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Bavaria: another case of a right to decide?

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Bavaria: another case of a right to decide?¹

Abstract: This paper analyses the possible existence of a Bavarian right to decide, including the independence option. In conclusion, there is no such right under international law or the German constitution. Bavaria has not been conquered, nor has the German fiscal regime been set up without Bavarian representation. In spite of the long political history of the country, Bavarians are not seeing themselves as a “Nation”. The argument is also weakened by existing cultural and linguistic particularities inside the country. If at all, Bavaria’s independence could only be justified by a majority decision, either in a referendum or by parliamentary majority as in the Kosovo case, arguing at the same time that Bavaria would be a viable state in Europe, and that it would offer inner minorities like the Franconians to decide on their own account whether to remain. However, according to poll data and considering the current party system, there is not the slightest possibility for such a majority for independence.

Keywords: Bavaria, self determination, right to decide, CSU, Bayernpartei.

Introduction

The “Freistaat”² Bayern is of great importance for the Federal Republic of Germany. It has a population of more than 12.5 million, which makes it second in population after North Rhine-Westphalia. Bavarian independence is currently not a political issue in Germany. Many Bavarian politicians show high levels of self-esteem, claiming that “Bavaria could do it alone”³. The German press usually uses these statements to ask “if anybody could take a country seriously that is as big as the Czech Republic but feels to be as big as Russia”⁴. The answer is that “if the reference is cheese or football, an independent Freistaat could compete. Provided the Franconians would not secede on their own.”⁵ Secession threats are sometimes addressed ironically as “Lederhosen-Separatismus”, which refers to the Bavarian folkloric dress, the leather pants.⁶

The supposed Bavarian egoism (“if the Greeks do not go, than we do”), monarchism, and use of snuff tobacco abound in the German media. Issues like the finding of an appropriate internet domain (“br” already means Brazil, “ba” stands for Bosnia-Herzegovina, “by” for Belarus)⁷ are satirically portrayed as main problems. The famous Bavarian “*mia san mia*” (Bavarian, something like “wir

¹ This paper is a larger and updated version of: Klaus-Jürgen Nagel: Bavaria. A right to self-determination and secession?, in: Daniel Turp/Marc Sanjaume-Calvet (coord.): The emergence of a democratic right to self-determination in Europe, Brüssel: Centre Maurits Coppieters 2016, S. 38-54.

² Free state is the official denomination for this and two other *Länder*.

³ “Bayern kann es auch allein” – the title of a book published by CSU-politician Wilfried Scharnagl (Köln/Berlin 2012) .

⁴ Sebastian Christ: So schön wäre Deutschland, wenn Bayern ENDLICH unabhängig wäre (How beautiful would Germany be if only Bavaria FINALLY became independent“, The Huffington Post 11.1.2015. Not the least advantage is that this would permit the German *Bundesliga* (first football division) to become competitive again.

⁵ “Bayern, die neue Grossmacht” (Bavaria, the new world power), *Süddeutsche Zeitung* (sz.de) 15.9.2014. The fact that Bavaria has nearly as many breweries as the rest of Germany is also frequently mentioned in these glosses. The „Süddeutsche“ is Bavaria’s leading daily.

⁶ Christoph Seils, Der Lederhosen-Separatismus liegt im Trend, *Tagesspiegel*, 3.9.2012.

⁷ Timo Stein: Servus, Bayern! („Bavarian“ for: Bye, bye, Bavaria), *Cicero online*, 28.8.2012.

sind wir” in standard German or “we are who we are”) is in fact “translated” as “We are against”⁸: the “lust of resistance”, the “disposition to staginess and showing off” (*Neigung zum Theatralischen und zum Protzen*) are presented as main features of “the” Bavarian character. However, if there really is a *Volksgeist* (national character), in the Herderian tradition, this would also mean the existence of such a *Volk* or nation.

1. Bavaria – an old European state

Ethnically, Bavarians are the result of the mixing of Nordic Germanic tribes with romanized Celts, which have produced the tribe of the “Baiern”, – with “i” in order to distinguish them from today’s “Bayern”. However, accounts of Bavarian identity normally start with political history. The political “birth” of Bavaria is dated on the year 555 with the establishment of a *Herzog* (duke) of the tribe, who was, however, acting under the Merovingian king of Franconia. In 1180 Bavaria became a territorial dukedom. The Wittelsbach dynasty has governed it since 1180 and up to 1918. Some Bavarian rulers even were elected as emperors.

During the religious wars, Bavaria’s defense of Catholicism was rewarded by upgrading the duke to prince-elect (*Kurfürst*) in 1623. Later, Bavaria’s alliance with Napoleon was rewarded by a further upgrading (to kingdom) in 1806. Its territory, that had underwent continuous changes during the Middle Ages and Modern Times up to this date, more than doubled, incorporating Franconia and part of Swabia. The immense territories won were saved by a timely change of alliances when turning against Napoleon, and consolidated by a thorough modernization process (first constitution in 1808, constitutional monarchy since 1818).

During the German war of 1866 Bavaria sided with Austria but only suffered few territorial and (more important) economical losses. After having won the German-French war on the side of Prussia in 1871, Bavaria joined the German Empire and thereby lost its international sovereignty, while maintaining statehood, but now as a federated state of the new Reich.

The monarchy was abolished by the November revolution of 1918, that established the *Freistaat* (free state of Bavaria, also translated as Republic). In 1919, a short lived independent Bavarian Soviet Republic (*Räterepublik*), was crushed by joint action of German military forces and extreme right militias. Bavaria became one of the *länder* of the Weimar Republic (and Munich the scene of the Hitler putsch of 1923). Under national socialism, *länder* were maintained as mere administrative units. As birthplace of the NS movement, Munich (and some Bavarian cities) became privileged. At the end of the Second World War, Bavaria was occupied by US troops and it was the first German *land* to be established as a state, already in September 1945, by the US military government. It lost some territory west of the Rhine, but on the whole, it was the only West German territorial state whose boundaries could be considered historic, because they overlap visibly with the territory it had possessed since 1803.

⁸ Hans Kratzer: Wir sind dagegen, sz.de 11.12.2013.

After joining the West German Federal Republic, Bavaria, a mainly agrarian country, underwent its own economic miracle towards a modern economy with a strong focus on high tech industries and services.

So there is no doubt that Bavaria has a long political history. However, until the beginning of the 19th century, the “over thousand years of history” of the Bavarian people the current constitution refers to in its preamble⁹, only included the territories of what has been known as “Altbayern” (Old Bavaria) and sometimes as “Baiern”, that is, *Niederbayern* and *Oberbayern* (Lower and Upper Bavaria) and *Oberpfalz* (Upper Palatinate), but not Franconia or Swabia. While Franconian Nuremberg, a city of a thousand years of history, too, and also the Swabian free city of Augsburg, were clearly linked to the history of the *Reich* and its *Kaiser*.¹⁰

2. The juridical situation

When the Canadian Court of Justice was asked by the Canadian government in 1998 whether the secession of a province of Canada could be justified under international and Canadian law, the first part of the question could easily be rejected. As Quebec was no colony, there was no recognized right to secede. This also applies to Bavaria.

However, the advocates of a Bavarian secession claim that Art 1 No 2 of the UN Charta also applies to the Bavarian people, and eventually even to each of the Bavarian tribes.¹¹ They also consider the OSCE Helsinki act (1975) to be taken into account which has been ratified by the Federal Government. It establishes the right of “peoples” to determine their political status without interference. According to Art 25 of the Constitution this may then have to be respected also under German Law. But even the *Bayernpartei*, the only party that defends the Bavarian right to secede, admits that the principles of international law (like the right to self determination) refer to “*bereits existierende Nationen*” (nations that already exist).¹²

Bavarian self-determination is currently granted only in terms of the Federal constitution (*Grundgesetz*) of Germany. However, this constitution does not provide a special status for Bavaria, as do the Italian, Spanish or British Constitutions for some regions. The *Grundgesetz* is basically providing the same autonomy for all member states. The autonomy of the *Länder* is constitutionally protected.¹³ Shared rule is somewhat asymmetric, as states may have between 3 and a maximum of 6

⁹ Bayerische Landeszentrale für politische Bildungsarbeit (ed.): *Verfassung des Freistaats Bayern. Grundgesetz für die Bundesrepublik Deutschland*, Stand: 1. Oktober 2010, Munich s.a. In 1992, the Bavarian prime minister even referred to 1500 years of history (Claire Sutherland: *Nation, Heimat, Vaterland: The Reinvention of Concepts by the Bavarian CSU*, German Politics 10.3, 2001, p. 11-36, here: p. 33). But see Haus der Bayerischen Geschichte (ed.): *Politische Geschichte Bayerns*, Munich 1989, p. 22: “The modern Bavarian state, today’s *Staatsbayern*, is the child of the French Revolution. It was its spirit and the strong hand of Napoleon that have created this state...” (my translation). This is the officious publication of the Bavarian State chancellory.

¹⁰ See Graham Ford: *Constructing a Regional Identity: The Christian Social Union and Bavaria’s Common Heritage, 1949-1962*, *Contemporary European History* 16.3, 2007, p. 277-297.

¹¹ <http://freiheit-fuer-bayern.de/juristische-wege-zur-eigenstaatlichkeit> (access 30/10/2015)

¹² <http://landesverband.bayernpartei.de/2013/ist-die-eigenstaatlichkeit-verfassungswidrig/> (access 30/10/2015).

¹³ For the (never used nor discussed) possibility to use federal force (*Bundeszwang*, Art 37 of the constitution) against a *Land* and its limitations in content and procedure, see Michael Sachs (ed.): *Grundgesetz. Kommentar*, München

votes in the *Bundesrat*, the second federal chamber. According to its population, Bavaria is entitled to six votes.

Shared rule institutions and in particular the second chamber protect the *Länder* and assure that the Federal Government cannot prevail against the will of the majority of them. Not even in European issues, where the role of the *Bundesrat* has been strengthened to provide protection against the tendency of the government to hand competencies of the *Länder* over to Brussels, where effective control can be exercised only by the federation.

Länder rights are also protected by the Constitutional Court. Half of the judges of the Court are selected by the second chamber (with a 2/3 majority). It is however true that, as usual in federations, individual states have no veto right or position, while their majority has. This applies also to amendments of the federal constitution – they depend on 2/3 majorities in both chambers.

According to the dominant interpretation of German constitutional history, Bavaria has joined the Federal Republic freely. However, the *Grundgesetz* does not provide any right to secede. This being so, secessionists still argue that the constitution does not outlaw secession; it just does not mention it. The list of federal competences, secessionists argue, is a closed list, and to rule on secession is not enumerated – and all powers not enumerated remain in the hand of the *Länder*. Separatists also challenge that an accession decided by the *Landtag* has not to be eternal. The *Landtag* that once had represented Bavaria legitimately, still does, and (like in international treaties), should not be bound eternally and under all circumstances by its previous decision. However, according to the prevalent opinion, the federal constitution is no treaty.

According to separatists, the act of accession should be interpreted under the premise of conserving Bavarian sovereignty. However, the Bavarian legislature did not explicitly establish such a reserve when deciding on accession. Further, separatists argue that the Basic Law previews the possibility of revision of *Länder* borders by regional referendum, without need of agreement by the federation; by analogy, independence could be achieved using this way (Art 29), too. However, even the *Bayernpartei* admits that there is nothing in the text of Art 29 that really suggests such an inclusive interpretation.¹⁴

The issue of a constitutional right or exclusion of secession has never been challenged. Therefore there is no Court opinion available.

The issue has rarely been commented in academic literature on law. However, there are some contributions to fiscal federalism literature, which analyze the possibility of opt-outs or even exit. In

(5)2009, “Artikel 37”. The article in itself seems to implicitly outlaw secession, when demanding loyalty with the federation. The independentist *Bayernpartei* however argues that Bavaria would not neglect any constitutional duty in seceding, because according to its interpretation any duties have to be spelled out in the Constitution, and non-secession is not (see <http://landesverband.bayernpartei.de/2013/ist-die-eigenstaatlichkeit-verfassungswidrig/> (access 30/10/2015)).

¹⁴ For ways to interpret the Basic Law admitting a right to secede, see <http://freiheit-fuer-bayern.de/juristische-wege-zur-eigenstaatlichkeit> (access 30/10/2015).

this strand of the literature, the argument is that such options are good measures against inefficiency, not only in the Bavarian case or in Germany, but also in federal states in general.¹⁵

The Bavarian accession to the *Grundgesetz* followed Art 178 of the Bavarian Constitution of 1946. Advocates of an (implicit) right to secede argue that secession should function the same way. Under the aforementioned Art 178, the accession had to be result of the free will of the Bavarian people. The argument than is that without this free will, membership in the federation could not endure. The current interpretation does not admit this interpretation, as federal law breaks *Land* law.

The Bavarian Constitution of 1946 is a very complete document, comparable to the one of an independent state.¹⁶ It had been accepted by a wide majority in the *Landtag*, it had been ratified in referendum by 71% of the votes (with a participation of 76%). Military government however had established that Bavaria had no right to renounce in any form its participation in a federal government; federal accession was, in the eyes of the military government, not facultative for Bavaria, but without alternative.¹⁷

In spite of this, the Bavarian constitution establishes a particular Bavarian citizenship (Art 6), to be acquired by birth or naturalization. However, this right was first suspended by Military Government and remained without practical significance after accession to the federal Republic. It remains an article of merely symbolic value. Its own text rules that a special law is necessary to develop this citizenship, and this law has never been passed.¹⁸

The Bavarian constitution is notoriously open to be challenged by everybody who may bring issues to the Bavarian constitutional court if his or her rights are hurt; associations are entitled, too. The constitution includes (at least for German customs) far reaching rights to popular initiatives and referendums which have been widely used either for issues of the Bavarian constitution or legislation. The Bavarian Senate, for example, has been abolished by referendum.

As the Bavarian constitution had already provided a paragraph on a Bavarian accession to a federal constitution, Bavaria had been the *Land* that had invited the other (Western) *Länder* to prepare the federal Constitution in the Constitutional Convent in Herrenchiemsee.

It is telling that not even the *Bayernpartei*, which mobilizes currently for a popular initiative for a Bavarian law on secession¹⁹, considers that the Bavarian constitution would have to be amended in order to permit secession. This is so because the Bavarian constitution includes references to the

¹⁵ See Norbert Berthold/Michael Neumann: Opting-Out Klauseln und der europäische Einigungsprozess. Eine sezeptionstheoretische Analyse, Bayerische Julius-Maximilians-Universität Würzburg, Wirtschaftswissenschaftliche Beiträge des Lehrstuhls für Volkswirtschaftslehre 56, Würzburg 2002.

¹⁶ See Gerhard Brunner/Frank Höfer: Staatsrecht. Bayerische Verfassung, Bayerische Verwaltungsschule BVS Heft 10, München 2012.

¹⁷ Haus der Bayerischen Geschichte p. 30.

¹⁸ See Werner-Hans Böhm: "Gott mit Dir, Du Land der (Ober-)Bayern". Das Land der Schlösser und Klöster, der Berge und Almen, Zur Debatte, special edition as supplement to number 4, 2015 (Bayerische Wegmarken), p. 22-24.

¹⁹ According to <http://freiheit-fuer-bayern.de/gesetzentwurf-zur-unabhaengigkeit> (access 30/10/2015) 7050 signatures have been gathered.

“German people” in its introduction, guarantees all German nationals residing in Bavaria the same rights and duties as Bavarians (Art 8), prescribes to teach children “to love the Bavarian *heimat*” “in the spirit of friendship between peoples” but also to the “German *Volk*” (Art 131).

In the case of the mentioned Art 178: “Bavaria will accede to a future German Federation”, the *Bayernpartei* proposes a change for “accession as an independent state to a Europe of the Regions”, a somewhat contradictory formula.

In a nutshell, we can resume that according to the current interpretation, a right to Bavarian secession does not exist either in international or in (German) national law. According to the underlying philosophy of a federation, the limits to self determination the federal pact implies are thought to be compensated by a constitutionally enshrined co-decision at the centre.

3. A moral defense of a Bavarian secession?

Beyond international or national law, it is in political theory where we find well established schools defending morally justified secessions. While some theories accept secession on grounds of exceptional “just causes” to react against manifest injustices if no other remedy is available, “primary right” theories consider secession to be morally acceptable either if the claimers are a nation, or if they just have the majority in a territory.²⁰ Let us now analyze the standard arguments of these schools and their eventual application to the Bavarian case.

3.1. Is there a just cause for Bavarian secession?

Among “remedial rightists”, the most widely accepted cause is unjust incorporation of a territory into a state, for example by conquest. Bavaria had renounced its independence joining the German *Reich* on January 30th, 1871. Bavarian independentist Wilfried Scharnagl considers this integration was a “disaster” –*Unheil*. The argument brought forward by fierce Bavarian independents and which is also shared by Scharnagl is that the discussion on accession in the second chamber of the Bavarian Parliament took place only after the foundation of the *Reich*, jeopardizing the legitimacy of the adhesion. Nevertheless, even Scharnagl admits that there are some facts which point to a contrary interpretation. First, the vote was won by a wide margin (102:48). Second, also the first chamber had voted with only three votes against, and this had happened before the foundation of the Empire. Besides that, also the Bavarian government and the Bavarian monarchy had been in favor. In the context of the glamorous victory against France achieved in an alliance with Prussia and other German states, many Bavarians were carried away by German nationalism.²¹ Even the adversaries of the treaty (that brought Bavaria important asymmetrical rights in self government, financing and in shared rule – and provided the Bavarian King with a lot of money for castle construction) defended a united Germany, albeit with a vision different from Bismarck’s.

The final overthrow of the Bavarian monarchy by popular revolution in 1918 ousted a Bavarian king that had styled himself as a German patriot during the First World War. What followed was a short-

²⁰ See for example Percy Lehning (ed.): *Theories of secession*, London/New York 1998.

²¹ Wilfried Scharnagl: *Bayern kann es auch allein. Plädoyer für den eigenen Staat*, Cologne/Berlin 2012, p. 18-52.

lived independent Bavarian revolutionary state. Somewhat surprisingly, the advocates of Bavarian secession do not use this experience with independence as an argument, maybe because of its left revolutionary character. After the defeat of this uprising, the new Bavarian government accepted the authority of the Weimar Republic and its Constitution. This meant the loss of the Bavarian asymmetrical self governing “residual” rights. And this loss was not properly compensated. The Bavarian railroads became *Reich* property without paying the established compensation. While their debts were also transferred, the stipulated price was never satisfied by the *Reich* treasury. The Bavarian post system suffered a similar fate – a compensation had been negotiated but was never paid. The centralization of the beer tax was compensated by a guaranteed Bavarian share of the tax income, which was paid but was deemed insufficient.²² Nevertheless it is difficult to imagine, that an unpaid historical debt could be seen as a just cause for secession today.

Bavarian independentists more often use a historical argument of more recent character. They defend that Bavaria is no part of the Germany, because in 1949 it has not joined the (West)-German Federal Republic. In its failed attempt to prevent German unification using the Bavarian Constitutional Court, the *Bayernpartei* has argued that Bavaria had rejected the Federal Constitution and that therefore it has never become a part of the FRG.²³ True, Bavaria had organized the German Constitutional Convention in Herrenchiemsee; it had sent representatives to the Parliamentary Council that debated the final text in Bonn. And a (narrow) majority even of the Bavarian members of the Council had accepted the Constitutional text (7 out of 13). The Bavarian Prime Minister, like his colleagues, had signed the document. However, the argument goes, on May 20th, 1949, the majority of the Bavarian Parliament (101:63 with 9 abstentions) had rejected the Constitution. This happened after a heated debate, with even the adversaries, however, not only claiming another form of federalism, but also insisting on their German patriotism. A good example of the atmosphere is given by the following quotes by *Ministerpräsident* Hans Ehard: “*Nein zum Grundgesetz und ja zu Deutschland!*“ (No to the Basic Law but Yes to Germany); “*Wir bekennen uns zu Deutschland, weil wir zu Deutschland gehören!*“ (We pledge ourselves to Germany because we belong to Germany).²⁴ But finally, in a second vote some hours later, the Parliament and the Government accepted the Constitution to be legally binding in Bavaria when at least 2/3 of the *Länder* had accepted it (and this was without question; in fact all of them did). This decision was carried by 97 yes against 70 abstentions, and with only 7 negative votes. One may interpret that while a clear majority hold a critical position about the text, it nevertheless preferred Bavarian accession to continued independence. Current defenders of independence, if mentioning the second vote at all, generally use the negative vote to argue that Bavaria became a reluctant partner in a treaty, but for them it would be unfair to consider that this relation binds the Free State for eternity, particularly if by continued

²² Reservatrechte, in: Historisches Lexikon Bayerns, http://www.historisches-lexikon-bayerns.de/artikel_44589 (access 30/10/2015)

²³ See Uwe Kranenpohl: *Bayernpartei*, in: Frank Decker/Viola Neu (eds.): *Handbuch der deutschen Parteien*, Wiesbaden 2007, p. 166.

²⁴ Arne Wilsdorff/Maximilian Steinbeis: *Warum Bayern das Grundgesetz ablehnte*, Deutschlandfunk 30.10.2015. http://www.deutschlandfunk.de/warum-bayern-das-grundgesetz-ablehnte.934.de.html?dram:article_id=131554 (access 30/10/2015)

centralization tendencies in Germany (and in Europe), the terms of this pact are changed, and Bavaria is downgraded, in their view, from a *Land* to a province.²⁵

Often it is this more recent political turn towards centralism that is seen as the main justification for independence. However, such a centralist turn (backed by majorities in both houses of the German parliament, and often with Bavarian votes) cannot easily be constructed as a “just cause” for secession, at least not under stricter secession theorists like Buchanan²⁶.

Since the USA achieved their independence in a war against “taxation without representation”, financial exploitation without consent is also considered a just cause for secession. For the independentist *Bayernpartei*, the Federal Republic is systematically depriving Bavaria of its prosperity – at an increasing rate (“*Die Bundesrepublik entzieht Bayern systematisch und in zunehmendem Mass seinen Wohlstand*”²⁷). The costs of membership are calculated at about 1300€ per capita and year.²⁸ For CSU-politician Scharnagl the system of financial equalization between the *Länder* is the culprit, and he does not shy away from naming it a “*Raubzug*” (raid, p. 113), which leaves Bavaria “*ausgebeutet*” (exploited, p. 113 and 182). The Bavarian government should end this “scandal” (113) by just stopping to pay (131).²⁹ The supporters of Bavarian secession are in favour of abolishing both the fiscal equalization scheme (*Länderfinanzausgleich*) and the *Solidaritätszuschlag*, the “solidarity surcharge” for the former GDR- parts of Germany.

Nevertheless, there are many problems with this argumentation. First, Bavaria itself had profited from the *Länderfinanzausgleich* in the 50s and 60s. Second, this system has been negotiated with the *Länder*, as the *Bundesrat* had to agree, and Bavaria arguably accepted the legitimacy of the process, and still did so when it used the Constitutional Court claiming unjust treatment.³⁰ In addition, the federal government spends a lot into the Bavarian infrastructure, and the German army has a more than proportional share of its effectives stationed in Bavaria.

Germany does not provide “fiscal balances” including all cash flows of federal money to the different *Länder* and/or the benefits that federal government institutions may bring to the citizens in different regions, nor has Bavaria claimed to see such numbers. Even politicians who (like Scharnagl) pretend to defend Bavarian independence often remit to reforms of German federalism as a workable and desirable remedy against exploitation (*Wettbewerbsföderalismus*, competitive federalism, p. 125).

Currently, the (according to the *Bayernpartei*) overwhelming public debt of Germany and the unlimited liability of Bavarian taxpayers the German government has consented to in the eurozone, are also argued as causes for secession. The Bavarian taxpayer is portrayed as the unprotected victim

²⁵ See “Zentralstaat Deutschland”, <http://freiheit-fuer-bayern.de/zentralismus-in-deutschland> (access 30/10/2015).

²⁶ In Lehning, op. Cit.

²⁷ <http://freiheit-fuer-bayern.de/> (Access 30/10/15)

²⁸ <http://freiheit-fuer-bayern.de/zahlmeister-bayern> (Access 30/10/15). The exact base of this calculation is difficult to establish.

²⁹ See interview with Scharnagl in Martin Knobbe: CSU-Urgestein Scharnagl: “Es ist Zeit für das grosse bayerische Aufbegehren”, Spiegel online 22.8.2015 (access 30/10/15)

³⁰ Sometimes with, more often without success.

to German government decisions that (like the help “packages” for Greece) were only decided at the centre, or, with the conniving federal government, in Brussels. However, it may also be considered that the majority of Bavarian representatives in Berlin have backed these policies. Under these circumstances, “taxation without representation” can surely not be argued, and the fiscal deviation of Bavarian money (if there is such deviation after calculating federal spending in Bavaria and for the Bavarians) could –if ever- only justify secession if other remedies have been tried and failed.

Some of the “remedial rightists” consider also “cultural oppression” as a just cause for secession. However in Bavaria, nobody expresses the opinion that such kind of oppression takes place.

3.2. Is Bavaria a Nation?

There are theoretical alternatives to the school of “remedial rightists”. Some theorists claim that secession is a “primary right”, either of nations (even if not oppressed), or of territorial majorities. Let us analyze whether Bavaria qualifies for secession in any of the two ways.

It is quite problematic to decide whether a community is a nation or not. Usually, proponents consider different objective criteria and/or the subjective national consciousness and the political will. In a recent interview, the president of the *Bayernpartei*, Florian Weber, assured that Bayern has its own history, culture and language, “like Scotland”.³¹ However, he did not use the term “nation”. We have already described how the long political history of Bavaria, until quite recently, only referred to the Old Bavarian part of the state.

But if there was no Bavarian nation, what about an ethnic identity? Today’s Bavarian state representatives use to recognize four Bavarian tribes, the *Baiern* (Old Bavarians), Franconians, Swabians, and, finally, the Sudeten Germans. This last “tribe” (*Stamm*), however, has no territorial base in Bavaria. About two millions of refugees and expulsions were received after 1945, proceeding from the Czechoslovakian republic. They had never been Bavarian (but Austrian), however, they considered themselves part of the German nation and were accepted as such.

Bavarian independentists have occasionally referred to a Bavarian dialect (but not language)³², and Germans outside Bavaria often do the same. Linguists however discover several groups of dialects in Bavaria: middle German dialects like Rhine-Franconian in Lower, and Thuringo-Saxon in a part of Upper Franconia; upper German dialects like Eastern Franconian, and *Bairisch* (Bavarian) mostly in Old Bavaria, finally Alemannic in Swabia. *Bairisch* is often seen as the archetype Bavarian, particularly outside Bavaria.

As for cultural features, Bavaria is often considered the most Catholic German region. In reality it is, after the Saarland, the *Land* with the second highest percentage of Roman-Catholics. However, citizens of Central Franconia and parts of Upper Franconia are usually Lutherans. They make up for

³¹ In Sascha Geldermann: Bayernpartei sieht auch gute Chance für eigenen Staat, Augsburg Allgemeine, 15.9.2014.

³² Interview with Florian Weber, president of the Bayernpartei, in Ingrid Fuchs: Bayernpartei setzt auf Schottland, sz.de 12.9.2014 (<http://www.sueddeutsche.de/bayern/referendum-ueber-unabhaengigkeit-bayernpartei-setzt-auf-schottland-1.2124053> (access 30/10/2015))

nearly 20% of the Bavarian population. It is usually forgotten, that important parts of Bavaria and in particular Nuremberg, were among the heartlands of the reformation.³³ In addition, more than 4% of the Bavarian population are Muslims.

The protestant minority, whose main territories only had been incorporated in the 19th century, resisted integration into an “all catholic” definition of Bavaria. This religious divide could be also an explanation, why Bavarian state building could be successful, while a common Bavarian national identity could not be built. Since the protestant territories have been incorporated into Bavaria, they were eager to emphasize that not all of Bavaria was Catholic.

In addition, Bavarian national myths, where they were created, quite often appealed only (or in the first place) two Old Bavarians. Examples are the “*Sendlinger Mordweihnacht*”, a revolt of old Bavarian peasants against Austrian domination in 1705 which was brutally repressed³⁴, and the fight of the bakers of Munich for the Wittelsbach dynasty in 1322, or the typical Upper Bavarian legends of social bandits and poachers.

Typical dishes, dresses and architecture also differ between Old Bavaria, Swabia and Franconia. These “tribes” are often thought to have different mentalities, while there is also the idea of a Bavarian character marked by what non-Bavarians consider to be *Eigenbrötelei* and *Widerborstigkeit* (taking an unduely independent line) and *Aussenseitertum* (liking to be an outsider).³⁵ Even for Bavarian independentists, Bavaria is marked by its diversity, not its uniformity.³⁶

The Bavarian state anthem³⁷ hails from the 1860s. It received the title of Bavarian “hymn” in 1966 and is since then protected as a state symbol. But it was never meant to become a Bavarian *national* hymn – it refers, instead, to the *German* nation.

Bavaria has also a state anthem, written in the 1860s, which in 1966 got the title of a Bavarian “hymn”. It is protected as a state symbol, but not as a “national” hymn. In fact, its text refers to the German and not to a Bavarian nation, when its first verse declares Bavaria to be “*deutsche Erde*” (German soil) and its second one exalts the Bavarians to show to everybody (in the first version: to the enemy) their unity with the German brother tribes (“*dass mit Deutschlands Bruderstämmen einig uns ein jeder schau*”). The Bavarian hymn usually is played together with the German national anthem. As official hymn of a member state it enjoys the same protection by the penal code as the

³³ See Werner K. Blessing: Bayern – das Land der “ausschliesslichen Katholizität?”, Zur Debatte, Special Edition „Bayerische Wegmarken“, 4, 2015, p. 19-21.

³⁴ See Katharina Weigand: Die Sendlinger Mordweihnacht von 1705: Genese und Morphologie eines Mythos, Zur Debatte, Special Edition „Bayerische Wegmarken“, 4, 2015, p. 13-16.

³⁵ Scharnagl, p. 78.

³⁶ This diversity is highlighted by the official state coat of arms which includes symbols standing for the historic regions, while the blue and white rhombus of the flag stand for the whole state. However, in Franconia, the Bavarian ensign is sometimes joined by the Franconian white and red “rake” flag.

³⁷ See Verfassung..., p. 86-88; Werner-Hans Böhm, op. Cit. Under the Bavarian monarchy, a German version of “God save the King” had been sung, with the correspondent tune.

German national anthem.³⁸ In Franconia, the so called “*Frankenlied*” may join the others, too, in tolerated practice.

Institutional denominations of Bavaria are generally referring to the Bavarian “state”. Contrary to the practice of other *Länder*, references to the Bavarian “state” are very widespread.³⁹ But “nation” terminology is reserved to Germany. One of the few exceptions is the “National” Museum of Bavaria (founded in 1855, that is, before German unity, by the Bavarian king Maximilian II, who tried to transfer a common identity to his recently integrated territories).⁴⁰

Albeit not seen as a “national” one, Bavarian identity, however defined, is shared by an immense majority of Bavarians. Bavaria is usually defined as *Heimat* (home or home land)⁴¹. 74% agreed totally to enjoy living in Bavaria, 23% mostly. More than half were “absolutely” proud to be Bavarian, an additional 28% felt “mostly” pride. During the same poll informants were asked whether they felt more Bavarian or German. 54% preferred Bavarian, 46% German identity.⁴² However, we should not forget that even if a large number of Bavarians identifies as Bavarians, they see it as a regional and not national identity.⁴³

In a survey conducted by the CSU party foundation (*Hanns-Seidel-Stiftung*)⁴⁴, 39% associated Bavaria spontaneously with its landscapes, 28% with emotions, 23% with culture and tradition, and 18% with politics and/or economy. As advantages of their life in Bavaria, 38% mentioned spontaneously issues related to politics and economy, 29% to landscape and nature, 27% to emotions, and 14% to culture and traditions. Only 7% could or would not number any advantage, while 31% could or would not name disadvantages. As “typical Bavarian”, 55% named the “way of life”, 36% landscape and tourist attractions, 18% culinary features including beer, 12% the people, and 11% referred to brands like the *FC Bayern München* football club, BMW⁴⁵ cars, or the CSU party. As motives for pride in Bavaria, “beautiful landscapes” received an overwhelming 91% (among very proud and proud), “living traditions” 81%, economic success and scientific achievements 79% each, Bavarian history 76%, Bavarian art and culture 71%, the Bavarian education system 70%, achievements in sports 67% and the way politics works in Bavaria, 51%. In comparison with previous surveys, pride has increased recently.

³⁸ Ridiculizing these symbols may be penalized with up to three years of prison. However, the hymn is often used for purely commercial advertising without any prosecution taking place.

³⁹ See for example Bayerische Staatsoper, Bayerisches Staatsballett, Bayerisches Staatsschauspiel, Bayerisches Staatstheater, among others.

⁴⁰ See <http://www.artattendance.com/970-bayerisches-nationalmuseum/> (Access 30/10/2015). The monumentalization of the German Kaiser Ludwig I “der Bayer” (the Bavarian) arguably also showed traits of a Bavarian “national” invented tradition, at least initially. See Karl Borromäus Murr: *Der mittelalterliche Kaiser Ludwig der Bayer im Mythenarsenal des Königreichs Bayern*, Zur Debatte 4, 2015, p. 10-12.

⁴¹ In 2009 75% agreed absolutely with considering Bavaria their *Heimat*, and a further 17% agreed partially; only 9% denied this. This survey was conducted by the public Bavarian Radio.

⁴² According to Scharnagl, p. 79-86.

⁴³ And they do not see this to be problematic. Non-national sub-state units should not be mixed with minority nations. More on this conceptual question in Adam Holesch: *What holds a multinational state together?* Phd Thesis, Universitat Pompeu Fabra, Barcelona 2016.

⁴⁴ Hanns-Seidel-Stiftung (ed.): *Generationenstudie 2009. Heimatgefühl und Leben in Bayern*, Oktober 2009.

⁴⁵ The acronym stands for *Bayerische Motoren Werke* (Bavarian Motor Works).

Bavarians felt mostly attracted by their local community (89%); the region and Bavaria scored both 88%, while Germany was rated slightly lower (85%) and Europe (60%) lowest. In comparing Bavaria with the other *Länder*, only 1 of 8 Bavarians did not see Bavaria on top. Economy and (good) work were seen as most important reasons for this position (61%), followed by politics (31%) and the people (10%).

Summing up, while objective elements of a Bavarian identity are often more difficult to establish than those of the single Bavarian regions, there is no doubt that there is a strong link to be found between the Bavarians and their country, which is widely seen as an emotional *Heimat*.

The existence of a nation, however, is not only linked to “objective” identity elements and identification. National consciousness can also be established or strengthened (and, may be, even invented) by nationalist organizations and parties. While Bavarian civil society organizations normally follow the federal pattern and thereby constitute Bavarian sections of German associations, this applies only partially to the party system. The Bavarian Social Democrats (SPD), Greens (*Die Grünen*) and liberals (FDP) follow the federal pattern. However, the most relevant Bavarian party, the Christian Social Union (CSU) forms a political alliance with the Christian Democratic Union (CDU); but the former presents its candidates only in Bavaria, while the latter does so in the rest of Germany. The tiny independentist *Bayernpartei* only competes in Bavarian districts, too.

The existence of non-state wide parties in Bavaria goes back to 1871, when the opponents of the adhesion of Bavaria to the *Reich* organized as *Bayerische Patriotenpartei* (Party of Bavarian Patriots). From 1887 onwards, this party, however, became the *Bayerische Zentrumspartei*, linked to the Catholic Centre Party (*Zentrum*) and loyal to the *Reich*. In 1918, the pendulum swung back and leading figures of this party founded the non-state wide *Bayerische Volkspartei* (BVP), which took more distance to the *Zentrum*, a party that oftentimes allied with the Socialists (SPD).

From 1893 to 1933 Bavarian peasants organized in the *Bayerischer Bauernbund* (BB). The association faced problems in Franconia, were peasants tended towards the all-German *Bund der Landwirte*. During the Weimar republic, BVP and BB shared most Bavarian governments.

A third regional party, the *Bayerische Mittelpartei* (Bavarian Central Party), founded in Nuremberg/Franconia in 1918, also participated in some Bavarian governments, but from 1920 onwards acted as Bavarian branch of the extreme right German DNVP (German National Peoples Party).

In Bavarian state elections, under the Weimar constitution, BVP and BB received more than 40% of the votes, until the upsurge of the NSDAP brought this rate under 30% in 1933.

This tradition was taken up after WW2 by the *Bayernpartei* and in parts by the CSU⁴⁶. 17 candidates of the former made it to the German Bundestag in 1949, but this success could not be repeated – a “Federalist Union” of small non-state wide and state-wide parties failed in 1957. In the

⁴⁶ Free associations of voters (*Freie Wähler*) are often playing an important role, too (9% in the last *Landtag* elections).

first *Landtag* election the party was allowed to stand (1950), the party won nearly 18% of the votes. However, its downward trend started soon after. Voters and leaders changed to the CSU. Since 1966, the *Bayernpartei* has no representation in the Bavarian parliament. Parties not achieving 1% do not receive public money – this was also the case of the *Bayernpartei*. Since the 1990s, the party stands for an independent Bavarian state in an European confederation. In the last *Landtag* election (2013), for the first time since 1966, the party received slightly over 2% of the votes, in lower Bavaria, which comes closest to something like its stronghold, over 3%. The party claims a referendum for self-determination or the improvement of the German federal system in a competitive and more dual direction, as well as direct representation of Bavaria in Europe. There, the *Bayernpartei* looks for an alliance with non-state wide and in particular with minority nationalist parties in Europe.

The NSWP status of the CSU is more questionable. The CSU is the current governing party of Bavaria (47.7% and an absolute majority of seats). After 27.4% in 1950 and 38% in 1954, the party quickly reached majority status. In fact, this party, with the exception of the years 1954-7, has always governed in Bavaria, and could normally count on an absolute majority (on one occasion, even a 2/3 majority, enough to change the Bavarian constitution). The party has been featured correctly as Bavaria's "official and hegemonic party" (*Staats- und Hegemonialpartei*).⁴⁷ The CSU is the only party that successfully asks electors to "vote for Bavaria", meaning itself.⁴⁸ To achieve this status, the party had to develop from the traditional circle of Bavarian honorary politicians towards a professional organization, capable to "catch-all" Bavarian electors with its powerful machine, stretching out far beyond the traditional Old Bavarian catholic agrarian background of the NSWPs we found in the Reich and the Weimar Republic, and reaching out towards the cities, the north, the Protestants....

Bavaria's structural change from a backward agrarian *Land* with an under average GDP per capita to one of the most modern and certainly rich *Länder* of Germany, remains, in the eyes of the Bavarians, linked to the dominance of this party, which made the relevant decisions (development of air and space, armament and other high tech industries, building of nuclear power stations, a big new airport, etc.). Bavaria is the only *Land* that ever changed permanently from receiving equalization money to be a spender, and is today the biggest one indeed. The party was able to combine *Laptop and Lederhose*⁴⁹ (the traditional Old Bavarian leather pants), a combination which became a symbol of the Bavarian state identity, but focusing now on *Gesamtbayern* (the whole of Bavaria), including all its different parts. CSU politics strengthened a Bavarian identity, which included the regions, even if that meant celebrating the Franconian apostle Saint Killian, the glorious (but widely protestant) past of Swabian Augsburg, the memory of Franconian Nuremberg as the "capital" of the medieval *Reich*, etc.

⁴⁷ See Alf Mintzel: The Christian Social Union in Bavaria: Analytical notes on its development, role and political success, in: M. Kaase and Klaus von Beyme (eds.): Elections and parties, London 1978; Alf Mintzel: Die CSU – Anatomie einer konservativen Partei, Opladen 1975.

⁴⁸ See Eve Hepburn: The neglected nation: the CSU and the territorial cleavage in Bavarian party politics, German Politics 17, 2008, 2, p. 184-202, here: 190.

⁴⁹ These famous words were pronounced by the former federal president Roman Herzog in 1998.

Perhaps somewhat belatedly, even Franconians were included into the party leadership, and some of them even protestants.⁵⁰ At the same time, Sudeten refugees became Bavarians, too. For Franz Josef Strauss, the historic leader of the party, Bavaria was “our *Heimat*”, Germany “our *Vaterland*”, and Europe “our future.”⁵¹

Recently, some researchers have equalized CSU’s Bavarian identity construction with nationalism. Claire Sutherland comes to the conclusion that the party asserts the existence of a Bavarian “imagined community” (p. 21) and “invented traditions”, coming to the conclusion that “the ideology of the CSU is nothing other than a nationalist one” (p. 22). However, not all imagined communities are nations, and not all invented traditions are national ones. Even Sutherland mentions that the CSU exclusively refers to a German and not to a Bavarian nation. To save her argument, he claims that “only the substitution of the term *Heimat* for Nation distinguishes the strategy” (22) from other nationalisms. On the other hand she considers that the CSU’s (and correspondingly the Bavarian governments) “affinity to the German nation is underplayed” (p. 25). However, she herself quotes *Ministerpräsident* Stoiber who in the course of an interview, in 1999, quipped: “My nation is called Germany. I am not Basque. I am not Quebecois. Federalism is not separatism.”⁵²

In similar efforts to equalize the CSU with nationalist NSWPs elsewhere in Europe, Eve Hepburn declared CSU’s core aim to be “akin to that of *Convergència i Unió* in Catalonia, *Spirit* in Flanders or *Plaid Cymru* in Wales”.⁵³ She “explores how the CSU constructs, and associates itself with, the Bavarian nation” (p. 185). In 2005, Eberhard Sinner, former Bavarian minister of European and Federal Affairs, had told her: “Bavaria is very similar to Scotland. We see ourselves as a nation.” (p. 185). But Hepburn herself admits that “the Christian Social Union uses the word *Heimat*”(186). She fails to give great importance to the fact that the CSU is not struggling for national recognition. However, this is just one of the main differences toward the other NSWP she cites (*Esquerra Republicana de Catalunya* and *Plaid Cymru* among them). Graham Ford, already in 2007, “distinguishes the CSU from ethno-regionalist parties, for it neither constructs Bavaria as a nation in its own right nor eschews the German nation state”. His conclusion differs from Sutherland and Hepburn and agrees more with the German research tradition: “Whereas ethno-regionalist parties typically use the past to assert their distinctiveness from the national state in order to legitimize demands for cultural protection, autonomy, federalization or separation, the CSU asserted its regionalism as constitutive of the (German, KJN) nation (...) by locating Bavaria’s ‘imagined past’ firmly within a German historical context.” Thereby “the CSU committed Bavaria’s ‘imagined future’ to the German nation...”

Alf Mintzel, Germany’s most renowned specialist on the CSU, always stressed the “dual role” of the CSU, both as a regionalist and as a federal party. The presence of some independentists like Wilfried

⁵⁰ Even some CSU *Ministerpräsidenten* have come from Franconia. For the region-inclusive strategy, see Graham Ford: Constructing a regional identity: the Christian Social Union and Bavaria’s common heritage, 1949-1962, *Contemporary European History* 16, 2007, 3, p. 277-297.

⁵¹ Cited in Martin Knobbe: CSU-Urgestein Scharnagl. “Es ist Zeit für das grosse bayerische Aufbegehren“, *Spiegel online* 22.8.2015.

⁵² Sutherland, op. cit., p. 27.

⁵³ Hepburn 2008, p. 184; see also Eve Hepburn/Dan Hough 2012, p. 74-96.

Scharnagl or *Landtag* MP Steffen Vogel should not make us forget or downplay this important feature.⁵⁴ In fact, even Hepburn (in a more recent article written together with Dan Hough⁵⁵) highlights the fact that the CSU is a party on the national (German) level, as part of the Christian Democratic parliamentary group. They could have gone further. The CSU enjoys special veto rights there. Hepburn and Hough admit, that the “fact that the CSU is a quasi-federal party allows it to punch above its weight in the federal political arena (...) indeed the CSU has long been the third political force in federal politics.” (p. 85). Candidates for the highest German offices like the Chancellor backed by the CDU have often come from the ranks of the CSU. The performance of the CSU ministers and parliamentarians in Berlin has an effect on the results of the CSU in the *Landtag* elections, because the Bavarian voter does not only consider Bavarian issues when voting there. The arrows of causality do not point in one direction only.

In regards to European politics, the CSU has repeatedly complained that the German government is not taken the Bavarian interest into account when acting in Brussels. The CSU is in favor of returning some policies to the German state, as this would protect the Bavarian interest better. It has to be concluded therefore that any claim that Bavarian has a right to self-determination, if based on the existence of a Bavarian nation, is indeed standing on a very weak base.

3.3. Bavarian secession as result of a majority decision

The most radical (or liberal) secession theory has been defended by Harry Beran, who claims that in order to secede, a majority of citizens in favor of it could be enough. Beran argues that individuals, according to liberal democratic values, should be entitled to make choices, and decisions on frontiers should not be excluded. With that secession should be permitted in principle, if there is a majority in favor. The existence of a nation is no precondition for choosing.

The *Bayernpartei* stands for reaching independence in 10 years, but would use a majority vote as base for negotiations.⁵⁶ The party defends: “The consent of the people is the basic condition for a secession. When we have this consent, we must negotiate with Berlin on many issues” (Florian Weber, party president).⁵⁷

According to a survey commissioned by this party, in 2003, only 33% of the Bavarians favored independence.⁵⁸ In a 2009 study on Bavarian *Heimat* feeling, the CSU party foundation (*Hanns-*

⁵⁴ Another issue is the symbolic support the CSU sometimes gives to a right to decide. In the statutory congress the European People’s Party celebrated in Madrid, the 16 CSU representatives did not vote in favour of the motion the Spanish nationalist Partido Popular promoted (that “any form of secessionism or external interference in a Member State is contrary to the very inclusive nature of the Union”). See Sara Prim: European People’s Party won’t recognise the legality of secessionist processes, Catalan News Agency (CNA) 22.10.2015.

⁵⁵ See Eve Hepburn/Dan Hough 2012, p.85.

⁵⁶ “Die Zustimmung des Volkes ist eine Grundvoraussetzung für die Abspaltung. Wenn wir diese Unterstützung haben, müssen wir mit Berlin über vieles verhandeln.“, in: 23% der Bayern wollen Unabhängigkeit – Bayernpartei zeigt den Weg auf, <http://landesverband.bayernpartei.de/2009/23-der-bayern-wollen-unabhangigkeit-%E2%80%93-bayernpartei-zeigt-weg-auf/> (Access 30/10/2015).

⁵⁷ Augsburg Allgemeine 15.9.2014.

⁵⁸ Andreas Settele, then chief of the party, in an interview for the extreme rightist Junge Freiheit, 12.9.2003. <http://phinau.de/jf-archiv/archiv03/393yy23.htm> (access 30/10/2015).

Seidel-Stiftung) asked informants whether the Bavarian government was sufficiently defending the Bavarian interest (41% hold this to be true, against 25% partially true and 28% that thought that the Government should do more). The political weight of Bavaria was considered to be adequate by 56%, too light by 20%, and too high by 18%. 39% answered that they would wish “more independence” (*mehr Unabhängigkeit*) for Bavaria, while 20% partially agreed, and 37% said no. However, on a clear question (if Bavaria should become an independent state), a majority of 56% clearly rejected the independence option, while 23% agreed and 16% partially agreed. This refusal confirms earlier surveys. There is no majority for independence.⁵⁹ Perhaps surprisingly, pro-independence positions had diminished among the younger age cohorts. But as this study has shown relatively high support for independence, it has been widely used by the *Bayernpartei*.⁶⁰

A recent online survey by ODC services (2012), which was conducted in the whole of Germany, showed that 62% were against Bavarian independence, while 12% were in favor. When taking only the Bavarian respondents, we find that 57% were against and 21% in favor. Those that supported independence expected a strengthening of Bavarian economy (38%), and/or of democracy (43%) and hoped for more influence in Europe. Adversaries mainly feared Bavarian isolation in Europe in case of independence.⁶¹

After analyzing all these surveys, basing independence of just a popular majority in a referendum might not work, but has it therefore be outlawed?

A justification of a secession under choice theories however, does not only ask for the existence of a majority, but also for the absence of some conditions that would make a secession impossible, although a majority might be in favor, provided these caveats cannot be met before.

The most important condition is that the new state should be viable. Considering Bavaria, this condition can be surely met. According to its population, Bavaria would be the 9th state among 28 EU members. According to its GDP (2010), Bavaria would be 7th, ranking before Poland, Sweden, Austria, Denmark, or Belgium.⁶²

Bavaria's low debts (in Germany, only Saxony has a lower debt per capita) would give the independent state a boost, and eventual intents of “capture” by economic interests could be rejected. Bavaria would be a viable independent state, particularly in Europe.⁶³

Beran claims that secession should be excluded if it takes away economically, military, or culturally essential parts of the original state.⁶⁴ What would happen in the German case? Bavarian secession

⁵⁹ A similar question by the same institute in 2003 had rendered 17% yes, 21% partially, and the same 56% against.

⁶⁰ See interview with Florian Weber, in Ingrid Fuchs: Bayernpartei setzt auf Schottland, sz.de 12.9.2014.

⁶¹ Marktforschung 17.8.2012; <http://www.marktforschung.de/nachrichten/marktforschung/forderung-nach-unabhaengigkeit-bayerns-nicht-mehrheitsfaehig/> (Access 30/10/2015)

⁶² Scharnagl 2012: 91; Rudolf Stumberger: Zerbricht Deutschland?, telepolis 16.9.2014; echoing the positions of the *Bayernpartei*.

⁶³ And not only according to the medals won in the Winter Olympic Games in Sochi, as satirical scenarios of Bavarian Independence have highlighted. An example in: Bayern – die neue Grossmacht. Ein Gedankenspiel, sz.de 15.9.2014.

⁶⁴ See Lehning op. cit.

would surely affect the remaining German state. Germany would lose 12.5 million people and an economically prosperous and innovative territory; e.g. 2 of the 9 excellence universities can be found in Bavaria. Nevertheless, this would not make the “Rest-of Germany” economically unviable.

Considering the military, Bavaria holds many of the training grounds for the German army, but relocations after secession are not impossible.

German self-representation and tourism industry strongly relies on the Bavarian landscapes⁶⁵, which would be seriously missed. But this inconvenience can hardly rule over a majority vote.

Another caveat against secession relates to a possible exploitation of subgroups after secession. Choice theorists claim that these groups should have the right to secede on their own account. If this is not possible, original secession should be rejected. Up to now, no fears of “remaining” German citizens or of immigrant communities or religious minorities against Bavarian secession have been voiced. This may be due to their positive attitude on living in Bavaria, but also to the fact that up to now they do not take Bavarian secession to be a serious possibility.

As for regionally concentrated minorities, Franconia would be a case to take into account, for ex. By establishing a secession right of its own if Bavaria decided for exit. Situated around Bavaria’s second city, Nuremberg, Franconia counts some 4 million people (more than Slovenia) and claims a particular history if not of independence, then of a strong link to the *Reich*. We have already talked about its history and religion. Franconians often complain to be passed over by Munich politicians. When a *Ministerpräsident* of Franconian origin had to step down because of a loss of support in his (CSU) party, this has sometimes been alleged to be the result of an (Old) Bavarian plot.⁶⁶ Franconia has higher rates of unemployment (though still below German average), so economic neglect might be argued, too. Franconians sometimes claim the return of works of art brought by the Bavarian kings to Munich, and criticize the concentration of Bavarian state cultural institutions in Munich.

While such animosities are quite easy to be found, they lack political expression by a successful Franconian movement or party. Historically, some intentions to separate from them kingdom of Bavaria in 1848/9 have been highlighted.⁶⁷ And after Bavaria’s adhesion to the Reich in 1871 the political and electoral behavior in parts of Franconia has been different, as we have seen, but this meant a preference for German SWPs and not organizing on the regional level. However, in 1991, the *Fränkischer Bund* was founded. It did not argue independence, but secession from Bavaria to become a German *Land* in its own right.⁶⁸ The *Bund* rejects any continuity with Nazi initiatives to establish certain symbols of Franconian culture (the *Frankentag*) and it professes “small is beautiful” instead.

⁶⁵ The loss of the Alps would reduce Germany’s highest point from 2962 to 1493 meters, as has recently been observed (Jan David Sutthoff: Bayern unabhängig? Das wären die Auswirkungen für Deutschland, Huffington Post, 17.10.2014.

⁶⁶ Case of Günther Beckstein in 2008.

⁶⁷ See Weigand, p. 14.

⁶⁸ Bayern könnte es allein – und Franken auch, Abendzeitung München 17.9.2014; <http://www.abendzeitung-muenchen.de/inhalt.unabhaengigkeit-bayern-koennte-es-allein-und-franken-auch.2dc9ded5-42a6-4695-bfa-e38a2fb7f=ec.present....> (access 30/10/2015)

The establishment of new territorial boundaries is theoretically possible under the German constitution, but according to Art 29 the territory in question has to fulfill some criteria of definition; in addition, a popular initiative has to be supported by a quorum, and in the end a referendum in the region in question has to be won. In praxis, the *Fränkischer Bund* included into its map of Franconia three Bavarian districts, but also and some counties of Baden-Württemberg and Thuringia. The *Bund* collected 8016 signatures, 7184 of which were recognized as valid, thereby meeting the threshold. However, the federal government rejected the claim to organize a referendum on grounds of failing the defining criteria for the territory; according to its standpoint, Franconia could not be delimited with clarity.⁶⁹ The German Constitutional Court backed this reject, and the European Court of Justice uphold this verdict in 1999.

Similar arguments for the change of inner-federal borders have been defended by the *Partei für Franken* (Party for Franconia, also named *Die Franken*), which was founded in 2009 in Nuremberg.⁷⁰ The slogan of the party has been “‘Bayern’ war gestern – Franken ist heute!” (‘Bavaria’ was yesterday – Franconia is today!), built above all on the over 1200 years old Franconian history. But after the failure to achieve a *Land* of its own, a better recognition inside Bavaria is argued. This includes to change the name of the *Land* to Bavaria-Franconia. Bavaria should be federalized, with autonomy for Franconia. In the long run, the Party for Franconia has not given up on founding an independent *Land* within a federal Germany. Nevertheless, the Franconian voters are failing the party, which in the last *Landtag* election won only 0.7% of the popular vote in its area of reference.⁷¹

However, the data presented in 2009 by the Seidel-Stiftung show some particularities of Franconia. People in Central Franconia are a bit less proud to be Bavarian; but even in this region (around Nuremberg), pride to be Bavarian prevails in a majority. These results are not salient enough to challenge Bavarian identity successfully. The deviation from the Bavarian average is usually under 5%, with 8% less pride in Bavarian sport achievements being the major exception. Apparently, fans of *1. FC Nürnberg* do not identify as much with *FC Bayern München*’s football championships. However, the results in the three different Franconian districts are also different and in some places very similar to the (other) Bavarian departments. Complaints on neglect in economic issues is argued more often against the metropolitan areas than in a Franconian vs. Bavarian frame. We certainly find people identifying more with Germany than with Bavaria, at least in Central Franconia. However, in Lower Franconia we find the opposite results. On the question about Bavarian independence, it is Lower Bavaria and Swabia that are most favorable, while Upper Bavarians outside Munich and Upper Franconia are most skeptical.⁷²

⁶⁹ BVerfGE 96, 139 – Volksbegehren Franken. Beschluss des Zweiten Senats vom 24. Juni 1997.

⁷⁰ Partei für Franken. Grundsatzprogramm verabschiedet auf dem Gründungsparteitag der Partei für Franken am 31. Oktober 2009 in Bamberg.

⁷¹ See Bayern, die neue Grossmacht, sz.de 15.4.2014.

⁷² To present Bavarian secession demands as absurd, the Franconian claims are quite often cited in the German media. Sometimes a further secession of the Coburg district is mentioned (Coburg was a free state between 1918 and 1920) – however, Coburg itself decided in 1920 to unite with Bavaria, in a referendum with an overwhelming majority.

Table 1: Should Bavaria be an independent state (in %)?

	TOTAL	Upper Franconia	Central Franconia	Lower Franconia
yes	23	17	22	25
Partly/partly	16	14	13	14
no	56	62	58	57

Franconian identity is strong enough to be addressed by Bavarian separatists. The *Bayernpartei* stands for federalizing Bavaria, albeit by upgrading the Districts (in the case of Franconia, 3) instead of empowering the region as such. However, an eventual autonomous status of Franconia seems not inconceivable.⁷³ The leader of the *Bayernpartei*, Florian Weber, claimed that in case Franconia would not agree with Bavarian independence, the rights of the Franconians would be respected: “I do not hope that the Franconians would do this. But if we invoke a right to self determination, we would have to grant this to the Franconians, too. The *Bayernpartei* is even standing for more autonomy for Franconia inside Bavaria.”

3.4. A right to decide for the Bavarians?

As we have shown so far, it is difficult to argue a right to self-determination and particularly a right to secede where national status is not even claimed, no irremediable injustices regarding taxation and survival are to be found, no unjust incorporation did take place, and no popular majorities for a secession can be mustered.

Recently, a three-judge committee of the German Constitutional Court rejected to deal with a complaint forwarded by a Bavarian citizen against the non-admittance of a Bavarian leaving of the Federal Republic. This non-admittance was often misunderstood as a sentence of the Tribunal. However, the laconic 4 line-reasoning of the three judges represents the common opinion: the member states are not the “Lords” of the Constitution, as it is based on the constituent power of the German people.⁷⁴

However, the recent advisory opinion of the International Court of Justice on the case of the Kosovo’s unilateral declaration of independence by parliamentary majority has spurred those that accept a right to decide without having to decide whether the seceding population is a nation, and even if the possibility of a referendum is denied.⁷⁵

⁷³ <http://freiheit-fuer-bayern.de/ein-selbstaendiges-bayern> (access 30/10/2015)

⁷⁴ Bundesverfassungsgericht -2BvR 349/16. See also Peter Mühlbauer: Beschwerde zu Volksabstimmung über bayerische Unabhängigkeit nicht angenommen, Telepolis 3.1.17.

⁷⁵ International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo (Advisory Opinion of 22 July 2010). Reports 2010. For an interpretation against further secessionist claims, see Hermann-Josef Blanke and Yasser Abdelrehim: Catalonia’s independence – is there a way in international and European Union law?, in: Klaus-Jürgen Nagel and Stephan Rixen (eds.): Catalonia in Spain and Europe. Is there a way to independence?, Baden-Baden 2015, p. 52-97, here: p. 76-77.

The Opinion holds that there is no guarantee in international law against state's disintegration. Unilateral declarations are therefore not *eo ipso* outlawed. In fact, the advisory opinion of the Supreme Court of Canada had defended a similar position for the context of a federation.⁷⁶

The case of a "right to decide" as an independent political principle deriving from the principle of democracy and different from the traditional right to self determination that is either based on the national principle or on the principle of individual choice has been discussed in Catalonia.⁷⁷ The *demos* character of Catalonia, and by extension of Bavaria, may be claimed by its history of self rule, including the election of its own parliament and the establishment of a democratic practice, which, as result of the Kosovo opinion, could extend to secession.

Such a practice of acting as a *demos* could also be invoked by Bavaria. However, a parliamentary majority would still be necessary. In the case of Bavaria, not even the staunchest defenders of this right do not seek unilateral secession. More often, they use the claim for a right to decide as an instrument to force negotiations, in the end, not on independence, but for a more competitive form of federalism, with independence, if at all on the agenda, then as "Plan B".⁷⁸

Surely an (improbable) majority for independence could not simply be ignored⁷⁹ - negotiations would be the foreseeable result, giving the Bavarian arguments for a different kind of federal relation to the rest of Germany –and to Europe - more salience.⁸⁰

⁷⁶ Supreme Court of Canada, Case 25506, Reference re Secession Quebec (Decision of 20 August 1998). It established a right for negotiation if the Quebec population provided a clear majority on a clear question on independence.

⁷⁷ See for example Jaume López: A "right to decide"? On the normative basis of a political principle and its application to Catalonia, in: Klaus-Jürgen Nagel and Stephan Rixen (eds.): Catalonia in Spain and Europe. Is there a way to independence?, Baden-Baden 2015, p. 28-41.

⁷⁸ This seems most clear in the case of the book written by Scharnagl.

⁷⁹ This is the argument of the *Bayernpartei*, see <http://freiheit-fuer-bayern.de/juristische-wege-zur-eigenstaatlichkeit> (access 30/10/2015)

⁸⁰ Scharnagl prefers national policies to European rules; *Bayernpartei* independentists have promised not to build new frontiers between Bavaria and Germany; they claim a commissioner and votes in the Council of Ministers, but also would leave the euro and consider (as the second best solution) to go the Swiss way and leave the EU. See Florian Weber in *Augsburger Allgemeine* 15.9.2014 and in *sz.de* 12.9.2014.