandhoke was formerly professor of political science at Delhi University. She has written widely on the subjects of civil society, democracy, rights, secularism, and political violence. Her publications include *State and Civil Society: Explorations in Political Theory* (Sage, 1995); *Beyond Secularism: Rights of Religious Minorities* (Oxford University Press, 1999); *The Conceits of Civil Society* (Oxford University Press, 2003); and *Contested Secessions: Rights, Self-determination, Democracy, and Kashmir* (Oxford University Press, 2012). Her most recent book is called *Democracy and Revolutionary Politics* (Bloomsbury, 2015). She lives in New Delhi.