FEDERALISM AND INTERNAL CONFLICTS
SERIES EDITORS: SOEREN KEIL · EVA MARIA BELSER

Territorial Politics and Secession

Constitutional and International Law Dimensions

Edited by
Martin Belov

palgrave
macmillan

Federalism and Internal Conflicts

Series Editors
Soeren Keil
School of Psychology, Politics and Sociology
Canterbury Christ Church University
Canterbury, UK

Eva Maria Belser
University of Freiburg
Freiburg, Switzerland

This series engages in the discussions on federalism as a tool of internal conflict resolution. Building on a growing body of literature on the use of federalism and territorial autonomy to solve ethnic, cultural, linguistic and identity conflicts, both in the West and in non-Western countries, this global series assesses to what extent different forms of federalism and territorial autonomy are being used as tools of conflict resolution and how successful these approaches are.

We welcome proposals on theoretical debates, single case studies and short comparative pieces covering topics such as:

- Federalism and peace-making in contemporary intra-state conflicts
- The link between federalism and democratization in countries facing intra-state conflict
- Secessionism, separatism, self-determination and power-sharing
- Inter-group violence and the potential of federalism to transform conflicts
- Successes and failures of federalism and other forms of territorial autonomy in post-conflict countries
- Federalism, decentralisation and resource conflicts
- Peace treaties, interim constitutions and permanent power sharing arrangements
- The role of international actors in the promotion of federalism (and other forms of territorial autonomy) as tools of internal conflict resolution
- Federalism and state-building
- Federalism, democracy and minority protection

For further information on the series and to submit a proposal for consideration, please get in touch with Ambra Finotello ambra.finotello@palgrave.com, or series editors Soeren Keil soeren.keil@canterbury.ac.uk and Eva Maria Belser evamaria.belser@unifr.ch

More information about this series at
http://www.palgrave.com/gp/series/15730

Martin Belov
Editor

Territorial Politics and Secession

Constitutional and International Law Dimensions

palgrave
macmillan

Editor
Martin Belov
University of Sofia 'St. Kliment Ohridski'
Sofia, Bulgaria

Federalism and Internal Conflicts
ISBN 978-3-030-64401-7 ISBN 978-3-030-64402-4 (eBook)
https://doi.org/10.1007/978-3-030-64402-4

Cover illustration: Westend61 / Getty Images

This Palgrave Macmillan imprint is published by the registered company Springer Nature Switzerland AG.
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

Praise for *Territorial Politics and Secession*

"The book offers a kaleidoscope of perspectives on a burning topic, which is gradually moving from the rule of force to the rule of law. For this reason, territorial politics and secession are now key aspects in several disciplines. This volume casts light on the most significant debate in legal, political, philosophical and geographical studies and explores some ongoing disputes. A must-read book."

—Francesco Palermo, *University of Verona and Eurac Research, Italy*

"This is a terrific collection of essays on the socio-legal dimensions of territoriality, territorial politics, and secession in comparative constitutional law and international law. The book's strong thematic organisation allows the concerns and contributions of the several disciplines to 'speak to each other' in a rigorous scholarly conversation. The country studies provide fresh analyses of even the most widely discussed cases. The way the book brings doctrinal, theoretical, and empirical analysis of territoriality and secession together is methodologically state-of-the art. It is a major contribution to both research and teaching."

—Asanga Welikala, *University of Edinburgh, UK*

"A collection of scholars from three continents tackle the vital question why, despite the ongoing processes of globalisation and digitalisation, territorial politics including the making of new borders, in particular through secessionist movements, have not simply withered away but gain more and more prominence. This book, due to its multifaceted approach combining (comparative) constitutional law and international law with international relations and conflict management perspectives, offers fresh insight not only from its range of case studies regarding the challenges of secession, humanitarian intervention, ethnofederalism, regionalism or devolution, but also a critical analysis of the underlying key concepts and legal principles and rules of territorial politics such as sovereignty, territorial integrity, non-intervention, or the internal and external self-determination of peoples. This volume is thus a source book for researchers and practicioners alike."

—Joseph Marko, *University of Graz, Austria; former international judge of the Constitutional Court of Bosnia and Herzegovina*

Contents

Notes on Contributors

Punsara Amarasinghe is a PhD candidate in law at Institute of Law, Politics and Development in Sant Anna School for Advanced Studies in Pisa, Italy. He was a visiting researcher at Global Legal Studies Center at University of Wisconsin Madison and held one-year research fellowship at the Faculty of Law at Higher School of Economics in Moscow. He holds LL.M in public international law from South Asian University, New Delhi, India.

Zemelak A. Ayele is an associate professor at the Addis Ababa University, where he is also the Director of the Center for Federal Studies. He received LL.B from Addis Ababa University, Advanced Diploma in Federalism from the Institute of Federalism, Fribourg University, and LL.M and LL.D from the UWC. He has widely written in the area of decentralisation and federalism in Ethiopia and Africa, including a book on 'Local Government in Ethiopia: Advancing development and accommodating ethnic minorities' (Baden-Baden-Nomos Verlagsges). He was a National Research Foundation (NRF) Post-doctoral research fellow under the South African Research Chair in (SARCHi) Multilevel Government, Law and Policy, at the Dullah Omar Institute for Constitutional Law, Governance and Human Rights of the University of the Western Cape (UWC), South Africa. He was also a visiting researcher at the Institute of Federalism, Fribourg University, and the Catholic University of Leuven.

Martin Belov is Professor in Constitutional and Comparative Constitutional Law at the University of Sofia 'St. Kliment Ohridski'. He is

Vice Dean of the University of Sofia 'St. Kliment Ohridski', Faculty of Law responsible for the international relations and digitalization. Martin Belov has been visiting professor at University Paris II Pantheon-Assas (2019), University Roma Tre, Rome, Italy (2019), Goethe-University Frankfurt am Main, Germany (2019), University of Girona, Spain (2019), University 'Pompeu Fabra', Barcelona, Spain (2019), Europa-University Viadrina, Frankfurt/Oder, Germany (2017 and 2018), University of Bari, Italy (2018), European Law and Governance School, Athens (2017–2018), University of Södertorn, Stockholm, Sweden (2017), Scuolla Superiore Sant'Anna, Pisa, Italy (2016), University of Warsaw, Poland (2015), University of Lisbon, Portugal (2012), State University of Milan, Italy (2011), University of Cologne, Germany (2007–2009), and so on. Martin Belov has been project researcher at the Max-Planck Institute for European Legal History, Frankfurt am Main, Germany (2010–2012) and visiting researcher at the Institute for Federalism, Fribourg, Switzerland (2014). He has specialized at the University of Oxford (UK) (2017), Max-Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany (2009), and many other academic institutions. Martin Belov is member of the European Group of Public Law, International Association of Legislation, the Advisory Board of the Central and Eastern European Forum of Young Legal, Political and Social Theorists and other scientific and academic organizations. Martin Belov is member of the scientific boards of many academic journals. He has published 19 books and more than 90 scientific papers.

Emanuel Castellarin is a professor at the University of Strasbourg since 2016. He also teaches at several other universities (Sorbonne Law School – Université Paris 1, Université Paris 2 – Panthéon-Assas, Sciences Po Paris). His publications include a monograph on the participation of the European Union in international economic institutions (2017), a co-edited volume on the Treaty of Versailles (2020) and several articles and book chapters in international economic law, general international law and EU external relations law.

Yonatan T. Fessha is Professor of Law at the University of the Western Cape in South Africa. His teaching and research focuses on examining the relevance of constitutional design in dealing with the challenges of divided societies. He has written widely on matters pertaining to but not

limited to federalism, constitutional design, autonomy and politicized ethnicity. His publications include books on "Ethnic diversity and federalism: Constitution making in South Africa and Ethiopia (Ashgate, 2010)" and 'Federalism and courts in Africa: Design and impact in comparative perspective' (co-edited, Routledge, 2020). He has contributed to constitution-building projects, including in Sudan, South Sudan and Yemen. He was a Michigan Grotius Research Scholar at the University of Michigan. He was also a recipient of the Andrew Mellon postdoctoral fellowship. He is a Marie-Curie fellow at the Institute for Comparative Federalism at Eurac Research (Italy).

Mira Kaneva is Assistant Professor in International Law and International Relations at the Faculty of Law, University of Sofia "St. Kliment Ohridski". She is a research associate with the Institute for Security and International Studies and a member of the managing board of Sofia Security Forum. Her research interests encompass international relations theory, international law and ethics, global governance, diplomacy and negotiations, foreign policy analysis and international security.

Costanza Margiotta is Associate Professor of Philosophy and Theory of Law, University of Padua, Italy. She holds a PhD in Legal Theory from the European University Institute, Florence. Her research focuses on secession in international law, European citizenship, codification and interpretation of international law, and on slavery, race and law. She has written widely on these and related areas.

Giuseppe Martinico is Full Professor of Comparative Public Law at the Scuola Superiore Sant'Anna, Pisa. In Pisa he also serves as STALS (Sant'Anna Legal Studies) Editor.
Prior to joining the Scuola Sant'Anna, he was García Pelayo Fellow at the Centro de Estudios Políticos y Constitucionales (CEPC), Madrid, and Max Weber Fellow at the European University Institute, Florence. His research interests cover both comparative and European constitutional law, fields in which he published extensively in international peer-reviewed journals in three languages (English, Italian and Spanish).

Jorge E. Núñez started his academic career teaching Introduction to Law in 1997 in his native Argentina (Universidad Nacional de La Plata). He moved to the United Kingdom where he was awarded his PhD in Law (Manchester). After teaching Jurisprudence in the School of Law, the University of Manchester, he joined Manchester Metropolitan

University as Lecturer in Law in 2013. He has also taught Law in Beijing, China-EU School of Law, in their Double Master Programme. His research interests are varied but he is particularly keen on issues related to legal and political theory and public international law and relations. In one of his books entitled *Sovereignty Conflicts and International Law and Politics* (2017), he combines these interests in a unique form. He offers a solution to sovereignty conflicts such as Gibraltar, Falklands Islands and Kashmir applying the international institution of shared sovereignty as viewed through the lenses of distributive justice principles. His latest book is *Territorial Disputes and State Sovereignty*. International Law and Politics (2020).

Sabrina Ragone is Associate Professor of Comparative Public Law at the University of Bologna and a senior research affiliate of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg (MPIL). She was previously a research fellow at the MPIL and at the Centre for Political and Constitutional Studies in Madrid. She has held research and visiting professor positions in several academic institutions in Europe, as well as in Latin America and the US (Harvard University, Boston College, Texas A&M, among others). Her extensive publications address comparative law methodology and substance proposing innovative perspectives on constitutional adjudication and territorial decentralization. Among her recent books, "Desafíos de la función judicial: un acercamiento desde el derecho público comparado", Ediciones Olejnik, 2018; "Managing the Euro Crisis: National EU policy coordination in the debtor countries" (edited), Routledge, 2018; "Parlamentarismos y crisis económica: afectación de los encajes constitucionales en Italia y España", Bosch, 2020.

Maja Sahadžić is a research fellow and guest professor at the University of Antwerp. Her work experience includes earlier academic positions at the universities in Bosnia and Herzegovina, Croatia and the United States of America. She has also worked as a lawyer, consultant, advisor and journalist. So far, she has authored books, book chapters and papers within the field of comparative constitutional law, asymmetrical federalism, multilevel governance, multinational societies, alternative conflict solutions, extreme constitutionalism, diplomacy, and terrorism and security.

Nikos Skoutaris is Associate Professor in EU Law at the University of East Anglia. His research interests lie in the intersection between EU law, comparative constitutional law and conflict resolution theory. He has written extensively on Brexit and its effect on the UK territorial constitution.

Joan Solanes Mullor is Lecturer of Constitutional Law at Pompeu Fabra University, Barcelona, Spain. He was a postdoctoral researcher at the Faculty of Law of Trento University (2015), and he was appointed a visiting scholar at KU Leuven (2013) and a visiting researcher at Harvard Law School (2009). He received his PhD in law from Pompeu Fabra University (2014) and holds an LLM from Harvard Law School (2009). His research areas include institutional design, separation of powers, public regulation and territorial organization of power.

Arenca Trashani specializes in human rights and international law at home and abroad. She is finishing her PhD in international law at Tirana University. From 1995 to 2005 she lectured at the University of Shkodra "Luigj Gurakuqi" international human rights and public international law courses. From 2005 to 2013, she was a member of the Albanian Parliament. She was Member of the Legal Affairs Committee and EU Integration Committee and Head of the Sub-committee on Human Rights. From 2005 to 2007, she was Minister of European Integration. She works as a lecturer of international law and international organisations at the University of "Luigj Gurakuqi", Law Faculty in Shkodra. At the same time she works as an independent expert on various programs on women's rights with UNDP and NDI, as well as on the problems of law and its approximation with European law and European integration issues as an external expert with EU Delegation in Tirana. She has several publications in the field of international law, human rights and European law.

CHAPTER 1

Introduction

Martin Belov

Territory is the ultimate playground of constitutionalism and international relations. Thus, it is of existential relevance also for constitutional and international law. Territory is a fundamental precondition for policy-making. It is simultaneously a strategic political resource, basic framework, furthest limit, and decisive framework of policy-making, polity, and politics. Law is setting the rules of the game, while territory is objectively predetermining their aim, efficiency, and feasibility. Thus, territory is an object of special interest for public law in general and for constitutional and international law in particular.

This book aims at exploring fundamental issues of territorial politics—the politics related to territory and territoriality—which are having huge constitutional and international law relevance. It is multidiscoursive collective enterprise of scholars coming from different fields of public law. The prevailing viewpoints in the book are related to theory of constitutionalism, constitutional and international law, and international relations.

M. Belov (✉)
University of Sofia 'St. Kliment Ohridski', Sofia, Bulgaria
e-mail: mbelov@uni-sofia.bg

M. Belov (ed.), *Territorial Politics and Secession*, Federalism and Internal Conflicts, https://doi.org/10.1007/978-3-030-64402-4_1

Thus, the constitutionalist and public international law discourses are framing the whole approach of the book towards territoriality, territorial politics, and secession. This fact safeguards the conceptual and methodological cohesion of the book structured around important themes of constitutional law, public international law, and theory of international relations.

Another important common denominator for all the chapters in this edited volume is the socio-legal approach used for the accomplishment of the analysis. All contributions offer important insights of the legal foundations of territorial politics. They explore the legal basis of the issues under research looking for answers in constitutional and international law.

Nevertheless, the analysis provided by the contributions to this volume is not limited to the normative or institutional foundations of the issues at stake. They go beyond valid law and explore the 'law in action', the application of law in its socio-legal and political context. They also take into account the theoretical and intellectual-imaginary implications of the legal phenomena under scrutiny. Thus, the book is generally marked by the decisive socio-legal approach to the problems of territorial politics and secession. To sum up, the conceptual and methodological framework of the analysis is based on constitutional and international law discourse founded on socio-legal approach.

The book is thematically focused on the topical problems of territorial politics. One of these issues is of special importance. This is the secession. Consequently, secession as a key problem of constitutional and international territorial politics is well exposed and driven to the front of the range of conceptual issues under research. This is due to the fact that secession is one of the most intriguing contemporary problems of territorial politics producing challenging questions for constitutional and international law theory and cracks and uncertainties for the legal orders that need thorough research and urgent explanation, preferably in comparative and interdisciplinary perspective.

Secession is rather a volatile phenomenon with diverse legal and socio-legal implications. It produces increasing trembling of the constitutional and international law terrain and attracts the attention of public law scholars and political scientists. This is the main reason why the current edited volume is structured around these two key issues—territorial politics as a general, fundamental and framing concept and secession as one of its most visible manifestations requiring urgent conceptual answers that take

into account both the requirements of the valid law and the de facto imperatives of the socio-legal context.

Nevertheless, the aim of the book is definitely not limited to secession. It goes well beyond secession offering original analysis of multitude of other forms of territorial politics. Devolution, balancing between integration and disintegration within the conceptual model of regionalism, territorial dispute resolution, humanitarian intervention, and forms of sub-national territorial politics are also discussed in this volume together with self-determination, revolution, referenda for independence, and secession.

The book is based on the following logic. It provides theoretical conceptualisation of territory and territorial politics. Then, it offers critical assessment of territorial politics with a view to important and topical issues such as secession, territorial dispute resolution, and self-determination and with a view to the key constitutional principles—sovereignty, democracy, rule of law, and the protection of human rights.

The book offers novel account on politics of exiting and remaining with a view to national and sub-national secession, direct democratic self-determination, and politics of regionalism. It provides original studies of sub-national constitutionalism with particular attention to ethnocentric nationalism and its impact on territorial politics. The book combines theoretical contributions with comparative research and important case studies. Thus, it offers new theoretical suggestions, provides for comparative schemes promoting better understanding of territorial politics and secession, and contains essential case studies.

It must be mentioned that the case studies are not only informative but also containing key insights for the theory of territorial politics and secession and their comparative legal and socio-legal research. Moreover, the case studies are wide-ranging and not limited to Europe. The book provides insightful analysis of some cases which are already a must for such scientific research, for example, Brexit, the UK devolution (with emphasis on Scotland and Ireland), Catalonia, and the centripetal forces in Northern Italy. It also contains important contributions to the literature devoted to sub-national constitutionalism and ethnocentric models of federalism. Apart from the European case of Bosnia and Herzegovina, there are also chapters devoted to Ethiopia and Sri Lanka. The research of Canadian federalism and the secessionist claims and processes in Quebec completes the comparative picture based on case studies. Hence, the book provides

for a balanced approach to the case studies including four European and three non-European (North American, Asian, and African) case studies.

Part I opens the discussion with critical assessment of several issues of paradigmatic and conceptual importance which are then explored in more detail in the subsequent chapters. These are the phenomena of territory, territoriality, and territorial politics, the key issue of secession with its multifaceted nature as both revolutionary and conservative device, and the problems of revolution and devolution in contemporary European territoriality triggering debates on the territorial politics of exiting.

In Chap. 2, some of the key concepts underlying the whole book are critically and reflexively defined. These are the concepts of territory, territoriality, and territorial politics. The chapter offers critical assessment of the conceptualisation of territoriality under the framing paradigms of Westphalian, post-Westphalian, and neo-Westphalian constitutionalism.

Special attention is devoted not only to the crisis of territoriality experienced in recent decades but also to the re-emergence of territoriality during the trend towards re-nationalisation which became visible in the context of the COVID-19 pandemic. The chapter provides an account of the constitutional importance of territorial politics in the age of globalisation and digitalisation. It discusses the impact of these phenomena on territoriality of power and its constitutional and international law implications.

Chapter 3 of the book, written by Costanza Margiotta, is related to the problem of theoretical conceptualisation of secession. The author believes that 'the concept of secession has both a conservative and a revolutionary character'. She proves her thesis exploring secession from the perspective of both internal and external sovereignty. Margiotta devotes special attention to the issues of the impact of secession on territorial integrity and the relationship between secession and peoples' right to self-determination and secession and democracy.

In this regard, her chapter is part of the general discussion on the relation between secession, self-determination, and their impact on democracy and rule of law. This issue is one of the conceptual pillars of the book. However, several chapters are especially focused on this problem. These are the chapters of Joan Solanes Mullor, Emanuel Castellarin, and Giuseppe Martinico. Margiotta's interest of territorial politics of decolonisation and state formation relates her contribution to Chap. 7 written by Emanuel Castellarin while her analysis of borders is connected to the problems of territory and territoriality explored in Chap. 2.

In Chap. 4 Mira Kaneva explores devolution and devolutionary territorial politics. In her account 'devolution in territoriality constitutes a new normality in the networks of interdependence'. Kaneva aims at defining the framework for devolutionary and evolutionary territorial politics. She provocatively defines this as a search for the 'practical and moral "red lines" to devolution in the European context'. Starting with an outline of the main trends in European territorial politics of integration the chapter continues with research on the impact of devolution of constitutional and European orders. The chapter concludes with application of Kaneva's theoretical viewpoints on devolution and exiting in the context of Brexit. Thus, the chapter joins the discussion on Brexit provided also in Chap. 9 by Nikos Skoutaris.

Part II of the book continues the debate on territorial politics focusing it on one of its most important dimensions. It explores the relationship between territorial politics and sovereignty. Sovereignty has always been in an ambiguous relation with self-determination and human rights. Self-determination is both a key aspect of sovereignty and a potential latent threat to the sovereignty of the framing community when accomplished by sub-national communities. Preservation of human rights is a key imperative of constitutional and international law. Sovereignty as a key principle of constitutional law and a key factor in international relations has not always been at ease with human rights, especially the rights of members of distinct sub-national communities.

The tension between sovereignty, self-determination, and human rights is conceptualised in Part II through the prism of different forms of territorial politics having fragile legal standing in international law, for example, humanitarian intervention, or being traditionally problematic as the instruments for territorial dispute resolution. Hence, the contributions published in Part II are rooted mainly in international law. They are tackling problematic phenomena with rather fuzzy standing in international law having also constitutional impact.

The uneasy relationship between sovereignty, self-determination, and human rights is discussed from constitutional law perspective also in Part V of the book. On the basis of important and informative case studies, the authors of the chapters framed by Part V explore the impact of ethno-territorial politics on sovereignty, self-determination, and human rights in the context of sub-national politics.

In Chap. 5 of the book Jorge E. Núñez tries to offer an original account of the relationship between territorial disputes and sovereignty believing

that their reconciliation is a matter of intellectual and political strategy. The author stipulates that the comprehensive understanding of state sovereignty and territorial disputes as multilayer and multi-contextual phenomena is the appropriate standpoint for the better explanation of their complexity. Núñez defines the concepts of sovereignty and territorial disputes. He emphasises the need to conceptualise sovereignty not as an absolute concept but as a concept with certain important limitations. In his view this is the way for reconciliation between sovereignty and territorial dispute resolution. However, this is possible only in the context of a global constitutional ordering embedding territorial politics within the context of the pluralism of pluralisms paradigm. Moreover, Núñez outlines the need to take into account all agents of territorial disputes and territorial dispute resolution policy, namely, the individual, the community, and the state.

The chapter not only offers thorough analysis but also is very informative providing multiple examples and case studies of territorial disputes all over the world. It is part of an intellectual discussion related to territorial politics in international relations including also the chapters of Mira Kaneva and Arenca Trashani.

In that regard Chap. 6, written by Arenca Trashani, enriches the international law and international relations arm of the book providing research of the rather disputed and important problem of humanitarian intervention as a form of territorial politics. The author explores the impact of humanitarian intervention on state sovereignty and human rights. She is looking for the possible justifications of this rather problematic and contested method of territorial politics. In that regard, Trashani outlines the main aspects of the theory of humanitarian intervention, explores the United Nations (UN) system of humanitarian intervention, and assesses the unilateral and collective humanitarian interventions. The author also offers critical account on the impact of humanitarian intervention on the right to self-determination.

Part III of the book explores the procedural discourse of territorial politics of independence and secession. It raises important questions related to the impact of self-determination, independence referenda, and secession on democracy and rule of law. The two chapters published in Part III have one but important common denominator. This is the procedural discourse on secession and the importance of the procedure for the accomplishment of secession for maintaining democracy and the rule of law. Both chapters explore the use of referenda for the accomplishment of

secession, thus focusing on direct democratic territorial politics. This common issue for both contributions is researched from two different perspectives—the use of referenda in international territorial politics for self-determination (Chap. 7) and the constitutionalisation of secession in the case law of the supreme courts and in the practice of secession referenda (Chap. 8).

Chapter 7, written by Emanuel Castellarin, focuses on independence referenda as a tool for constitutional and international territorial politics. It offers broader account on these referenda going beyond post-colonial situations of self-determination and independence through direct democracy. Castellarin explores the use of direct democracy for international territorial politics and its impact on identity, self-determination, and recognition claims. The main thesis of the author is 'that, in spite of their shortcomings, independence referendums can convey a new conception of the international society, which can be translated into a new vision of self-determination and of territorial structures'. He critically assesses the rather peripheral status of independence referenda in international law apart from decolonisation and post-colonial situations. Castellarin believes 'that independence referendums can indeed contribute to the renewal of self-determination and of territorial politics, provided that procedural standards of international law are developed'.

In Chap. 8 Giuseppe Martinico explores the exit-related conditionality, federalism, and secession. The author provides an insightful analysis of 'the role that the referendum can play in the proceduralisation of secession in federal systems'. The research commences with outline of the process of constitutionalisation of secession. It explores the set of techniques developed by the courts—and more precisely by the Canadian Supreme Court—in order to cope with secession. Martinico reconstructs the steps used by this court to constitutionalise secession in the Canadian constitutional order. In the first part of his chapter Martinico explores 'how to proceduralise secession in light of the notion of "exit-related conditionality"'. The second part of the chapter is devoted to outlining the 'reasons for prudence in the use of referendums in contexts of representative democracy'. Although focusing on the Canadian experience the author sets it in a telling and topical comparative perspective drawing also conclusions with huge importance for the comparative constitutional research on secession.

Part IV of the book brings to the front the stretching of territorial politics between integration and disintegration. It includes three chapters

devoted to highly visible and topical case studies of constitutional orders where disintegrative forces massively challenge the integrative territorial politics of the state. Chapter 9 offers an account on Brexit and the secessionist challenges in the UK. Chapter 10 outlines the territorial politics of regionalism in Italy between integration and disintegration. Chapter 11 explores the Catalan secessionists' challenge and the attempts at reconciling their quest for independence and constitutionalism.

Chapter 9, written by Nikos Skoutaris, shows 'how the UK's withdrawal from the European Union (EU) and the relevant implementation policies challenge the fragile balance of the UK territorial constitution'. It explores the challenges to the UK integrity and, vice versa, the variants, preconditions, and procedures for eventual secession of Scotland and Northern Ireland from it.

Skoutaris presents the constitutional foundations of the UK territorial politics with special emphasis on the constitutional framework for the integration of Scotland, Northern Ireland, and Wales. He offers informative and topical outline of the UK territorial constitution. The overview of the process of devolution in the UK is followed by two important questions posed by the author. The first one is how does Brexit challenge devolution and what will be its consequences for the British and European future of Scotland and Northern Ireland. Skoutaris explores the Procrustean bed in which Scotland and Northern Ireland are stretched between the UK and the EU. The second and more concrete question is 'which tier will "take back control" of those repatriated powers?' In other words, will Brexit lead to more centralised or more decentralised and devolved UK.

Moreover, Skoutaris explores which would be the eventual path that Scotland and Northern Ireland would have to go along in order to reintegrate in the EU. He comes to the conclusion, based on solid exploration of legal arguments, that the path to independence and re-joining the EU will be legally easier for Northern Ireland than for Scotland. Instead, there are much more de facto impediments for such potential process in Northern Ireland than in Scotland. Skoutaris finalises his analysis with the conclusion that 'the intoxicating cry of "taking back control" ironically seems to destabilise the Union and strengthen the European prospects of those two regions'.

Chapter 10, written by Sabrina Ragone, analyses the territorial politics of regionalism in Italy. It is illustrative of a state stretched between integration and disintegration and coping with moderate secessionist challenges. In contrast to many of the chapters in this edited volume, which explore

ethnocentric secessionism resulting in claims for self-determination, autonomy, and independence, Ragone's chapter offers an account of a system, in which the centripetal and secessionist forces are not ethnically grounded. In that regard, her chapter offers an important background for the analysis of secessionism which demonstrates both similarities and differences from the more radical cases based on ethnocentric nationalism or on religious fragmentation of society.

Ragone provides informative outlook of the evolution of Italian regionalism. The historical analysis serves as an important background setting the context for the current debates for reform of the Italian constitutional model for territorial politics and the recent referenda for increased autonomy and even for independence. In that regard, the author clearly demonstrates the different stages of the evolution of Italian regionalism and the driving forces behind them. Ragone is also suggesting possible trends for the development of the Italian constitutional model of regional state.

In Chap. 11 Joan Solanes Mullor provides insightful, provocative, and original analysis of the Catalan secessionism. The originality of the contribution stems from the successful attempt of the author to explore the main arguments of the Catalan secessionist movement from both legal and socio-legal perspectives. Solanes Mullor uses constitutionalist paradigm as a key reference for such evaluation. However, he does not stick to the institutional-normative dimension of the problem, but goes beyond it offering an informative journey in the 'Zeitgeist', the ideological conceptions and the socio-legal practices generated and performed during the recent events in the trend for Catalan secession.

Joan Solanes Mullor systematises the criticism against the Spanish constitutional order used in the secessionist argumentation and tactics in three main groups. These are the critics against the origin of the 1978 Spanish Constitution, the critics against the practice for application of this constitution, and the critics against constitutionalism itself. Moreover, he systematically presents the tools of secessionists used for attacking the constitutional order and shows their allocation within and beyond constitutionalism. Finally, Solanes Mullor outlines also the possible features of a post-independence scenario. The author properly writes that the lessons from the Catalan case might be of high relevance also in comparative perspective having important repercussions to the situation in the UK and Canada—cases that are explored in the current volume as well.

The book concludes with Part V devoted to territorial politics of subnational ethnocentric constitutionalism. Thus, it includes contributions

engaged in two important debates. These are the debates on sub-national constitutionalism and sub-national territorial politics and on ethnocentric nationalism and its impact on constitutional integrity, territorial politics, and secession. The case studies are carefully chosen. They offer insights for ethnocentric sub-national constitutionalism on three continents—Europe, Africa, and Asia. They demonstrate how three rather different constitutional orders—Bosnia and Herzegovina, Ethiopia, and Sri Lanka—functioning in non-identical socio-political context are coping with ethnic and religious diversity which is producing aspirations for internal or external secession.

Chapter 12, written by Maja Sahadžić, explores the ethno-territorial politics and sub-national constitutionalism in Bosnia and Herzegovina. The author provides the reader with an outline of the complicated constitutional history of the country setting the current problems in their historical context. She demonstrates the path dependencies of the issues at stake producing turbulences in the asymmetric multilevel constitutional order of the country.

Sahadžić explicitly defines the aim of her chapter: to explore the effects of sub-national constitutionalism on territorial politics. Using Bosnia and Herzegovina as an example she 'investigates the interplay between identity, territory, autonomy claims, and sub-national constitutionalism' offering 'insights about cohesive and divisive qualities of sub-national constitutionalism in Bosnia and Herzegovina'. The author 'explores whether and how wide sub-national constitutional autonomy counteracts autonomy claims in Bosnia and Herzegovina'. This is done through contrasting of ethno-territorial and ethno-nationalist with the more cohesive unitary versions for the constitutional structure of the state. Sahadžić explains why the former have definitely prevailed over the latter.

Special attention is devoted to the development of sub-national constitutionalism in Bosnia and Herzegovina. Sahadžić analyses the scope of sub-national autonomy and the tendencies and trends in its development on the levels of the entities and the cantons. Sahadžić analyses the driving forces behind sub-national constitutionalism. She defines territory and identity as both cohesive and divisive features and explores how 'ethno-territorial balance is maintained through the institutionalisation of conflict'.

In Chap. 13 Yonatan Fessha and Zemelak Ayele analyse the Ethiopian experience with sub-national constitutionalism in the context of ethnocentric federalism. They provide an insightful research on the important

problem of internal secession. The chapter is methodologically grounded on socio-legal approach to the problem which is explicitly announced already in the title with the aim of presenting both the law and politics of internal secession. This approach allows the reader to grasp the determinants of the context and the socio-political driving forces of internal conflict triggering internal secession.

The chapter is focused on one particular case of internal secession. This is the process for the establishment of the new Sidama state within the Ethiopian federation through its internal secession from the Southern Nations Nationalities and Peoples state. The authors present the constitutional and political context which stimulates ethnic communities in Ethiopia to demand for the establishment of their own states. They place internal secession in the context of ethnic federalism in Ethiopia. Fessha and Ayele explain the procedural issues for internal secession in Ethiopia and explore the politics of internal secession. Here they focus on the use of referendum and the particularly challenging constitutional amendment issues produced by internal secession.

The final Chap. 14 is written by Punsara Amarasinghe. It explores the impact of ethnic nationalism in Sri Lanka. More precisely, it focuses on the Tamil secessionist movement. Amarasinghe informs us about the ethnic discontents and rivalries in the post-colonial Sri Lanka especially with a view to the civil war between Sinhalese majority and the Tamil ethnic minority. He presents the main stages of unfolding of the ethnic conflict between the two hostile communities in Sri Lanka. This is done on the basis of analysis of the cornerstone events, relevant literature, and the shifts in the socio-political context. Thus, Amarasinghe's chapter further develops the socio-legal approach to territorial politics and secession used not only in the other two chapters included in Part V but also by all contributors to this edited volume. Amarasinghe comes to the conclusion that 'the lack of serious commitment to seek a satisfactory answer for the ethnic discontent under political framework appears to be the biggest problem in post-civil war Sri Lanka'.

In fact, all three chapters of Part V provide visible and comprehensive historical perspective of ethnocentric sub-national territorial politics, thus offering important insights for the comparative study of sub-national constitutionalism in divided societies. The chapters of Sahadžić, Fessha and Ayele, and Amarasinghe demonstrate the fragility of composite societies with internally hostile cultures deeply divided on the basis of ethnos and nationality of religion. Indeed, such issues are behind secessionism and

disintegrative territorial politics in general, thus being object of analysis also of many of the other chapters of this edited volume. However, the greatest value of Sahadžić, Fessha and Ayele, and Amarasinghe chapters is that they offer contextual dissection of divided societies providing analysis of both the legal issues and the socio-political context. Taken in conjunction with each other and as a group, these three chapters provide informative comparative perspective spotting and mapping the problems of ethnocentric sub-national constitutionalism in three continents. Thus, they are valuable not only as case studies but also as a comparative sample that is especially useful if read together.

PART I

Territoriality and Territorial Politics in Constitutional and International Law

CHAPTER 2

Territory, Territoriality and Territorial Politics as Public Law Concepts

Martin Belov

1 Introduction

This chapter aims at exploring the role of territory and territoriality in public law with special emphasis on constitutional and to lesser extent on international law. This is necessary in order to give conceptual basis for the subsequent debates on the different forms of territorial politics provided by the other chapters of this book. Hence, this chapter is focusing on territory and territoriality as fundamental paradigms conceptually framing the subsequent discourses on federalism, devolution, secession, direct democratic self-determination, territorial dispute resolution and humanitarian intervention.

The chapter opens with clarification and systematisation of the different aspects of territory and their reflection in the legal order and in the intellectual discourse on public law consisting of the doctrine and the

M. Belov (✉)
University of Sofia 'St. Kliment Ohridski', Sofia, Bulgaria
e-mail: mbelov@uni-sofia.bg

M. Belov (ed.), *Territorial Politics and Secession*, Federalism and Internal Conflicts, https://doi.org/10.1007/978-3-030-64402-4_2

constitutional anthropology of the socio-legal communities. Territory is conceptualised as a phenomenon with three aspects—empirical (factual), normative-institutional and imaginary-conceptual. The third aspect of territory is defined as a separate concept, namely, territoriality. Thus, the analysis takes also into account the semiotic importance of the relationship between territory and territoriality with its implications for understanding or misunderstanding, constructing, deconstructing and reconstructing of constitutional and international territorial politics.

Territoriality is presented as the imprint of territory in the imaginary constitutionalism. It is defined as a signifier of territory as fact and the territory as institution in the intellectual-imaginary discourse. The different features of territoriality as well as its role as a key concept of the imaginary discourse of constitutional and international law are discussed. The different models of territoriality are presented. More precisely, I am offering critical assessment of the conceptualisation of territoriality under the framing paradigms of Westphalian, post-Westphalian and neo-Westphalian constitutionalism.

Special attention is devoted to the crisis of territoriality with its complex manifestations as well as to the re-emergence of territoriality during the trend towards re-nationalisation which became visible during the COVID-19 pandemic. The chapter offers an account of the constitutional importance of territorial politics in the age of globalisation and digitalisation. It discusses the impact of these phenomena on territoriality of power and its constitutional and international law implications.

Furthermore, the chapter presents an outline of the concept of territorial politics. The definition of the phenomenon and the demarcation of its conceptual scope is followed by systematisation of the main tools for territorial policy-making.

2 Territory and Territoriality as Fundamental Concepts with Paradigmatic Importance for Constitutional and International Law

Territory is an element of the natural, physical reality. It is a part of the sphere of the real, empirical and factual. Territory is the most prominent dimension of space as a physical, factual context of social life and

relations.[1] This is due to the fact that territory is that part of space which is inhabited by the people. It is the spatial segment which serves as a factual background of key concepts of law such as jurisdiction, sovereignty and state territory, thus having strategic importance for constitutional and international law and for public law in general.

Space and time form the fundamental conceptual framework within which law operates. They are ultimate limits and ultimate empowerments of the legal order. And they are open for conceptual modelling and paradigmatic definition by legal theory—although with respect to their essential minimal characteristics which are objectively predetermined. Later, it will be demonstrated that globalisation, 'time-space compression'[2] and digitalisation are challenging the basic characteristics of territory and space as fundamental frames of territorial politics.

Territory and space are substantially independent with regard to their core characteristics from their legal institutionalisation in constitutional, international and generally in public law and from their conceptualisation by legal, constitutional and international law theory. Hence, territory and space as facts precede their theoretical conceptualisation by constitutional theory, socio-legal studies, political and legal philosophy and theory of international relations and their legal institutionalisation as elements of public law. Nevertheless, territory and space are also objects of modelling by both law and legal theory, thus having imprints and representations in the sphere of ideas.

Ontologically territory and space precede their legal institutionalisation and their constructive, conceptual or imaginary encoding in the text of the constitution, the constitutional, international and public law. Territory and space are existential artefacts with paradigmatic importance for public law. Hence, logically and substantially territory and space are autonomous from human mind, human understanding and the social, political and legal reflections on physical determinants of human socio-political coexistence. They are independent variables in the scheme of power and objective determinants and framing paradigms for public law and public and state power. This allows the teleological deconstruction, construction and reconstruction of territory and space in theory and valid law.

[1] See Paasi (2003) p. 117.
[2] See Eriksen (2014) p. 39 and Brenner (1999) p. 39.

While territory and space are partially independent from human mastering—in theory and in valid law—territoriality and spatiality are signification proxies that serve the function of human conceptualisation of the empirical facts they stand for. Exactly territoriality and spatiality demonstrate the capability of territory and space to be objects of human mastering in valid law as well as in legal theory.[3] Territoriality and spatiality make territory and space prone to human imagination moulding their legal institutionalisation and theoretical conceptualisation.

Territory and space are independent variables of the constitutional and international legal order to the extent that they cannot be immediately and as such reshaped, reordered or institutionalised. They can be legally arranged only through their intellectual conceptualisation via their imaginary imprints—territoriality and spatiality. Territoriality and spatiality are not categories of the valid law but of the imaginary discourse of constitutionalism and international law forming the ideal constitutional model of territory. Hence, 'territory and space as facts' are object of double representation—first, in constitutional imagination in the form of territoriality and spatiality and, then, in the legal order (especially in public law) as 'territory and space in law'.

This double status of the territory and space—as legal institution and as fact—is tricky and may be source of misunderstandings. It may lead to conceptual confusion with practical implications for the proper understanding of the territory as fact, as legal institution and as intellectual representation, conceptualisation and signification of the former.

Exactly due to their existence as 'rough material', as substantial precondition of socio-political reality, territory and space are detached from the possibility of their immediate mastering and representation in law. They are, as such, substantially and existentially independent from the forms and manifestations they achieve through their conceptualisation via human mind and human understanding. Hence, as such, they are objective preconditions for shaping of the institutional dimension of territory and space by social, political and legal theory and by constitutional, administrative, international and European Union (EU) law.

In other words, territory and space as facts must be represented in the institutional-normative order established by law and in the mindset of the members of the socio-legal community. The factual territory and space must be transformed into legal categories with normative-institutional

[3] See also N. Brenner, op. cit., pp. 39–78.

dimension and with projection in human understanding shaping the imaginary-psychological aspect of constitutionalism and the intellectual perception of public law in collective socio-legal imaginaries.

This representation, being both theoretical conceptualisation and legal institutionalisation, is of great importance for territoriality politics. Territorial politics works exactly with the signifiers of the territory and space as facts—the territory and space as legal institution and the territoriality and spatiality as theoretical concepts—and not directly with the 'rough material'. However, it is limited, fostered and generally framed by the dimensions of territory and space provided by the legal order or, more precisely, by a multitude of legal orders. Very frequently, territorial politics is stretched in a field of representations and misrepresentations of territory and space serving as both plans for territorial politics and argumentative strategies for building, launching and justifying it in front of the domestic and the international communities.

Social and political philosophy, theory of state and law and especially theory of constitutional and international law frequently work with representations of territory and space. They conceptualise territory and space as territoriality and spatiality.[4] Territoriality and spatiality are ideal, conceptual models of the territory and space. In that regard, territoriality and spatiality are theoretical constructs which symbolise, represent and stand for territory and space in the legal order and in legal theory.

Hence, while territory and space are elements of the factual reality and are traditionally perceived as objective preconditions of constitutionalism, territoriality and spatiality are phenomena belonging to the theoretical conceptualisation of the territory and space serving as conceptual frameworks and providers of meaning. They are also encoded in the symbolic-imaginary aspects of constitutionalism in their capacity as signifiers of territory and space being structural elements of empirical and normative-institutional dimensions of constitutionalism.

Thus, territoriality and spatiality are important for both pragmatic, symbolic-imaginary and emotional territoriality politics. These aspects of territorial politics mutually limit and at the same time reinforce themselves. This is demonstration of the strategic interdependence between territory as fact, norm and idea, the latter forming the concept of territoriality.

[4] See Vollaard (2009) pp. 687–706, Ruggie (1993) pp. 139–174 and Sack (1983) pp. 55–74.