SELF-DETERMINATION AT THE UKSC AND THE FAILURE OF INTERNATIONAL LAW

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According to the UKSC in *Reference by the Lord Advocate of devolution issues* self-determination as found in international law does not apply to Scotland.[1] This is a surprising finding that would not have arisen, had the Scottish National Party (SNP) not raised the issue in its submission.[2] The SNP argued that the right to self-determination mandates a narrow reading of the phrase 'relates to [a reserved matter]' in section 29(3) of the Scotland Act 1998, implying the power of the Scottish Parliament to legislate for a referendum on Scottish independence.[3] The UKSC's finding is incidental and brief but it is nevertheless striking. This contribution focuses on one of these striking aspects: namely that the judgment misunderstands international law on the matter as well as the at least some of the sources it cites to support its conclusion. It argues, first, that both the SNP's submission and the judgment do not grasp the structure of the right to self-determination and how it relates to the regulation of secession in international law. Second, it suggests that while these errors act as a sort of distraction, international law fails to adequately respond to secessionist pressures. Accordingly, it would not have helped even if it had been invoked correctly. Third, the contribution suggests that this state of affairs raises the hurdles for separatist movements to succeed and with them the stakes for constitutional arrangements. The upshot is that the SNP's submission as well as the judgment are at worst a setback for the international legal regulation of secession and at best a missed opportunity.

1. The SNP's Submission, the Court's Findings, and Two Crucial Errors

The SNP's written submission focuses on the right to self-determination in international law, arguing that it is a fundamental and inalienable right and that it should inform the interpretation of the Scotland Act 1998.[4] It starts by citing UN General Assembly Resolution

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[1] [2022] UKSC 31, para 88.
[2] Written Submissions on Behalf of the Scottish National Party, <https://www.snp.org/the-snps-supreme-court-submission-on-the-independence-referendum/> accessed 16 February 2023.
[3] ibid, paras 2.3 and 7.1.-7.23.
[4] ibid, para 3.1.

1514: 'All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'[5] Next, it rightly concedes that the right to self-determination was most prominent and important in the colonial context, affording a route to independence for colonial peoples.[6] The submission further emphasises – again rightly – that the right is not restricted in its application to the colonial context.[7] In a next step, the submission partly recognises that the context in which the right to self-determination is applied makes a difference for what it guarantees.[8] In the colonial context, the right to self-determination is read as external self-determination, essentially affording a right to secede unilaterally to affected peoples. In other contexts, it only amounts to internal self-determination, that is, the right to claim representation or autonomy within an existing state rather than to form a new one.[9]

The submission, however, misunderstands this right to internal self-determination. This is unhelpful for two reasons. First, by buying into the self-determination narrative, the SNP's submission needs to argue the case that Scotland is a people for these purposes. However, international law does not define this entity of self-determination, not even for the comparatively clear case of colonial peoples.[10] Because Scotland is not, and never was, a colony in this sense, the submission needs to make the case in a different way, which brings us to the second reason why this focus is unhelpful. The understanding of the term 'people' that helps the SNP's case is an institutional one. However, because the submission rightly relies on an institutional rather than nationalist or ethnic understanding of the term, it has to point to the internal autonomy of Scotland to make its case. It emphasises, for example, the extent of devolution, that Scotland has a parliament, and the need for a referendum consulting the Scottish people were the devolved institutions to be abolished.[11] This kind of power to determine forms and institutions of government, however, is precisely what internal self-

[5] ibid 3.2., citing UN GA Resolution 1514, Adopted 14 December 1960, para 2. On self-determination generally see BR Roth, 'Self-determination Short of Secession' in J Vidmar, S McGibbon and L Raible (eds), *Research Handbook on Secession* (Elgar 2022). For a view on its limitations specifically see J Klabbers, 'The Right to be Taken Seriously: Self-determination in International Law' (2006) 28 *Human Rights Quarterly* 186.

[6] Written Submissions on Behalf of the Scottish National Party, <https://www.snp.org/the-snps-supreme-court-submission-on-the-independence-referendum/> accessed 16 February 2023, para 3.6.

[7] Although it incorrectly refers to the colonial context and ensuing emancipation movements as 'post-colonial': ibid, para 3.6.

[8] ibid, para 3.6, citing International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010 p 403, Separate Opinion of Judge Cançado Trindade, para 174.

[9] For a recent analysis including a historical overview see P Bossacoma Busquets, *Morality and Legality of Secession* (Palgrave MacMillan 2020) ch 5.

[10] M Weller, 'The Self-Determination Trap' 2003 (4) *Ethnopoitics* 3, 10.

[11] Written Submissions on Behalf of the Scottish National Party, <https://www.snp.org/the-snps-supreme-court-submission-on-the-independence-referendum/> accessed 16 February 2023, paras 5.1-5.6.

determination guarantees.[12] In other words, the SNP's strategy of reasoning meant that the submission had to undermine its case in order to make it. This seems to be an unfortunate choice.

The Supreme Court, in turn, did not mince it words when it found that '...[T]he principle of self-determination is simply not in play here.'[13] This is surprisingly stark phrasing for what is essentially an incidental aspect of the judgment. It is also, as a matter of international law, not entirely correct.[14] To reach this conclusion the Court relied on the Supreme Court of Canada's reasoning in the *Reference re Secession of Quebec*,[15] quoting extensively form the judgment. The UKSC first draws on the finding that an external right to self-determination in the form of a unilateral right to secede is only generated in '... situations of former colonies'; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government... .'[16] The Supreme Court then added a quote substantiating a state's entitlement to territorial integrity whenever it '... respects the principles of self-determination in its internal arrangements... .'[17] The Supreme Court of Canada also summarised its take in the following statement, which the UK Supreme Court omitted:

> The right to self-determination of a people is normally fulfilled through *internal* self-determination … A right to *external* self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises only in the most extreme cases and, even then, under carefully defined circumstances.[18]

The Supreme Court of Canada went on to conclude that the people of Quebec were not oppressed either colonially or otherwise and accordingly do not enjoy a right to external self-determination in the form of a right to secede unilaterally. The UK Supreme Court for its part found that these 'observations apply with equal force to the position of Scotland and the people

[12] Generally: BR Roth, 'Self-determination Short of Secession' in J Vidmar, S McGibbon and L Raible (eds), *Research Handbook on Secession* (Elgar 2022).
[13] [2022] UKSC 31, para 88.
[14] Similar: M Weller, 'The UK Supreme Court Reference on a Referendum for Scotland and the Right to Constitutional Self-determination: Part II', *EJIL:Talk!* (13 December 2022) <https://www.ejiltalk.org/the-uk-supreme-court-reference-on-a-referendum-for-scotland-and-the-right-to-constitutional-self-determination-part-ii/> accessed 16 February 2023.
[15] [1998] 2 SCR 217.
[16] ibid, para 138; quoted in *Reference by the Lord Advocate of devolution issues* [2022] UKSC 31, para 88.
[17] *Reference re Secession of Quebec* [1998] 2 SCR 217, para 154; quoted in *Reference by the Lord Advocate of devolution issues* [2022] UKSC 31, para 88.
[18] *Reference re Secession of Quebec* [1998] 2 SCR 217, para 126. Emphasis my own.

of Scotland within the United Kingdom.'[19] This much is uncontroversial. However, the *Quebec Reference* does not support the UK Supreme Court's conclusion that the *principle of self-determination* is not applicable to Scotland. It only suggests that Scotland does not have a unilateral right to secede. As we have just seen a unilateral right to secede as a form of external self-determination is not its only expression in international law. There is also an internal right to self-determination, which *is* applicable to Scotland. Granted, the SNP's submission did not make things easier for the Court. It did not fully articulate this difference and accordingly could not argue that the devolution settlement should be read in light of all requirements of internal self-determination. Instead, the submission reduces the difference to whether the concerned group that is seeking self-determination is defined by a state boundary or to be found within the state.[20]

In terms of international law, the overall impression of both the judgment and the SNP's submission is thus rather mixed. The SNP's submission failed to distinguish the two expressions of self-determination correctly and the Supreme Court did not distinguish them at all. That said, it is arguable that it would not have helped if international law had been invoked according to its actual substance. The next section first articulates the consequences of this substance and argues that international law is not as helpful as one might hope.

2. Internal Self-determination and Secession in International Law

As set out above, external self-determination in the form of a unilateral right to secession does not apply to Scotland. This section takes this for granted and instead focuses on how internal self-determination relates to the regulation of secession in international law. Secession is best understood as 'the emergence of a new state in a part of the metropolitan territory of an existing state.'[21] The parent state claims the territory in question as its own and the secessionist movement challenges this claim by doing the same. This results in competing territorial claims and a secession or the lack thereof is in a sense a decision as to which of these claims is the better one. Competing claims and how to settle them is one of law's key concerns. Apart from the right to self-determination in its two expressions as seen above, international law in this

[19] *Reference by the Lord Advocate of devolution issues* [2022] UKSC 31, para 89.
[20] Written Submissions on Behalf of the Scottish National Party, <https://www.snp.org/the-snps-supreme-court-submission-on-the-independence-referendum/> accessed 16 February 2023, para 4.1.
[21] J Vidmar, L Raible, and S McGibbon, 'Introduction to the Research Handbook on Secession' in J Vidmar, S McGibbon, and L Raible (eds), *Research Handbook on Secession* (Elgar 2022) 1.

case does this by neither allowing nor prohibiting secessions, and thus suggesting that it is neutral.[22]

The consequence, however, is far from neutral. It means that international law privileges consensual secessions. In fact, territorial claims of secessionist entities almost never succeed unless consent from the parent state is secured first. Internal self-determination, which in all but the rarest cases must be pursued before a claim to secede would gain international legal traction is part of this structure.[23] It is also why some argue that self-determination far from being a democratic emancipatory tool is a trap and that its structure serves to disenfranchise populations, contributing to protracted conflicts.[24] As it stands, then, consent from the parent state is the primary path to independence.

Privileging consensual secession is not as such problematic, of course. One might even argue that '... consensual secessions are more likely to be legitimate over and above their legality and their likely success, as the consent of a parent state can be regarded as the democratic counterweight to the self-determination of the secessionist entity.'[25] What is problematic is to privilege it without also providing ways of settling competing claims when agreement is unlikely or impossible. Making it difficult for unilateral secession to occur – which is what international law currently does – is not the same as providing avenues for settlement. Because international law fails to embrace situations where consent from the metropolitan state is not forthcoming, it contributes to rendering secessions so fraught politically. Its structure requires separatist movements to build a legitimate case for their claim, but effectively relieves the parent state of the same duty. Against the background of this imbalance, it is difficult to see how a 'democratic counterweight' as in the quote above may be legitimately required.

In a sense, by omitting internal self-determination entirely, the UK Supreme Court articulated international law's consequences more explicitly (and more honestly) than international law does itself. But if this is true, the question becomes what the problem of the findings are in light of and for international law. The issue is that the judgment is not only a (somewhat incorrect) statement of what international law requires, but it also directly

[22] ibid 3-4.
[23] This is known as the remedial secession doctrine and it can be argued that the UKSC in its findings has (perhaps inadvertently) revitalised it, which to my mind represents a regressive step: K Istrefi, 'The UK Supreme Court in the Scottish Case: Revitalising the Doctrine of Remedial Secession', *EJIL:Talk!* (14 December 2022) < https://www.ejiltalk.org/the-uk-supreme-court-in-the-scottish-case-revitalising-the-doctrine-of-remedial-secession/> accessed 16 February 2023.
[24] M Weller, 'The Self-determination Trap' 2003 (4) *Ethnopoitics* 3.
[25] J Vidmar, L Raible, and S McGibbon, 'Introduction to the Research Handbook on Secession' in J Vidmar, S McGibbon, and L Raible (eds), *Research Handbook on Secession* (Elgar 2022) 4.

contributes to its development. According to article 38 (1)(b) of the Statute of the International Court of Justice, one source of international law is custom '... as evidence of a general practice accepted as law.'[26] Judgments such as this count as exactly such evidence – of both state practice and that it is accepted as law.[27] This means that the UK Supreme Court here contributes to the substance of international law. But the content it supports in this judgment is has just been shown to be problematic because it regularly contributes to sustaining rather than settling conflicts. It may thus be argued that the findings on self-determination in *Reference by the Lord Advocate of devolution issues* are a missed opportunity to contribute to remedying some of international law's shortcomings. Because of this, they also contributed to raising both the political stakes and makes constitutional arrangements more important than international ones.

3. The Role of Constitutional Law

Independence claims and secessions do not only have an international legal dimension, but they are also political and constitutional processes.[28] In fact, the political nature of secessions may explain some of the inadequacy of international law on the matter. As seen above, self-determination is connected to democratic institutions (or the lack thereof) and these are primarily provided for and regulated by constitutions rather than the international legal order. What the UK Supreme Court says on these matters is thus doubly important: first, as just seen, as a contribution to international law, and, second, to compensate for the latter's shortcomings.

Recognising the importance of constitutional arrangements, Weller has long been arguing that international practice now leans towards establishing 'constitutional self-determination' in international law and that is applicable to Scotland.[29] Constitutional self-determination arises when a domestic, constitutional arrangement has responded to the international right to self-determination in a particular way. That is, it recognises that

[26] Literature often refers to the requirements as state practice and opinion juris. See generally, eg, Gleider Hernández, *International Law* (2nd ed, OUP 2022) 35-46. One might usefully draw a comparison to the Jennings test of constitutional conventions, which also requires practice accompanied by the idea that the relevant practice is constitutionally required. Unlike constitutional conventions, however, customary international law is legally enforceable.

[27] See, eg, International Court of Justice, *Jurisdictional Immunities of the State (Germany v Italy)* Judgment, ICJ Reports 2012, p 99, para 55.

[28] For an analysis of Scotland's process in exactly these terms (albeit only up to early 2022), see S Suteu, 'Scotland's Political an Constitutional Process: Negotiating Independence under a Flexible Constitution' in J Vidmar, S McGibbon and L Raible (eds), *Research Handbook on Secession* (Elgar 2022).

[29] M Weller, 'The UK Supreme Court Reference on a Referendum for Scotland and the Right to Constitutional Self-determination: Part II', *EJIL:Talk!* (13 December 2022) <https://www.ejiltalk.org/the-uk-supreme-court-reference-on-a-referendum-for-scotland-and-the-right-to-constitutional-self-determination-part-ii/> accessed 16 February 2023.

constitutional law may not only take its cue from international law (as the Supreme Court here seems to suggest) but that it can also give shape to self-determination for a particular entity in a particular setting.[30] The Supreme Court of Canada recognises this when it says that 'legality of unilateral secession must be evaluated, at least in the first instance, from the perspective of the domestic legal order of the state from which the unit seeks to withdraw'[31] in a statement that was again omitted by the UK Supreme Court.

Whether or not international law is changing to incorporate this type of constitutional settlement is however not so important for present purposes. I want to suggest instead that any constitutional arrangement – independently of international law – should contribute to avenues of settling competing claims. There are two main ways in which it can do that. First, in the case of an entity such as Scotland, access to assessment of the population's will on the territorial claim should not be attached to high hurdles. Whether or not consent from Westminster for even a non self-executing referendum is too high a hurdle is thus a question worth asking. As it stands, such consent is required. The real question thus becomes if and when it can be legitimately withheld. Of course, the timing of the reference meant that the arguments about self-determination had to be raised in an incidental manner and relating to a narrow question. It was thus a missed opportunity to contribute an answer to this question. Second, and as stated in the *Quebec Reference* with regard to the reasonably similar situation of Canada,[32] if an expression of the population's view in favour of an independence claim is clear, both Scotland the UK government would be required to negotiate a secession in good faith.[33]

The focus of the *Reference by the Lord Advocate of devolution issues* as well as the SNP's submission was narrow and technical and neither addressed these questions with the depth they deserve.[34] They did not address the relationship between constitutional and international law nor investigate what might help to provide avenues for settling competing claims in the absence of agreement.

[30] M Weller, 'The Self-Determination Trap' 2003 (4) *Ethnopoitics* 3, 16-23.
[31] *Reference re Secession of Quebec* [1998] 2 SCR 217, para 88.
[32] ibid, para 143.
[33] In 2014 this was the express view of both Governments. On this see S Suteu, 'Scotland's Political an Constitutional Process: Negotiating Independence under a Flexible Constitution' in J Vidmar, S McGibbon and L Raible (eds), *Research Handbook on Secession* (Elgar 2022) 143-145.
[34] Part of the reason is the timing. Had the Scottish government waited until after the UK government objected to passing the proposed bill, the issue might have been addressed in more depth. On this see M Weller, 'The UK Supreme Court Reference on a Referendum for Scotland and the Right to Constitutional Self-determination: Part I', *EJIL:Talk!* (13 December 2022) <https://www.ejiltalk.org/the-uk-supreme-court-reference-on-a-referendum-for-scotland-and-the-right-to-constitutional-self-determination-part-i/> accessed 16 February 2023.

4. Conclusion: A Missed Opportunity

The Supreme Court's findings as well as the SNP's submission contain important misconceptions about what self-determination requires under international law. Still, and perhaps precisely because of this, they capture the clear imbalance between parent state and separatist groups that international law creates and reinforces. The Supreme Court's findings in addition count as evidence of custom in international law and thus further entrench an unhelpful state of affairs. Finally, as regards the role of constitutional law on self-determination and secession, both the submission and the findings are a missed opportunity beyond the immediate question and context.