Morality and Legality of Secession

A Theory of National Self-Determination

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"The owl of Minerva takes its flight only when the shades of night are gathering."

HEGEL, *Philosophy of Right*

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Abbreviations

Art.	Article
ch.	Chapter
chs.	Chapters
dir.	director
ed.	editor
e.g.	*exemplii gratia* (for example)
et al.	*et alii* (and others)
etc.	*et cetera* (and so forth)
et seq.	*et sequens* (and following)
EU	European Union
ibid.	*ibidem*
ICJ	International Court of Justice
i.e.	*id est* (that is)
No.	Number
OSCE	Organization for Security and Co-operation in Europe
p.	page
pp.	pages
par.	paragraph
pars.	paragraphs
TEU	Treaty on European Union
UDI	Unilateral Declaration of Independence
UK	United Kingdom
UN	United Nations
US/USA	United States of America
USSR	Union of Soviet Socialist Republics
v.	*versus*
Vol.	Volume
§	section
§§	sections

Synopsis

The claims for sovereignty and independence in Quebec, Scotland and Catalonia show that secession demands are not necessarily heading for disappearance in consolidated liberal democracies. Thus, this book intends to offer a renewed framework for the morality and legality of secession. *Morality* in the sense of a political philosophy analysis regarding a moral right to secede. Moral argument is especially important since laws regarding secession are often partial and deficient. *Legality* as an exploration of how international and constitutional law do and ought to approach self-determination and secession. Legal analysis, in contrast to philosophical analysis, tends to be more realistic, less abstract and more attached to official documents, doctrines and practices.

Secession is a significant political instance of a more general phenomenon that both morality and legality are bound to discuss endlessly: union and separation. Beyond the classic example of marriage and divorce, freedom of association includes the right to constitute and join associations as well as the right to exit and not to be forced to form part of any association. Secession is a case of political divorce from State bond. The values of liberty, equality, democracy and self-determination upheld by political liberalism tilt the balance towards assuming that secession should be tolerated, recognized and, in certain cases, protected. The study of secession forces this book to revisit major debates of political philosophy and public law, such as contractualism, liberalism, democracy, group rights, nationalism, statehood, self-determination, federalism, sovereignty, constitutionalism and constituent power.

As regards the structure of the book, morality will be discussed first and then legality, in order to understand, criticize and reshape international and constitutional law in accordance with the proposed moral arguments on the right to secede. Although there is a need to further theorize on institutionalizing secession (to prevent unilateral secession and advance consensual secession), the philosophical debate requires to be addressed first. In many places of the globe, including liberal-democratic contexts, discussion focuses more on philosophical than on institutional

issues. If politics and jurisprudence believe that no moral right to secede must be granted unless a region is facing serious and persistent injustices, it is difficult for an institutional theory of secession to make its way.

Normative theories – both moral and legal – of the right to secede tend to blur, and sometimes confuse, international and internal law. To avoid such confusion and favour a comprehensive, systematic and in-depth analysis, this book is divided into three main parts: the first, on political philosophy; the second, on international law; and, the third, on constitutional law. Still, moral and legal arguments are often addressed jointly, which is something usual and sound when dealing with hard cases. The combination of deep moral and legal analysis (including international and constitutional law) aims to make the present book more unique. Such an extensive study may generate some benefits, but also certain costs.

Part 1 starts by defining the concept of secession, by identifying different types of secession and by distinguishing secession from other close notions. After this preliminary chapter, it is pointed out that contract theories developed to justify political authority have tended to sidestep the question of where and how territorial borders have been drawn. Then, a theory of secession based on a hypothetical multinational contract will be constructed. Such a contract between national communities helps to discover some principles of justice of the multinational State, and specially a principle of external self-determination. The theory of secession proposed follows a conception of *justice as multinational fairness*. The moral right to secede arising from such contract theory is primary, for no prior injustices need to be pleaded. Nevertheless, this primary right to secede is neither absolute nor unqualified, but subject to multiple procedural, substantive and material limits and conditions. The requisites for secession of the second article of the hypothetical multinational contract are encapsulated in seven principles: (1) the *Principle of democracy*, (2) the *Principle of agreement and negotiation*, (3) the *Principle of need for liberal nationalism*, (4) the *Principle of respect for human rights and protection of minorities*, (5) the *Principle of territoriality*, (6) the *Principle of viability and compensation* and (7) the *Principle of avoiding serious damage to third parties*.

Even if States tolerate or recognize their national pluralism, they are neither *non-national* nor alien to nationalism. Since there is an intrinsic and intense connection between statehood and nationality, it is both consistent and reasonable to use the principle of nationality in conjunction with the principle of democracy to (re)draw territorial borders. Justice as multinational fairness ascribes a primary right to secede to minority nations. Hence, the classic debate on the principle of nationality will be revived together with the more modern debate on liberal nationalism. As under the hypothetical multinational contract only minority nations possess a moral right to secede, distinction between national and ethnic minorities will be drawn. Ethnic minorities may, nevertheless, become national minorities through the normative force of the passage of time and of the bond forged with the territory. To solve the dilemma of the right to secede of better-off nations, a *system of secession taxation* is proposed and developed. Requiring the seceding entity to be a nation together with a *secession taxation*, amongst other requisites and conditions, helps to counter classic objections to the right to secede, such as excessive fragmentation and infinite secessions.

Paraphrasing the opening passage of *The Social Contract* of Rousseau, this book intends to take both people and peoples as they are, and moral and legal principles as they could be. Justice as multinational fairness is thus based on a Rawlsian contractualism seeking a realistic utopia. The requisites for secession articulated in the hypothetical multinational contract are to be applied mainly to ideal contexts, but have the capability to adapt to nonideal situations. Ideally, a liberal-democratic State would respect and recognize its national pluralism and be inclined to tolerate democratic secession. Contrariwise, certain nonideal contexts could modulate and nuance the principles and conditions of the hypothetical multinational contract. If the parent State has perpetrated or is perpetrating an injustice against the seceding territory, such as military occupation, selective violation of human rights or economic exploitation, secession requisites would evaporate or diminish, favouring the recovery of statehood or the exercise of secession. This is to say, the more unjust the State treatment of minority nations is, the lower the requirements to secede ought to be. Justice, as well as legitimacy, is a matter of degree. Conversely, if the seceding nation or its nationalism were manifestly illiberal compared to the parent State, the right to external self-determination would be reduced to a mere right to

internal self-determination. In this situation, the liberal parent State would still be the guarantor of last resort for correcting the excessive illiberalism of these sub-State nations.

The need for *juridifying* the right to secede is defended since moral rights (or moral claims) lack institutional recognition and protection. Without this official dimension, normative reasons are more often trumped by effectiveness and expediency. Through law, the politics of facts should gradually be overcome in favour of the politics of norms. Therefore, this book advocates against a realistic power-politics conception of the creation of new States in favour of a more rational, fair, peaceful and secure conception. The traditional role of law, both internal and international, as a technique to avoid the rule of the strongest, the arbitrariness of *faits accomplis* and the *bellum omnium contra omnes* is recalled and emphasized. Unlike a moral right, a legal right involves institutionalization and the creation of mechanisms of recognition, adjudication and enforcement. These are some basic reasons for the subsequent parts.

Part 2, on international law, starts by analysing the principle of and the right to self-determination of peoples. Even if under the current circumstances minority nations within liberal-democratic States have no international legal right to secede, the secession of these nations can be grounded on the principle of self-determination of peoples. The absence of a legal right to secede does not imply that unilateral secession is forbidden under international law. Since this sort of sub-State nation has neither an international right nor an international prohibition to secede, this part ends with a debate on the principle of effectiveness and the doctrines of international recognition of new States.

The first chapter of Part 2 outlines the process of international emergence and development of self-determination of peoples, which started in the context of the World Wars of the 20th century. In the light of the moral theory defended in Part 1, this process is still excessively incipient, for international law does not yet even clearly recognize a general right to secede for territories subjected to serious, persistent and selective violations of human rights (beyond colonies). Given the state of affairs, minority nations under peaceful liberal-democratic contexts are not

expected to be granted a primary right to secede any time soon. Although the recognition of such right to secede could promote perpetual and just peace, this proposal is a non-realistic utopia since States are the lawmakers *par excellence* of international society and since many of them are neither liberal nor democratic. Hence, at the level of international law, this book defends a more realistic right to external self-determination based on prior violation or failure of internal self-determination.

The 2010 ICJ Advisory Opinion on Kosovo confirmed the academic mainstream opinion according to which unilateral declarations of independence are not against international legality. Implicitly, the Court seemed to understand that unilateral secession by peaceful means, democratic process and in response to prior failed attempts at negotiation and agreement is compatible with international law. In the light of this case law, the principle of effectiveness and the doctrines of international recognition of new States will be reappraised. In contrast to a declarative vision of international recognition, a conception of recognition with constitutive effects is defended to nuance the principle of effectiveness. The latter should allow recognition of new States that have not reached full effectivity and, vice versa, deny recognition of certain illegitimate factual realities. Revival of constitutive views of recognition could add a normative and idealist dimension to the emergence of new States while moving away from the arbitrariness of *faits accomplis*.

With the use of its legal monopoly of force (and maybe at times illegal), the parent State could try to stop sub-State nations satisfying the principle of effectiveness. A constitutive conception of international recognition based on normative values and principles such as peace, negotiation, democracy and nationality could help to moderate the unfairness of facts and regional instability. In Europe, the process of disintegration of Yugoslavia offers some support to such a constitutive recognition of new States. Likewise, the ICJ Opinion on Kosovo smooths the way for peaceful and democratic secessionism. This Opinion also narrows the international principle of territorial integrity of States and broadens the international principle of non-use of (unlawful) force. In addition, the disintegration of Yugoslavia provides instances to criticize over-tight application of the *uti possidetis* principle giving international validity to internal territorial borders. Rigorous application of this principle would

be legitimate only if internal territorial borders could be categorically presumed reasonable.

Part 3, on constitutional law, starts by pointing out that, in general, contemporary constitutions do not recognize any right to secede for minority nations or other sub-State units. Nonetheless, this book lists more than fifteen constitutional acts that grant or granted a right to secede or to external self-determination. They are exceptions that confirm the general rule. What is more, some of the cases are of little significance since these constitutional laws lacked real normative force and judicial and political mechanisms to ensure their effectiveness. The panorama, however, is not as desolate as it might seem. Inspiration can be drawn from the Quebec Secession Reference of the Supreme Court of Canada, the Agreement between the UK Government and the Scottish Government on a referendum on independence for Scotland, the constitutional recognition of the right to secede of Montenegro and its exercise through a referendum. These cases inspire the development of a constitutional right to secede based on clarity, negotiation and compromise.

In a more theoretical approach, Part 3 defends constitutionalizing the right to secede as a special type of constitutional reform in which, provided certain principles stemming from the moral proposal are met, a minority nation may secede. A constitutional right to secede intended to prevent unilateral and foster consensual secession. In this way, the principle of democracy is meant to be made compatible with that of constitutionalism. More specifically, the constitutional values and principles of liberty, democracy and national pluralism work as a driving force for creation and interpretation of the constitutional right to secede as an explicit or implicit mechanism of constitutional reform. Consequently, these principles will be contrasted with those of State sovereignty, unity, indissolubility, territorial integrity and solidarity, which can be interpreted in ways not to impede peaceful, liberal and democratic secession.

Constitutionalism, federalism and right to secede are not necessarily an oxymoron, but a compromise and balance to be sought. The progress of *de jure* multinational State and supra-State integration depend and will depend especially on appropriate

recognition and guarantees of a qualified constitutional right to secede. Multinational union and right to secede are not normative opposites; they may exist together in harmony instead. In this regard, the right to secede is also defensible in a context of ideal multinational federalism, provided that the more just the State treatment of minority nations is, the stricter the requirements for secession should be. In the end, a qualified constitutional right to secede can foster: (1) recognition and accommodation of national pluralism, (2) cooperation and compromise between majority and minority nations, and (3) multinational integration and stability.

Then Part 3 descends to more institutional issues related to the principle of democracy, namely how should the democratic demand for secession be expressed via representatives and via referendum. Ideally, a secession claim should be clearly expressed by both means. In respect to the secession referendum, several questions are addressed such as what could be a clear question and a clear majority, and who should vote in this referendum. As regards the clarity of the question, for instance, the objectives in the wording ought to be *intelligibility*, *conciseness*, *simplicity*, *vernacularity*, *straightforwardness*, *neutrality*, and *legal correctness*. In addition, the wording of the question should appeal to *(minimally) realistic subjective preferences based on public reasons*.

As for the clarity of the majority, the problems with turn-out and approval quorums in referendums in general and, in particular, in secession referendums are discussed. Because of these problems, this book leans towards a simple majority in a referendum (more yes votes than no) which is, in fact, the most coherent rule in a referendum of a consultative legal nature as well as the general rule in many legal orders. Nevertheless, there are many arguments why a democratic qualified majority is appropriate for the purposes of exercising secession. After warning that the importance of representative democracy cannot be undervalued at least concerning secession claims, this book argues that a simple majority expressed in a referendum should be backed up by a qualified majority of democratic representatives in favour of independence. An alternative proposal would be to require referendum quorums and, if the majority in favour of secession falls short of these, to require simple majorities in consecutive referendums. After all, it is important to make sure that the desire for secession is sustained, since the creation of a new State should be a long-

lasting event. Another proposal, alternative to or complementary with the previous two, would consist in making the approval quorum conditional on the turn-out through a mathematical formula.

Part 3 also discusses consensual secession and the obligation of principled negotiation, setting out from the experience gleaned from comparative politics and law. Despite not having an express legal right to secede, hard cases often ought to be resolved by reference to the values and principles on which the constitutional order is based. Even in adverse constitutional frameworks, many arguments are raised to defend secession referendums and other moves towards self-determination. At least, a large part of the secession process can be tolerated by liberal-democratic constitutions. Thus, as far as possible, a constitutional break should be avoided and postponed until the final stages of the secession process. In liberal-democratic contexts, secession process must follow a sort of order that goes from more constitutionality and compromise to more unilateral democratic legitimacy. Even if the ultimate possibility of creating a new State by a unilateral break is accepted, such rupture ought to be understood with the seriousness it deserves.

This book claims that internal self-determination is more constrained by the principles of constitutionalism and federalism than external self-determination through secession. The final sections of Part 3 develop a constitutional theory on unilateral secession for cases where there is no recognition of the right to secede (either explicit or implicit) in the existing constitutional order or where such recognition would be practically illusory. Defending the constitutionalization of a right to secede as an ideal legal proposal should not, and will not, preclude the possibility of developing a constitutional theory of secession based on the rise of a new constituent people. After theorizing on unilateral declarations of independence as democratic titles to legitimize the emergence of new legal orders, more practical aspects concerning those declarations are addressed. Since unilateral secession is a kind of revolutionary act, in liberal-democratic contexts only after a long path seeking negotiated and constitutional ways will unilateral democratic routes, backed up by extensive, intense and sustained popular mobilization, be able legitimately to overcome the constitutional barriers and raise the seceding nation as a constituent people.

1. SECESSION IN POLITICAL PHILOSOPHY

1.1. The concept of secession

Secession is a more specific and technical term than *independence*, which is more often used in everyday language. The verb *secede*, which can be broken down into the Latin words *se* and *cedere*, means to leave or to separate from a place or group.[1] In this book, *secession* is defined as a separation of part of the territory and population of a State with attributes of sovereignty in order to create another State with similar attributes of sovereignty.[2]

Secession can be one way to exercise the right to *external self-determination*. Association with or integration into another fully sovereign State can be considered other ways of external self-determination.[3] Although eminent authors such as Allen Buchanan included the separation of a territory in order to associate or integrate with another pre-existing sovereign State within the concept of secession, this book regards secession as separation to create a new State.[4] It remains to be assessed whether it is reasonable to extend the theory of secession defended here to association or integration with a pre-existing State.[5] As Aleksandar Pavković and Peter Radan specify, transfer of territory and population from one State to another (usually a neighbouring country) is not secession strictly speaking, but rather *redemption* (liberation). The internal movement seeking association or integration

[1] PAVKOVIĆ, A.; RADAN, P. *Creating New States*, p. 5.

[2] A similar definition is: "secession is the creation of a new state by the withdrawal of a territory and its population where that territory was previously part of an existing state". PAVKOVIĆ, A.; RADAN, P. *Creating New States*, p. 5. The Supreme Court of Canada, in the Quebec Secession Reference, also defines secession similarly (see par. 83).

[3] CASSESE, A. *Self-Determination of Peoples*, especially ch. 4. Even dissolution could be considered a kind of external self-determination. DUGARD, J.; RAIČ, D. "The role of recognition…", pp. 101-2.

[4] BUCHANAN, A. *Secession*, p. 10.

[5] Since irredentism necessarily involves several States, it is often a (more) destabilizing issue in international relations and it can endanger international peace. Sorens warns that "Irredentism usually requires interstate warfare or threat of warfare to be satisfied". SORENS, J. *Secessionism*, p. 11. A recent example of the risk of breaking international relations and peace could be the integration of Crimea into the Russian Federation. See KRISCH, N. "Crimea and the Limits of International Law". WILSON, G. "Secession and Intervention in the Former Soviet Space", pp. 153-75. The establishment of a cross-border confederal scheme between the parent State where the redentist movement is located and the irredentist adjacent State can be a reasonable settlement. PATTEN, A. *Equal Recognition*, pp. 262-3. As the 1998 Good Friday Agreement shows, this kind of accord can offer internal and external peace while legalizing a right of redemption as a consensual form of external self-determination. See § 3.1.1 below.

with the other State would then be *redentist*, whereas a State claiming part of the population and territory of an adjacent State would be *irredentist*.[6]

At this point, a distinction should be drawn between *external secession* and *internal secession*. While the former implies the creation of a new sovereign State independent from the parent State withdrawn from, the latter involves the creation of a new member State within the same federation. Supporters of the notion of internal secession argue that if, following theories of federalism, sovereignty can be shared between the Federation and its States, separation of a territory from a federated State can be deemed as internal secession.[7] Even though internal secession fits this book's definition of secession, *secession* will generally refer to external secession. That said, the political and legal potential of including internal secession in the proposed concept of secession should be stressed: if, for instance, the EU is considered or eventually becomes a federation, the independence of Catalonia from Spain could be deemed as a case of internal secession.[8]

Following a rather general opinion among academics, the concept of secession proposed covers both peaceful and violent and both unilateral and consensual secessions.[9] In contrast, James Crawford defines secession restrictively as "the creation of a State by the use or threat of force without the consent of the former sovereign".[10] Such a restrictive definition should be rejected because it confuses means and ends when discussing this issue.[11] In contrast, it is sounder if the same term covers both the desirable means (peace, negotiation and agreement among the relevant parties) and the undesirable ones (lack of consent and use or threat of

[6] In this direction, PAVKOVIĆ, A.; RADAN, P. *Creating New States*, p. 9. SORENS, J. *Secessionism*, pp. 11, 184. Examples could include the cases of Alsace, Lorraine, Trieste, Fiume, the Aaland Islands, etc. Secessionism and redentism are sometimes mixed up, as in the cases of Northern Ireland (with Ireland), South Tyrol (with Austria), Kosovo (with Albania) and Crimea (with Russia). Since Kurdistan is divided between Turkey, Iran, Iraq and Syria, this could be a case of secession, but of irredentism if a Kurdish State managed to emerge.
[7] GILLILAND, A. "Secession within federations", pp. 39-49.
[8] See § 3.6.3 below.
[9] See ch. 3.5 below.
[10] Accordingly, Crawford draws a distinction between secession and devolution, depending on the absence or presence of a metropolitan consent. CRAWFORD, J. *The Creation of States…*, pp. 330, 375. Consistent with this restrictive definition, Crawford and Boyle distinguish between secession, which is mainly unilateral and includes the use or threat of force, and a "negotiated independence", achieved in a mainly agreed and pacific way. CRAWFORD, J.; BOYLE, A. *Referendum on the Independence…,* pars. 22.1, 56.2.
[11] PAVKOVIĆ, A.; RADAN, P. *Creating New States*, p. 6.

force). A more practical argument to support this broader definition is that, as time goes by, elements of unilateralism and use of force tend to combine with elements of negotiation, agreement and subsequent recognition by the parent State.

The concept of secession employed here is restricted, generally, to *secession of the minority*.[12] In principle, the theory of secession supported in this book does not include *secession of the majority* (defining majority both in geographic and demographic terms) because often this could be an expulsion (and so an exclusion). Following the same line, it should be considered an expulsion when the part of the State that questions its unity includes the central government and bases its legal identity on the existing State.[13] Notwithstanding the difficulties to distinguish secession from expulsion in the world of facts, in the normative realm a right to secede ought to be distinguished from a right to expel.[14] Justice as multinational fairness especially upholds a moral right to secede for minority nations, whereas other theories of secession do recognize a right to secede of the majority.[15]

Secession of the periphery is the typical case exercised by a national minority concentrated geographically on the edge of the State's territorial borders. Conversely, *secession of the centre* (or "hole-of-a-donut secession", in Buchanan's terms) is a rare case, involving secession of a territory surrounded by the remainder of the parent State.[16] Since this kind of secession generally opposes the *Principle of territoriality* defended later, secession of the centre should be excluded *prima facie* from this book's theory of secession.[17] If such secession happened to arise, an international guarantee of a sort of right of passage through the remaining territory of the parent State would be necessary in order to safeguard land contact between the territory of the newly independent State and the rest of the world. To a certain extent, an analogy could be drawn with the cases of enclaves. Both enclaves and

[12] See BUCHANAN, A. *Secession*, pp. 15-6.
[13] BERAN, H. "A Liberal Theory of Secession", p. 21.
[14] The separation of Flanders, for instance, may raise some controversy as the Flemish region has more inhabitants and a stronger economy nowadays. Would it be secession or expulsion? This example shows that geographic and demographic evolution can turn a minority into a majority and so a case of secession into one of expulsion. If it were considered expulsion rather than secession, it could be necessary to reject the right to secede unilaterally and to look for more consensual and constitutional ways to dissolve the Union.
[15] See § 1.2.3 below. By contrast, WELLMAN, C.H. *A Theory of Secession*, p. 74.
[16] BUCHANAN, A. *Secession*, pp. 14-5.
[17] See § 1.2.7 below.

secessions of the centre are exceptional cases to be considered cautiously, case by case.

Secession involves splitting away from an existing political union.[18] Secession from a state of anarchy is not conceivable. Secession challenges the sovereignty (or certain attributes of sovereignty) of an existing State. The pre-existing State might disappear as a result of a secession, but this does not mean that, at the time of secession, it was not an existing political union. At this juncture, secession must be distinguished from *dissolution*. In principle, when one or more secessions happen, the parent State remains as the continuator State under international law. By contrast, in the event of dissolution, the parent State would no longer exist and all the new States would become the successors of the predecessor State.

Yet there are overlaps between dissolution and secession. Dissolution is often caused by previous secessions or attempts at secession. As an example, it is open to debate whether the case of Yugoslavia was a dissolution or a dismemberment caused by a chain of secessions. The distinction between whether there is a continuator State or whether all the new States become successor States is significant in international law (*e.g.* for the purpose of continuity of international treaties) but should not overly concern Justice as multinational fairness.[19] In this book the term *dismemberment* (as a broad concept) will therefore be used when parallel or successive secessions occur within the same parent State, in order to include both cases where a continuator State is recognized (USSR – Russian Federation) and those where dissolution occurs and all the new States are considered successor States (Yugoslav Federation).[20]

The concept of secession defended here is *groupal*, since it excludes *individual secession*. Anarchist or libertarian thinkers have explored the idea of secession of a single individual, as distinct from group secession. Secession seeks to end sovereignty of a State over part of its territory and population. By analogy,

[18] BUCHANAN, A. *Secession*, p. 22.
[19] In consequence, as long as the later discussed *Principle of viability and compensation* is respected, the morality of secession processes should not be confused with the final results that these could cause. Whenever this principle is respected, a final result of dissolution or non-dissolution is a contingency for Justice as multinational fairness.
[20] See ch. 2.3 below.

"independents" seek to end sovereignty of a State over an individual (without being forced to emigrate).[21] The concept of secession should not include individual secession for several reasons. One stems from the close connection between the concept of secession and the concept of State. The commonly accepted definition of State brings together the essential elements of population, territory and independent and effective government. A single person could not be considered a population and would hardly meet other basic requisites of statehood.[22]

Since a society cannot be created with a single individual, neither is a State with a single individual possible. Freedom of association shows that liberalism is not *per se* incompatible with the recognition of fundamental rights the exercise of which is not strictly individual. In this regard, the right to secede might be conceived as an individual right exercised collectively (similarly to freedom of association) or as a group right more tied to specific groups. This book will defend a right to secede ideally assigned to national communities. Yet, in nonideal contexts where the parent State has perpetrated or perpetrates injustices against a specific sub-State territory, these could extend the right to secede beyond nations.

In sum, this book does not attempt to seek nor explore the conceptual borders of secession. Instead, its aim is to provide a moral and legal justification for secession using a definition with broad consensus. Hence, it will try to stay in the core of certainty of the concept and to avoid the penumbra cases.

1.2. A contract theory of secession

1.2.1. Contractualism and boundaries

[21] See BUCHANAN, A. *Secession*, pp. 13-4. See § 1.2.6 below.

[22] See ch. 2.3 below. Individual secession would normally lack the territorial element since the individual could not legitimately declare him or herself sovereign over a defined territory. Generally, a government by and over a single person could not exercise the competences and duties that international law mandates to sovereign States. Even if a kind of internal sovereignty could be reached, external sovereignty would not be achieved since the international society would not recognize a one-person-State. The *Principle of viability and compensation* defended later totally opposes any individual secession.

Liberalism does not conceive the State as something immutable by nature, but as a human creation at the service of human needs. Often, to justify political authority, Anglo-Saxon liberal theories use contract theories, whether the early one by Locke or the more recent by Rawls.[23] The basic idea is that the political order should be founded on a concurrence of wills of citizens as free and equal rational beings. Accordingly, a social contract which has actually been or would hypothetically be approved by all citizens is the moral basis of political obligations. Historically, however, the territorial boundaries drawn between States have been shaped by causes which, today, would be considered illegitimate, such as conquests, colonization or transfers from one power to another without the consent of the local population. The principle of popular sovereignty is normally rooted in a constituent people established by arbitrary *faits accomplis*. Democratic liberalism has granted moral validity to contracts reached within territorial frameworks which, often, were built on violence, force, intimidation or deceit.[24] Consequently, in numerous instances the territorial delimitation on which liberal democracies were founded was neither liberal nor democratic. Since the contract tradition takes the existence of the group as a given, the spatial sphere in which liberal democracy is exercised all too often suffers from an original hidden vice.

The question of where and how to draw frontiers remains open. The liberal and democratic theories which have inspired and guided constitutionalism have forgotten, consciously or unconsciously, to theorize about the territorial ambit in which this social contract should be set.[25] In general, there has been less theory on the *demos* (people) than on the *cracy* (power). The eminent twentieth-century liberal theorists, such as John Rawls or Ronald Dworkin, implicitly assumed that States were uninational.[26] Up until the closing decades of the 20th century, the question of

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[23] LOCKE *Two Treatises of Government.* RAWLS, J. *A Theory of Justice.*

[24] KYMLICKA, W. "Territorial Boundaries", p. 250. TAMIR, Y. *Liberal Nationalism,* p. 122. LÓPEZ BOFILL, H. *Nous estats i principi democràtic*.

[25] KYMLICKA, W. "Territorial Boundaries", pp. 252-4. PHILPOTT, D. "In Defense of Self-Determination", p. 367.

[26] KYMLICKA, W. *Multicultural Citizenship*, p. 128. KYMLICKA, W. *Politics in the Vernacular*, p. 221. KYMLICKA, W. *Liberalism, Community and Culture*, p. 177: "Rawls and Dworkin, like most post-war political theorists, work with the very simplified model of the nation-state, where the political community is co-terminous with one and only one cultural community". Still, Dworkin seems to conceive secession as a last resource. According to him, although "the boundaries created by accidents of history remain the default", "we rarely find a persuasive argument for correcting what history has achieved". DWORKIN, R. *Justice for Hedgehogs*, pp. 380-2.

secession seemed ignored or avoided by contemporary political philosophy.[27] Liberal theories generally took the existing State territorial borders as the starting point and omitted to formulate more democratic theories of State-building, for example through secession referendums.[28] These referendums may call into question both the spatial scope of a constitution and the principle of *demotic monism* on which liberal constitutionalism is usually based.[29] In this regard, liberal democracies are said to be more liberal than democratic.[30] Even if an initial pact were concluded justly, liberalism should not forget that contracts could be interpreted abusively in favour of the majority and the powerful.

Many minority nations query the *demotic monism* in favour of a *demotic pluralism*, thus posing a great challenge to liberal constitutionalism. In order to face this contest, in some cases it will be necessary to overcome certain over-rigid or literal interpretations of the law in force. Secession and *demotic pluralism* may not only clash with certain constitutional clauses on unity and territorial integrity, but will also lead us to the edge of the legal field: the notions of sovereignty and of constituent power. In this respect, it might be necessary to rethink the concept of sovereignty and explore new conceptions of it.[31] If the idea of sovereignty is reformulated, embracing a right to secede might be simpler. Renewed theories on the awakening, emergence and exercise of *pouvoir constituant* may also be needed.[32]

Why democratic liberalism opposes secession of a territory if the majority of the population there desire it and the new State continues to respect the basic rights of individuals and minorities on its territory? Liberal democracy seems predisposed, at

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[27] Yet, secession was not always neglected. Eminent philosophers and jurists of the 16th, 17th and 18th centuries, such as Althusius, Grotius, Pufendorf and Vattel, included the topic of secession in their works. See BUCHHEIT, L.C. *Secession*, pp. 49-54.

[28] KYMLICKA, W. "Territorial Boundaries", p. 251.

[29] *Demotic monism* is the term which identifies a single *demos* or sovereign people within the State, by contrast to *demotic pluralism*, which identifies various *demoi* or peoples (which can share certain attributes of sovereignty or sovereign powers). Hence, in this regard, demotic monism is closely related to the idea of nation-State. TIERNEY, S. *Constitutional Referendums*, p. 138.

[30] See REQUEJO, F. *Las democracias*, ch. 7. REQUEJO, F.; CAMINAL, M. (ed.) *Political liberalism and Plurinational Democracies.*

[31] See MACCORMICK, N. *Questioning Sovereignty*, ch. 8. POGGE, T.W. "Cosmopolitanism and Sovereignty", pp. 57-61. KEATING, M. "Rethinking sovereignty". KRAUS, P.A. "Democratizing Sovereignty", in KRAUS, P.A.; VERGÉS, J. *The Catalan Process*, ch. 5. BOSSACOMA, P. *Sovereignty in Europe*.

[32] See ch. 3.7 below.

least *prima facie*, to recognize the right to secede by virtue of the preeminent values of liberty, self-determination, pluralism and diversity.[33] Despite this normative predisposition, liberal democracy has often used federalism and decentralization to calm secession claims and to avoid recognizing a right to secede. However, the capacity of federalism and decentralization to accommodate national pluralism is being questioned in liberal democracies such as Canada, Belgium, the UK and Spain.[34]

Although liberal-democratic federalism remains one of the best formulas to conciliate national identities by making possible a sound combination of unity and diversity as well as of individual and minority rights, federalism and decentralization cannot guarantee full appeasement of secession demands – as the cases of Quebec, Flanders, Scotland and Catalonia show.[35] There are several ways in which federalism can accommodate national pluralism: embrace multinational federalism in which political and cultural frontiers match; accept political and legal asymmetries; develop a plurinational political and legal culture especially within central institutions; adopt confederal arrangements; move towards consociational models and recognize a qualified right to secede.

1.2.2. A hypothetical multinational contract

Liberal political philosophy did not take secession seriously until the final decades of the 20th century. This academic gap can be noticed in the lack of philosophical discussion on secession in the works of John Rawls, which are commonly considered the most influential, systematic and comprehensive in contemporary political philosophy.[36] Given this theoretical vacuum, Buchanan wondered about the possibility to derive a right to secede from a plausible form of ideal contractualism without undermining the various contractarian arguments. "In conditions of perfect

[33] BUCHANAN, A. *Secession*, pp. 4, 30.
[34] See REQUEJO, F.; CAMINAL, M. "Liberal democracies, national pluralism and federalism", in *Political liberalism and Plurinational Democracies.*
[35] KYMLICKA, W. *Politics in the Vernacular,* ch. 5. See NORMAN, W. *Negotiating Nationalism*, ch. 3-5. In general, federalism cannot eliminate secession from the political agenda for a long time.
[36] The works of Rawls dominate the normative debate of political philosophy not because everybody accepts them but because the alternative views are often defined in terms of opposition to or discrepancies from them. KYMLICKA, W. *Contemporary Political Philosophy*, pp. 10, 55.

compliance, there would be no justification for secession", according to him.[37] Conversely, this chapter will attempt to defend a moral right to secede under a rather ideal contract theory. This defence will take the form of a hypothetical multinational contract, which nevertheless will point out some nuances and gradations of nonideal theory.[38]

The moral theory of secession proposed here will be based on the Rawlsian contract method, in which the contracting parties will be national communities. This hypothetical multinational contract will neither try to explain what law is nor try to deny the legality of certain legal norms in a jusnaturalist approach (it is not a sort of contract theory intending to validate nor describe the legal obligation), but will serve as a parameter for moral evaluation of the positive law and as an ideal of what law ought to be. Hence, the aim here is that the positive law should be interpreted in accordance with the hypothetical multinational contract and, if no such harmonic interpretation is possible, to reformulate or to rewrite the positive law. Since this hypothetical contract would aim to establish some principles of justice for a multinational State, the normative proposal of this book will be directed more towards constitutional law than towards general international law.

In *A Theory of Justice*, Rawls offered a contractual defence of these fundamental principles of justice: (1) the principle of maximum equal basic liberties, (2.1) the difference principle and (2.2) the principle of fair equality of opportunity.[39] Influenced by Kantian theory, Rawlsian contractualism is built around a

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[37] BUCHANAN, A. *Secession*, pp. 5-6.

[38] Ideal theory will *grosso modo* apply when the protagonists follow the dictates of the political morality of liberal multinational democracies. Nonideal theory will, in contrast, regulate situations where the main actors circumvent or violate this political morality. However, whether a principle, an institution or a conduct is part of an ideal situation or not is a matter of degree, contingency, speculation, conception and interpretation.

[39] The Rawlsian principles of justice are:

> 1. Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all (the principle of maximum equal basic liberties).
> 2. Social and economic inequalities are to be arranged so that they are both:
> 2.1. to the greatest benefit to the least-advantaged members of society, consistent with the just savings principle (the difference principle); and, at the same time,
> 2.2. attached to offices and positions open to all under conditions of fair equality of opportunity (the principle of fair equality of opportunity).

After formulating these two principles of justice, Rawls adds two further rules on priority: (1) the priority of liberty and (2) the priority of justice over efficiency and welfare. RAWLS, J. *A Theory of Justice*, pp. 228-34.

hypothetical social contract in which the contracting parties, in an original position and under a veil of ignorance, agree on the basic principles of justice. This veil of ignorance prevents the contracting parties from exploiting their social and natural circumstances to their own advantage. In order to ensure long-term rationality and fairness, the parties, as "continuing persons" or "family heads", congregate to sign the social contract behind a veil of ignorance which prevents them from knowing their social and natural conditions as well as their conceptions of the good and life plans.[40]

The contracting parties do not get to know these personal circumstances and preferences before they have reached agreement on the principles of justice and the veil of ignorance is then lifted. Despite this ignorance, family heads behind the veil are aware of the advantages of cooperation and are conscious of the existence of different conditions, abilities, practices, beliefs and conflicting interests amongst their members. This original position behind the veil of ignorance would foster *interpersonal* impartiality (between different members and future generations) as well as *intrapersonal* impartiality (ensuring that the particular circumstances of each individual do not distort the choice of the principles of justice).[41] The veil of ignorance guarantees that the social contract is both rational and fair:

> The original position is defined in such a way that it is a status quo in which any agreements reached are fair. It is a state of affairs in which the parties are equally represented as moral persons and the outcome is not conditioned by arbitrary contingencies or the relative balance of social forces. Thus justice as fairness is able to use the idea of pure procedural justice from the beginning.[42]

The principles of justice will satisfy the ideal of justice as fairness if they are freely accepted from this hypothetical original position. Remaining consistent with Rawls, if in the original position and behind the veil of ignorance the principles of justice would be agreed, this would mean that they are rational and fair. This method

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[40] Rawls refers to "continuing persons", "family heads" or "genetic lines" in order to secure justice between generations. This continuing nature of the parties is important not only to the social contract but also to the multinational contract, since a well-ordered society is ideally conceived as an ongoing society in which members perceive their common polity as extending backward and forward in time over generations. As Burke pointed out, society is a contract "between those who are living, those who are dead, and those who are to be born". BURKE, E. "Reflections on the Revolution in France", in *The Works of the Right Honourable Edmund Burke*, Vol. III, p. 359.
[41] BUCHANAN, A. *Secession*, p. 130.
[42] RAWLS, J. *A Theory of Justice*, p. 104.

intends to reach hypothetical unanimous consent on the major principles of justice by means of a rational deductive process based on pure procedural justice.[43] This moral constructivism seeks to transcend intuitionism and prevail over utilitarianism.[44]

That Rawls's hypothetical social contract has never happened in history (since no real concurrence of wills as such has ever occurred) deprives it of automatic legal value, but not of its moral value. It should be understood as a philosophical method to endorse liberty, equality and fairness. The parties in the original position are "mutually disinterested rather than sympathetic". Nonetheless, the veil of ignorance forces to view the arrangements in a general and impartial way and helps to decide both rationally and fairly. Since the Rawlsian original position has the capacity to evaluate correctly the plurality of interests, beliefs and purposes of the contracting parties, it should be a superior method to that of the ideal observer.[45] The original position and the veil of ignorance are therefore useful devices for moral evaluation, from a both pluralist and prudent stance, of existing institutions and potential reforms to them.

Rawlsian contractualism does not only apply to the domestic context of States, but also to the international scene. In *The Law of Peoples*, Rawls reflects on how international law ought to be in his ideal perspective of a "realistic utopia".[46] Realistic utopia implies that participants in the original position would not choose principles with which they could not live or that could not be implemented.[47] In this

[43] Pure procedural justice could be exemplified by sharing a cake. If the cake has been cut into two parts, procedural justice could be achieved by "one cuts, the other chooses" (in my grandmother's terms). If there are more candidates to eat the cake, another option would be to give one of them the job of cutting the cake without letting any of them know which piece they would receive. If the cutter is averse to risk, all the pieces will be as similar as possible. Unfortunately, if the cutter is not risk-averse, justice as fairness might not be achieved. If the candidates to eat the cake have no risk aversion, it would also be compatible with pure procedural justice to decide who will eat the whole cake by rolling dice. But since justice as fairness is not to be grounded on agreements based on radical decisions of the contracting parties, risk aversion is imposed on them. See RAWLS, J. "Kantian Constructivism in Moral Theory", in *Collected Papers*, pp. 311, 354.

[44] See RAWLS, J. *A Theory of Justice*, §§ 4-9.

[45] *Ibid*. § 30.

[46] RAWLS, J. *The Law of Peoples*, Introduction and § 1.

[47] Thus, the realistic utopia tries to avoid making the mistake of utopian thought criticized by Lord Acton: "the pursuit of a remote and ideal object, which captivates the imagination by its splendour and the reason by its simplicity, evokes an energy which would not be inspired by a rational, possible end, limited by many antagonistic claims, and confined to what is reasonable, practicable, and just." ACTON, J.E.E. "Nationality", par. 3.

work, Rawls again uses the contract method based on the original position in order to reason about which principles of justice peoples behind the veil of ignorance would choose to regulate the relations between each other. Rawls argues that they would choose eight principles of justice familiar in current international law.[48] These principles would be adopted not only by *liberal* peoples but also by *decent* peoples.[49]

In *The Law of Peoples*, Rawls largely avoids the demotic question once more. Even though he uses the term peoples, he does so implicitly referring to the nation-State.[50] According to Rawls, *liberal peoples* have three basic features: (1) a reasonably fair, democratic and constitutional government, (2) citizens united by "common sympathies" and (3) a moral nature.[51] When Rawls underlines that citizens of his liberal peoples are united by "common sympathies", he explicitly refers to the definition of *nationality* given by John Stuart Mill.[52] For Buchanan, Rawlsian peoples are organized groups with their own States.[53] Although some parts of *The Law of Peoples* refer to peoples with no State, Rawls's peoples do not generally seem to include those without their own State. Interestingly, *The Law of Peoples* shows that Rawls's contract method (based on the original position and on the veil

[48] These principles are articulated as follows (*The Law of Peoples*, § 4.1):

1. Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
2. Peoples are to observe treaties and undertakings.
3. Peoples are equal and are parties to the agreements that bind them.
4. Peoples are to observe a duty of non-intervention.
5. Peoples have the right of self-defense but no right to instigate war for reasons other than self-defense.
6. Peoples are to honor human rights.
7. Peoples are to observe certain specified restrictions in the conduct of war.
8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime.

[49] See RAWLS, J. *The Law of Peoples*, Part II.

[50] See RAWLS, J.; VAN PARIJS, P. "Three letters on *The Law of Peoples…*".

[51] RAWLS, J. *The Law of Peoples*, § 2. One of the reasons why Rawls does not use the word *State* is to "deny to states the traditional rights to war and to unrestricted internal autonomy". That is, to move away from a traditional conception of State sovereignty erected after the Peace of Westphalia.

[52] Mill's chapter on nationality opens with the words: "A portion of mankind may be said to constitute a nationality if they are united among themselves by common sympathies which do not exist between them and any others — which make them cooperate with each other more willingly than with other people, desire to be under the same government, and desire that it should be government by themselves, or a portion of themselves, exclusively." MILL, J.S. *Considerations on Representative Government*, ch. XVI.

[53] BUCHANAN, A. "Rawls's Law of Peoples", pp. 698-9.

of ignorance) can be appropriate to explore the principles of justice between peoples.[54]

As mentioned in a previous section, Rawls was not too concerned about the *demos* when formulating his theory of justice – neither about where to locate the territorial borders, nor about which people should sign the social contract.[55] Like Rawls, many liberal authors treated the political community as prior to justice as fairness, instead of being an object or product of it. According to Will Kymlicka and to Ferran Requejo, the society to which Rawls refers is implicitly defined in terms of national society, that is to say the nation-State.[56] On this matter, if asked which would be the relevant society to which the Rawlsian ideal would apply, most citizens would answer their own nation. Starting from this hypothetical answer, Kymlicka points out that people lean towards Rawlsian liberty and equality applied within their nation. Most people prefer both to be free and equal within their nation (even if this implies having less liberty and equality outside it) and to be able to live and work in their own language and culture (rather than to be free and equal citizens of the world).[57] Rawls does say that members of a well-ordered society shall see themselves as part of an ongoing society which extends over generations and within which they attempt to cooperate in perpetuity.[58] Even if well-ordered societies should ideally be conceived as cooperative schemes in perpetuity, this does not forbid integration and secession in the real world. In multinational countries, this togetherness should be understood in looser and more provisional forms.[59]

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[54] Other authors have applied the contract method in *A Theory of Justice* to international society. See BEITZ, C.R. *Political Theory and International Relations*, Part 3 and Afterword (1999).
[55] See § 1.2.1.
[56] KYMLICKA, W. *Politics in the Vernacular*, p. 221. KYMLICKA, W. *Multicultural Citizenship*, p. 128. KYMLICKA, W. *Liberalism, Community and Culture*, pp. 177-8. REQUEJO, F. "John Rawls", p. 129.
[57] KYMLICKA, W. *Multicultural Citizenship*, p. 93.
[58] "A well-ordered society is conceived as an ongoing society, a self-sufficient association of human beings which, like a nation-State, controls a connected territory. Its members view their common polity as extending backward and forward in time over generations, and they strive to reproduce themselves, and their cultural and social life in perpetuity". RAWLS, J. "Kantian Constructivism in Moral Theory", in *Collected Papers*, p. 323. If a union or society is ideally perpetual, then the systems of cooperation reasonably decided by the contracting parties will be wider and more intense than those of a society that could be broken anytime. For instance, while the prisoner's dilemma might be a problem for sporadic cooperation, cooperation seems to come more naturally if it is iterated. On top of that, when the horizon of expectations of cooperation is presumed to be long, participants tend to act in a more loyal and supportive way.
[59] KYMLICKA, W. *Politics in the Vernacular*, pp. 93-4.

Having outlined the Rawlsian contract method, it will now be applied to ascertain some principles of justice in multinational States. In such contract theory, nations under a veil of ignorance would agree a hypothetical contract covering some of the main principles of justice in a (liberal and democratic) multinational State. The subject of the contract would be to create a multinational State with sovereign powers normally governed by majority rule (either simple or qualified). This multinational State would probably have some federal traits (either in the self-rule or the shared-rule dimensions). Unlike *The Law of Peoples*, the subject of the contract would not be to agree on the principles of a world society of peoples. The hypothetical multinational contract would not aim to create an international organization, nor a mere alliance of sovereign States, nor a loose confederation essentially governed by a rule of unanimity.

The interests of contracting nations will be numerous and often conflicting: prosperity, cooperation, integration, mutual commitment, external and internal protection, well-ordered multinational cohabitation, national as well as multinational fraternity, mutual respect, public recognition of distinct identities, plurinational accommodation and self-government, etc. The willingness to contract presupposes a will to prosper together within the same State and to commit themselves to each other to the extent of accepting future decisions which might not be their preferred choices. Conflicting with this willingness for cooperation, integration and commitment, they would also have an interest in self-protection, in securing respect and recognition and being partly self-governed. Out of awareness that these interests can be combined and balanced differently in the course of time, the contracting nations would require an exit clause, since, much as they might wish to unite under a multinational State, they also fear a perpetual union.

Some readers might already refuse to go on playing the game of the original position between nations to conclude a multinational contract. Certainly some might think that this is playing with marked cards. However, a provisional answer to them is that even if they do not believe in nations and nationalism, most States are either national or nationalizing. Furthermore, this original position would not only serve national self-determination, but it would also set conditions and limits to nationalism and secession. In this vein, one could accept the principles established

under the hypothetical multinational contract without fully or partially sharing the contract method. From a more practical approach, it is also possible to support some principles and arguments on national self-determination and the right to secede defended here. As the book proceeds, the reasoning will be less abstract and contractual.

The hypothetical multinational contract shall be justified under the theoretical framework of liberal nationalism. According to Kymlicka, both *liberal nationalism* and *liberal multiculturalism* are intrinsically related forms of *liberal culturalism*, to the extent that they deny State neutrality in relation to culture and accept State promotion of one or more national cultures – provided that basic individual and group rights are respected.[60] Liberal culturalism argues that no individual is free from context, but that individuals can be free within certain kinds of context.[61] Following such liberalism, six lines of argument will now be pointed out to justify a contract theory based on national self-determination.[62]

1. Contemporary liberalism praises neutrality, meaning that the liberal State should neither restrict nor promote particular life plans or conceptions of the good. However, as State intervention has grown exponentially in the wake of egalitarianism and welfarism, it has become very complicated to secure strict neutrality (neither restriction nor promotion). In particular, it is difficult to prevent social and redistribution policies from promoting certain life plans at the expense of others.[63] Regarding religion, aware that religious communities and values could be a constitutive part of citizens' identity, liberalism tends to guarantee neutrality through the non-confessionalism of the State. Drawing an analogy with religious pluralism, attempts have been made to handle national pluralism via State neutrality. Nevertheless, the analogy with religious neutrality may be misleading.[64] According to David Miller, complete cultural neutrality is impossible.[65] For Margaret Moore,

[60] KYMLICKA, W. *Politics in the Vernacular*, p. 42. See PATTEN, A. *Equal Recognition*, pp. 5-10.
[61] TAMIR, Y. *Liberal Nationalism*, p. 14. MACCORMICK, N. *Questioning Sovereignty*, p. 163.
[62] This initial defence will be gradually developed in the following sections.
[63] As an example, compare social house purchase policies with house renting. The former will promote more sedentary life plans, whereas the latter a more nomadic lifestyle.
[64] Even strict religious neutrality is complicated. For instance, the weekly day off in States with a Christian tradition tends to be Sunday, which sometimes makes it difficult to grant a similar level of respect and recognition to the weekly festivities of other religions.
[65] MILLER, D. *On Nationality*, p. 137.

the modern State is not and cannot be neutral with respect to national membership.[66] Although the liberal State cannot be completely neutral, it tends to be (and it should be) more neutral and less coercive than other kinds of State.[67] Even if it cannot be *non-national*, it can be *plurinational.*

The lack of cultural neutrality in western States is made clear in their legislation on citizenship, education, language, public service, military service, media, and so forth. Ethnocultural neutrality is also problematic regarding the design of internal territorial borders, for multinational federalism empowers minority nations whereas uninational federalism often disempowers them.[68] States are not culturally neuter because they are continually propagating coats of arms, flags, uniforms, maps, anthems, currencies, myths, ceremonies, etc.[69] Education curricula, official languages, public service, the army, national sports teams, public rituals, holidays and even monuments work as vehicles for systematic State nationalization, sometimes not so much because of the strength of the ideas they spread but because of the symbolic power of this daily bombardment. Both new and old States are nationalist since all of them, including the liberal and democratic, have been and continue to be nationalizing agents. Instead of nation-States, it could be more accurate to describe them as "nationalizing States", because most States have not been able to eradicate their national pluralism.[70] States not being nationally neuter and the difficulty of them acting in nationally neutral ways are strong arguments to justify a right to secede based on national self-determination.

Having said that, the value of liberal neutrality can be interpreted in several ways that might favour the recognition of rights for national minorities and, among them, a right to secede. *Neutrality of justification* could be based on the principles of justice of a hypothetical multinational contract. This justificatory neutrality would be close to the idea of multinational impartiality, since contracting nations behind the veil of ignorance would not agree on unjust terms provoked by morally arbitrary facts. Under such an impartial method, considering the State could not escape its

[66] MOORE, M. *The Ethics of Nationalism*, p. 18.
[67] NORMAN, W. *Negotiating Nationalism*, p. 51.
[68] KYMLICKA, W. *Politics in the Vernacular*, pp. 97-101. MOORE, M. *The Ethics of Nationalism*, pp. 159-60.
[69] MIRA, J.F. *Crítica de la nació pura*, p. 45.
[70] KYMLICKA, W. *Politics in the Vernacular*, p. 229.

nationalizing dimension once the veil is lifted, the contracting nations would stipulate certain guarantees for minority nations. This original position under the veil of ignorance would ensure a basic (or deep) moral equality between contracting nations compatible with non-basic (or superficial) inequalities once the veil is lifted. *Neutrality of consequences* focuses on the results in such a way that if a State policy favours certain groups, the liberal State itself should aim to even things out and offer compensation to the unfavoured ones. Since States are often nationalizing and normally favour the national majority, consequential neutrality would therefore tend to recognize group rights for the members of national minorities in order to even things out and offer them compensation for multinational cohabitation. In this sense, neutrality of consequences could promote fairness between cultural majorities and minorities.[71]

Neutrality of treatment could be placed somewhere between neutrality of justification and neutrality of consequences. Alan Patten proposes a rehabilitation of liberal neutrality suggesting that the liberal State has the possibility and the moral obligation to treat neutrally the distinct cultures living in it and, in particular, to offer equal recognition of national majorities and minorities. His renewed account emphasizes neutrality not as a strict prohibition but as a *pro tanto* constraint (*i.e.* neutrality can be outweighed by countervailing considerations). For Patten, neutrality of consequences focuses on the equal effects, whereas neutrality of treatment focuses on fair opportunities for self-determination.[72] Yet, these three conceptions of neutrality might be compatible depending on the actor, scenario and stage taken into consideration. In particular, neutrality of justification can play a role in more abstract reasoning, neutrality of treatment can be the policymaker standpoint, and neutrality of consequences can finally compensate the unduly unfavoured. As long as neutrality of consequences is not understood as requiring identical effects but as a remedy to lessen and rebalance unfair results, these three approaches to neutrality can form a virtuous circle.

These three views of neutrality show that, although States cannot be completely neutral towards culture, some of them can reason and behave in more neutral ways

[71] See TORBISCO, N. *Group Rights…*, pp. 124-34.
[72] See PATTEN, A. *Equal Recognition*, ch. 4.

than others. Hence, national neutrality is a gradual property and may be applied and analysed in a dimension of weight. Perhaps a distinction that works in some Romance languages might be exported to English: even if States are not and cannot be nationally *neuter*, since they tend to have, build or favour a predominant or State-wide nation, States can intend to reason and behave in a nationally *neutral* way, as far as they try to be impartial, fair and balanced between the majority and minority nations. In short, States are not nationally *neuter* but they can be (more or less) nationally *neutral* as long as they conduct themselves in a nationally neutral manner.

2. To be a member of a national community (*societal culture* in Kymlicka's terms) is relevant for individual liberty and autonomy. Since conceptions of the good and life plans are neither decided nor developed in isolation, liberalism should not ignore the importance of groups and communities by hiding behind individualism. Certain communities in which individuals live or with which they coexist constitute their personal identity and provide the values which they will apply to judge their own acts and those of others.[73] Therefore, these constitutive communities give options and directions, set conditions, and provide meanings to individuals' personal liberty and autonomy.[74] Up to a certain point, to interact, to take part in or to be part of these cultural communities can condition the boundaries of what is conceivable and feasible.[75] In other words, a relationship with, participation in or membership of such communities could be understood both as preconditions (in the positive sense) and as restrictions (in the negative sense) of the framework for individuals' personal liberty and autonomy. After all, persons are "contextual individuals".[76]

People have an intense bond with their culture and, in line with Kymlicka and Rawls, there is no strong reason to regret it.[77] Consequently, by virtue of the values of liberty and of equality, liberal democracies ought to tolerate, recognize and, in some cases, protect cultural communities in order to protect the circumstances that

[73] See KYMLICKA, W. *Multicultural Citizenship*, ch. 5.
[74] TORBISCO, N. *Group Rights…*, pp. 164-7.
[75] See MARGALIT, A.; RAZ, J. "National Self-Determination", p. 449.
[76] TAMIR, Y. *Liberal Nationalism*, pp. 7, 32-4.
[77] KYMLICKA, W. *Liberalism, Community and Culture*, pp. 165-77. RAWLS, J. *The Law of Peoples*, § 15.4. See § 1.3.3 below.

allow a meaningful personal autonomy.[78] That is to say, concern for individual autonomy requires (equal and prior) concern for healthy cultural contexts in which individual choices are framed.[79] Overall, both the right to national self-determination (liberal nationalism) and the rights of ethnocultural minorities (liberal multiculturalism) protect these cultural contexts of choice. And neither of these rights are means to pursue some specific ends, but rather to protect group structures within which ends are chosen and evaluated.[80]

3. On the one hand, to be a member of a national community can give individual acts greater meaning, leading them to generate greater satisfaction and, eventually, promote greater collective success. When individuals are members of a national community with due recognition, just like other communities that build identity, their individual acts gain added value which could further self-fulfilment and meaningful life.[81] Any individual success in whatever field – art, sport, business, politics, and so on – could be read as a contribution to the nation. Individual acts designed or aimed for public spaces are potentially patriotic acts, and this can help both to enhance individual self-satisfaction and to boost collective efforts and successes.[82] On the other hand, wrongs, crimes, injustices and every other possible kind of unrighteous conduct by any member of the national community usually engender shame and rejection from the rest of the members. These feelings of shame and rejection are not regrettable if they favour endeavours and resources to prevent, punish and redress such misconduct. The national community can be a human group psychologically well disposed towards reproving certain individual conduct, assigning responsibilities, avoiding the free rider dilemma and, at the same

[78] If a right to self-determination is recognized for national communities based on the connection with the argument of autonomy, it seems consistent to increase these rights to self-determination if these national communities respect the value of personal autonomy more or to reduce them if they respect it less. See § 1.2.5 below.
[79] NORMAN, W. *Negotiating Nationalism*, pp. 2, 29.
[80] See KYMLICKA, W. *Liberalism, Community and Culture*, ch. 9. KYMLICKA, W. *Multicultural Citizenship*, pp. 108-16.
[81] TAMIR, Y. *Liberal Nationalism*, p. 85.
[82] Even if these are not times of national myths and heroes, the individual success and genius of the members of a nation increase its prestige, and this could multiply the individual and collective benefits. In brief, a kind of multiplier effect of individual and collective successes, and of the satisfaction they engender, could occur.

time, promoting rehabilitation of members who have gone astray.[83] In short, the "feeling of nationality" is strongly linked to "collective pride and humiliation, pleasure and regret".[84]

4. The values of pluralism and diversity are arguments to defend national self-determination when actual cultural diversity faces the difficulties of State neutrality. According to Michel Seymour, national diversity ought to be respected, protected and promoted, because it is one of the main sources of cultural diversity in the world.[85] Since minority nationalisms are not *per se* contradictory to liberalism, liberal democracy should accommodate national pluralism.[86] In cases where a national reality is significant enough in a precise territory, a public (cultural and political) space for that nation is to be accessible. Instead of politics, for Yael Tamir the cultural argument is a central element of liberal nationalism. Whilst culture is the end, politics is the means.[87] Criticizing the cultural argument as a defence of national self-determination, Moore warns that national identity is political and less and less cultural.[88] Still, most nations and nationalisms are both cultural and political.[89]

It is sometimes questioned whether cultural pluralism is a value in itself or insofar as it is connected to liberty. Although liberty is a main reason for liberal respect for pluralism, pluralism itself nourishes liberty or autonomy since it broadens the range of thought, action and association. Nevertheless, the argument of cultural pluralism as a value *per se* is open to criticism. First, it is objectionable to base multicultural justice on a *quasi-aesthetic* argument. Second, the analogy between protection of cultural diversity and protection of biodiversity is questionable. Third, the argument of cultural pluralism as such would seem to place a moral obligation on members of a culture to maintain their cultural tradition. However, under the value of personal

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[83] This psychological predisposition is illustrated by Otto Bauer's fervent assertion: "If someone slights the nation, they slight me too; if the nation is praised, I have my share in this praise." BAUER, O. "The Nation", p. 63.
[84] MILL, J.S. *Considerations on Representative Government*, ch. XVI.
[85] SEYMOUR, M. "Secession as a Remedial Right", pp. 406-7.
[86] REQUEJO, F. "John Rawls", p. 132.
[87] TAMIR, Y. *Liberal Nationalism*, p. xiii (*new preface*).
[88] MOORE, M. *The Ethics of Nationalism*, ch. 3.
[89] NIELSEN, K. "Liberal Nationalism and Secession", pp. 105-6. See also COUTURE, J.; NIELSEN, K.; SEYMOUR, M. (ed.) *Rethinking Nationalism*, p. 610.

autonomy, members of a culture should be free to decide to abandon it. In the final analysis, the argument of cultural pluralism seems to work better if it is understood in a manner compatible with the abovementioned arguments of neutrality, liberty, autonomy and equality.[90]

5. Nations can be considered communities with certain moral character (or, at least, communities of special ethical worth) as long as they generate, sustain or stimulate values such as *altruism, trust, loyalty, cooperation* and *solidarity*. Thus, providing nations produce or promote these values, they can have intrinsic and instrumental worth. Nations would have intrinsic moral worth on the assumption that the mentioned values also have such a worth. These values are of intrinsic moral worth when they are morally admired without the need to prove any beneficial or utilitarian outcome. Nations would have instrumental ethical worth if these values are considered beneficial or useful to develop well-ordered societies. In this sense, the ethical value of nations would depend on their capacity to generate public virtues or public goods.[91]

6. *National identity* constitutes an important part of the identity of individuals (how we see ourselves and others see us).[92] Hence, following Neil MacCormick, respect for persons as contextual individuals ought to include respect for that aspect of their sense of identity. This, plus the likelihood that individual self-fulfilment will require a political context involving self-government, justifies the defence of national self-determination.[93] In a similar vein, Avishai Margalit and Joseph Raz argue that membership of a national community is a significant aspect of an individual's personality and that the individual welfare of each member depends, to a certain extent, on the possibility of giving full public expression to this personality and on others' moral duty of recognition. Here recognition is referred to as a kind of public social phenomenon. The interests of a national group in *self-respect* and *prosperity* of the group are significant human interests. Given their importance, in the words of Margalit and Raz, "their satisfaction is justified even at considerable cost to other

[90] See KYMLICKA, W. *Multicultural Citizenship*, pp. 121-3. TORBISCO, N. *Group Rights…*, pp. 171-2, 220.
[91] See § 1.3.3 below.
[92] On the concept of *national identity* and both beliefs and sentiments related to it, see NORMAN, W. *Negotiating Nationalism*, pp. 33-7.
[93] MACCORMICK, N. *Questioning Sovereignty*, p. 182. MILLER, D. *On Nationality*, ch. 2.

interests".[94] All this requires giving a political dimension to the national group by means of a moral right to self-determination.

Personal and collective identities are shaped partly by recognition or by its absence since, according to Charles Taylor, identity is forged through dialogue with others. That is to say, because identity (in particular, national identity) is not created in isolation, recognition is a crucial factor. For Taylor, nonrecognition or misrecognition of a distinct identity "can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being."[95] In practice, lack of recognition can prove a lack of respect for the other moral being. Consequently, respect for somebody's identity may require a moral duty of recognition. Hence, in contrast to the "politics of dignity" based on universal respect for fundamental individual rights, the "politics of recognition" requires a sort of different treatment.

Liberal democracy faces the challenge of seeking how to fit together equal rights and equal recognition. Liberal culturalism and liberal nationalism, in particular, aim to achieve a sound balance between the politics of dignity and the politics of recognition. Following Taylor, Requejo suggests that liberalism should address national pluralism from the politics of recognition based on Hegelian moral collectivism in order to strike a balance with and a re-interpretation of Kantian moral individualism. Under moral collectivism national groups can be seen as legitimate holders of moral rights and claims. This does not entail accepting, however, that these groups are of static, eternal or non-plural character. Nuancing Taylor, Requejo stresses that defending the ethical relevance of national groups does not imply adopting a *communitarian* position.[96] In fact, liberal nations, in which diverse conceptions of the good frequently coexist, seem too large

[94] MARGALIT, A. ; RAZ, J. "National Self-Determination", pp. 451-61.
[95] TAYLOR, C. "The Politics of Recognition", p. 25.
[96] See REQUEJO, F. "Plurinational democracies, federalism and secession". REQUEJO, F. "Shadows of the Enlightenment" in REQUEJO, F.; CAMINAL, M. (ed.) *Political liberalism and Plurinational Democracies*, pp. 11-30. REQUEJO, F. "Three theories…" in SEYMOUR, M.; GAGNON, A. (ed.) *Multinational Federalism*, pp. 45-68. REQUEJO, F. "Liberal Democracies, Federalism and National Pluralism" in KRAUS, P.A.; VERGÉS, J. (ed.), pp. 77-97.

communities to develop communitarian politics based on a single conception of the common good.[97]

1.2.3. Articles and principles of a hypothetical multinational contract

The hypothetical contract between nations to found a multinational State works on the liberal presumption that nations (and their members) are the best judges of their group interests.[98] Although here nations are personified, the contracting parties could be thought to be the democratic representatives of the contracting nations. Personifying the nation does not seem to conflict with Rawlsian thought, since liberal-democratic nations have a moral nature according to Rawls.[99] In liberal democracies, recognition of fundamental rights and popular sovereignty allows to treat the nation and national representatives similarly.[100]

The question now is which principles of justice national communities of diverse and varying political, military, demographic, economic and cultural weight would accept behind the veil of ignorance when they come to conclude the multinational contract. Such contracting nations behind a thick veil would know they have different weights, but would not know their own.[101] This veil of ignorance would allow them to know that: (1) States are not nationally neuter – on the contrary, the dominant nation often carries out nation-building programs intolerant of the minority nations.[102] (2) The meaning and interests of State and (majority) nation are often confused to such an extent that minority nations are at risk of not being duly recognized, represented or accommodated. (3) Minority nations are likely to be *perpetual minorities* that might be ignored, distrusted or despised by the majority.[103]

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[97] KYMLICKA, W. *Multicultural Citizenship*, p. 92.
[98] MARGALIT, A.; RAZ, J. "National Self-Determination", p. 457.
[99] RAWLS, J. *The Law of Peoples*, § 2.1.
[100] Personifying the nation (instead of conceiving the representatives as the contracting parties) could make referendums, as a democratic mechanism to express the will of the nation, fit into the hypothesis better.
[101] Contracting nations would not know their main conceptions of the good either. Ideally, liberal nations should not have a singular conception of the good, but a political consensus on what is right, based on the principles of justice. See RAWLS, J. *The Law of Peoples*, § 2.1.
[102] "Given the broad range of beliefs and sentiments that constitute an individual's sense of national identity, there will always be a tremendous number of permissible State policies and political exercises with the potential to shape this identity." NORMAN, W. *Negotiating Nationalism*, p. 56.
[103] See ch. 3.2 below.

(4) Dominant nations may stop respecting the compromise which led to creation of the multinational State or simply no such compromise ever existed. (5) Even in liberal democratic contexts there may be subtle forms of domination and discrimination such as fiscal unfairness, selective inspection, lack of investment, institutional sidelining, cultural marginalization and plurinational misrecognition. (6) Survival or flourishing of the nation may, in some cases, depend on statehood itself.[104] For these reasons together with the arguments based on liberal culturalism explained in the previous section, the signatories behind the veil of ignorance (which can randomly turn out to be majority or minority nations once the veil of ignorance is lifted) would rationally agree that an exit clause is appropriate to guarantee the balance between national communities and the fairness of the multinational State.[105]

While the second article of the hypothetical contract would deal with a right to secede, the first article would contain the principles of multinational cohabitation. Regarding the latter, the nations behind the veil of ignorance would make sure that their members are not treated differently with no objective and reasonable justification (*Principle of non-discrimination*). The contracting parties would not only allow preferential treatment, but would also be concerned with equal opportunities for the members of national minorities and equal recognition of those minorities (*Principle of equal opportunities and equal recognition*), for instance by guaranteeing the national minorities proportionately higher presence than the national majority in selected legislative, political, administrative or judicial institutions. Another clause would establish a duty of multinational solidarity that ought to be compatible with national solidarity and ought neither to be discriminatory towards some national minorities nor work only for the benefit of the

[104] "Neither this colossus nor the people living outside the region of Utopia has necessarily harmed the Utopians economically or physically; the imperial government may even be liberal and democratic. But, crucially, it does not understand the Utopian dialect, practise the Utopian religion, delight in splendid tales of Utopian past peopled with Utopian heroes, or desire to extrapolate Utopianism into the future. And so, the Utopians want to govern themselves, not find their political will diluted or hindered by an encompassing oblivious mass. (...) they may regard self-government itself – participation and representation in their own affairs – as integral to their identity, a rite of passage, a source of self-respect in the transition from national adolescence to adulthood." PHILPOTT, D. "In Defense of Self-Determination", p. 360.

[105] The contingencies of real life (too) often force small nations to accept conditions which would be considered unfair in the hypothetical multinational contract. There are, however, some cases of bottom-up federalization or integration in which an exit clause is agreed. For instance, Article 50 of the TEU grants each Member State the right to withdraw from the EU. See § 3.1.1 below.

national majority without objective and reasonable justification (*Principle of multinational solidarity*). Contracting nations would demand institutional arrangements guaranteeing some reasonable level of self-government within the multinational State to be able to represent themselves and promote self-conservation (*Principle of internal self-determination*). This principle of internal national self-determination would not be satisfied just by respecting the individual civil and political rights of the members of the national minorities (as it is often understood in current international law), but by allowing each minority nation to have some territorial or political autonomy and even special representation within the multinational State.

These clauses would be designed to respect and recognize reasonable national pluralism within the multinational State. Nonetheless, the contracting nations behind the veil of ignorance would sense that such internal arrangements within the multinational State might collapse, become inoperative or be found deficient by their respective members in future. Hence, the contracting parties would want to safeguard their interests in self-protection and national prosperity, in securing respect and recognition, and in having a reasonable level of self-government. Prudence would dictate that, out of awareness that the interests of future generations within democratic nations can evolve over the years, the multinational contract ought to include a democratic mechanism which would allow minority nations to exit the multinational State (*Principle of external self-determination*). The tyrannical potential of majority rule together with the possibility of being permanent minorities would push contracting nations towards a secession clause as well.[106] Moreover, the presence of a reasonable exit right could promote and guarantee robust recognition and accommodation of national pluralism within the multinational State. In sum, the contracting nations would see the right to secede of the minority nations as both rational and fair.

By contrast, the contracting nations behind the veil of ignorance would not be inclined to agree to a right to secede of the majority nation.[107] This contract theory assumes that the contracting nations behind the veil of ignorance would establish a

[106] See § 3.2 below.
[107] See ch. 1.1 above.

unilateral right to secede for minority nations but not for majority nations for three reasons. First reason: by virtue of the veil of ignorance and of the criterion of prudence (maximin) which this veil ensures, the contracting nations would focus on protecting the weak contracting parties rather than the strong. Second reason: the contracting nations behind the veil of ignorance, focusing on protecting the weak contracting parties, could interpret the right to secede of the majority nation as a covert (or fraudulent) right to expel the minority nations from the multinational State. Third reason: the veil of ignorance would not stop the contracting nations being aware of the international law in force. Under current international law, in case of secession of the majority nation, the seceding nation would probably be considered the continuator State, thus relegating the rump State and the minority nations to the position of merely successor State.[108] This could leave the minority nations with too little protection and isolated since, among other international problems, they would have to re-apply to join many important international organizations.[109] These reasons altogether should prevail over any challenge on grounds of lack of reciprocity.

To sum up, the contracting parties would not morally empower the majority nation with a unilateral right to secede. This may not imply, however, that the majority nation cannot secede by means of constitutional reform. In general, it is easier for the majority nation than for the minorities to fulfil the majority and procedural requirements needed to amend the constitution of the parent State.[110] This book makes no claim to be conclusive on this point, but will focus on the secession of peripheral minority nations (which is, in fact, the usual problem encountered in

[108] Continuation of States is the general rule in international law. One continuator State is usually recognized and the rest are considered successor States. See ch. 2.3 below.

[109] For moral reasons, the negative legal and political effects of secession of the majority nation should not affect minority nations more directly and more negatively than the majority. For example, it would not be reasonable if minority nations had to face loss of membership of international organizations or treaties as a consequence of another's exercise of liberty. This would not be proper implementation of the link between liberty and responsibility.

[110] One example of a secessionist movement of the majority nation could be that in northern Italy led politically by *Lega Nord per l'Indipendenza della Padania* (Northern League for the Independence of Padania). Interestingly, the unionist and unifying movement in Italy arose largely from northern regions such as Veneto, Piedmont and Lombardy. During romanticism Italian nationalism raised ("*Risorgimento*") and in the mid-19th century unification took place *manu militari*. In the 21st century, Padanian identity seems an Italian sub-national identity in conflict with other Italian sub-national identities. Many *Lega Nord* voters did not consider themselves as non-Italians but as "arch-Italians". SEGATTI, P.; GUGLIELMI, S. "Padani o italiani?", pp. 431-8.

western liberal democracies where secession demands by national majorities, by the majority or by the centre are not common).

The *articles* of the hypothetical multinational contract could be the following:

1. *Every nation which forms part of a multinational State shall act in accordance with the constitutional pact insofar as:*

(1) *Non-discriminatory treatment of members of the national minorities is guaranteed.*

(2) *Equal opportunities for the members of national minorities and equal recognition of those minorities are promoted.*

(3) *Multinational solidarity is established. Multinational solidarity shall be arranged in ways compatible with national solidarity and shall not be discriminatory towards national minorities.*

(4) *A reasonable minimum of internal national self-determination is permitted.*

2. *A minority nation which forms part of a multinational State may secede unilaterally if all the following requisites concur:*

(1) *Unilateral secession shall be the result of a democratic process within the minority nation with clear majorities and extensive, intense and reasonable deliberation.*

(2) *Agreed ways shall be sought under the obligation of principled negotiation*.

(3) *The claim for secession shall be consistent with liberal nationalism.*

(4) *Respect for human rights and protection of minority rights shall be guaranteed during the secession process, during the constituent process and once the powers of the new State have been constituted.*

(5) *The minority nation shall be concentrated in a specific territory located on the confines of the multinational State*.

(6) *As a result of secession, both the newborn State and the parent State shall become territorial units objectively capable of providing sufficient public authority to exercise effective and independent sovereignty over their territory and to survive in a global context. The wealth of the parent State shall not be substantially altered. If the parent State has no duty to bear the costs and damages caused by the secession, these shall be repaired, compensated for or subsidized by the new State. If reparation, compensation or subsidization is not possible, it may be fair to impede secession.*

(7) *As a result of secession, no serious damages shall be caused to third parties which have no reasonable duty to bear them. If the third parties have no duty to bear such damages to their legitimate interests, the damages shall be repaired or compensated for. If reparation or compensation is not possible, it may be fair to impede secession.*

Behind this wording of the hypothetical multinational contract, various *principles* of multinational justice can be identified:

1. *Principle of constitutionality*
   (1) *Principle of non-discrimination*
   (2) *Principle of equal opportunities and equal recognition*
   (3) *Principle of multinational solidarity*
   (4) *Principle of internal self-determination*

2. *Principle of external self-determination*
   (1) *Principle of democracy*
   (2) *Principle of agreement and negotiation*
   (3) *Principle of need for liberal nationalism*
   (4) *Principle of respect for human rights and protection of minorities*
   (5) *Principle of territoriality*
   (6) *Principle of viability and compensation*
   (7) *Principle of avoiding serious damage to third parties*

Rawls attempts to list the general, universal, public, ordered and final principles of justice that would be adopted in the original position.[111] Here, the principles of multinational justice are intended to be *public*, *general* and *universal in application* (referring to an ideal contractual situation in a liberal and democratic context), but neither *ordered* nor *final* (if the ambition of formulating *final* principles is understood as excluding the existence of any other principles at similar level).[112] The objective of Justice as multinational fairness is less ambitious, simply trying to argue that these could be basic principles of a hypothetical multinational contract. Since this book focuses on the right to secede, the *Principle of external self-determination* and its related sub-principles have been explored deeper than the *Principle of constitutionality* and its related sub-principles. Therefore, these principles are neither *ordered* in the Rawlsian sense, nor subject to any clear rule of priority. Yet, perhaps no priority rules are strictly necessary, since there should be no insurmountable tension between the *Principle of constitutionality* and the

[111] RAWLS, J. *A Theory of Justice*, p. 117: "Taken together, then, these conditions on conceptions of right come to this: a conception of right is a set of principles, general in form and universal in application, that is to be publicly recognized as a final court of appeal for ordering the conflicting claims of moral persons."
[112] The principles of justice listed in *The Law of Peoples* are, according to Rawls "incomplete", and without clear rules of priority. RAWLS, J. *The Law of Peoples*, § 4.1.

Principle of external self-determination, as any right to secede that follows the principles and requisites listed above could and should be constitutionalized. Constitutionalizing the right to secede (as a type of constitutional reform) should moderate the tension between constitutionalism and self-determination.[113]

1.2.4. The multinational contract in between other hypothetical contracts

The hypothetical contract between nations to form the multinational State is proposed as a third hypothetical contract compatible in parallel with the Rawlsian contract between persons (formulated in *A Theory of Justice*) and the Rawlsian contract between peoples (formulated in *The Law of Peoples*). *Compatibility in parallel* means that the hypothetical multinational contract is not intended to replace these two Rawlsian contracts, but instead to be placed between them in order to cover and theorize about certain relevant aspects of national pluralism of contemporary liberal democracies. Compatibility in parallel also implies that the hypothetical multinational contract is neither isolated nor disconnected from the two Rawlsian contracts, but, on the contrary, is aimed to fit in with, complement and link them. The position of the hypothetical multinational contract in between the Rawlsian contracts does not imply hierarchical relations in any pre-established direction, but instead a relation based on spheres of competence (depending on the context and the topic) and, when contracts or their articles partially overlap, a sort of obligation for a harmonious or comprehensive interpretation. They are, thus, interacting contracts.

Compatibility in parallel between the three hypothetical contracts solves one of the objections that Buchanan makes to *The Law of Peoples*. According to him, *The Law of Peoples* is based on the assumption of deep political unity within States. Although Buchanan admits that this thinking of peoples (sovereign States) as homogeneous entities is part of an ideal theory, he criticizes the absence of nonideal theory to cater for intra-State conflicts. Hence, under *The Law of Peoples*, these

[113] See chs. 3.1 and 3.2 below.

conflicts within States are removed from the domain of international law.[114] Nevertheless, in the real world, many sovereign States do not have such deep political and cultural unity, and often have internal conflicts due to the lack of such homogeneity. To some extent, the hypothetical multinational contract defended here helps to overcome this objection. Yet, while a main aim of the Buchanian objection would be to reformulate international law, Justice as multinational fairness puts the emphasis on the normative development of self-determination of peoples in an ideal constitutional law of liberal democracies.[115]

Compatibility in parallel between the three contracts can help to answer the objections of the "methodological individualism" of social contract theories and of their "atomistic assumptions about the character of human beings". These criticisms tend to claim that persons are social products, "contextual individuals".[116] Nationhood is one social context of paramount importance for the identification and development of the *self* and for the organization and cohesion of the *polity.* Hence, compatibility in parallel allows upholding the Rawlsian social contract by complementing it with a significant social context for the contracting individuals. Compatibility in parallel recognizes a particularly relevant group dimension (both cultural and political) of the contracting parties, which enriches the value of autonomy adding to individual autonomy a sort of *collective autonomy*. In sum, compatibility in parallel allows contractualism to overcome an excessively individualistic approach to political theory.[117]

Nonetheless, some might think that this compatibility in parallel can endanger the social contract. In this line of thought, Buchanan warns that recognizing a right to secede could compromise the social contract as a result of the obligation to renegotiate it because of the threat of the secessionist group leaving the contract unilaterally (which minorities could use as a kind of right of veto).[118] The answer to

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[114] BUCHANAN, A. "Rawls's Law of Peoples", pp. 716-20.
[115] See BUCHANAN, A. *Justice, Legitimacy, and Self-Determination*, chs. 8-9.
[116] See MACCORMICK, N. *Questioning Sovereignty*, pp. 162-3.
[117] Another path in a similar direction would be adding to the traditional Rawlsian natural and social primary goods other primary goods linked to identity or nationality, such as own language and culture. If one takes this road, a renewed hypothetical contract of *A Theory of Justice* could include national pluralism. See § 1.2.5 below. KYMLICKA, W. *Liberalism, Community and Culture*, chs. 8-9. REQUEJO, F. "John Rawls", pp. 128-34.
[118] BUCHANAN, A. *Secession*, pp. 6, 100.

this warning could be: (1) considering these contracts are hypothetical, they are not endangered by such real-world threats; (2) since the three hypothetical contracts referred to are compatible in parallel, any collisions between their objectives and principles should be balanced;[119] (3) the veil of ignorance behind which the nations are concealed prevents threats during the multinational contract negotiation process; (4) the seven secession requisites of the hypothetical multinational contract make it difficult for national minorities to exercise a merely strategic threat once the veil of ignorance has been lifted. Part 3 of this book will debate the threat which constitutionalizing a unilateral right to secede poses to the constitutional order. As will be seen, in the real world a threat of unilateral secession has advantages and disadvantages, which partly depend on the different conceptions of democracy and constitutionalism.[120]

The articles and principles of the hypothetical multinational contract are meant to be consistent with the maximin rule of choice. The *maximum minimorum* rule directs our attention to the worst that can happen. Thus, it tells us "to adopt the alternative the worst outcome of which is superior to the worst outcomes of the others". According to Rawls, the great uncertainty brought by the veil of ignorance makes it appropriate to apply the maximin rule in the original position.[121] As the veil of ignorance would not allow the contracting nations to conduct a proper probability analysis, they would choose a prudent and moderate option in line with the maximin rule. This would be so because the veil of ignorance engenders risk aversion since possible cases can be understood as probable. That is to say, as a rational choice based more on possibilities than on probabilities, the parties would want to protect themselves against future contingencies and misfortunes. In this way, fairness would be preferred to utility. In such a position, the contracting nations would not dare to obtain benefits from the union or integration without balancing them with the dangers of domination, extinction, marginalization, misrecognition,

[119] A kind of hypothetical global contract between peoples, nations and States could be explored in order to evaluate, rethink and formulate some ideal principles of justice and rules of priority or of interpretation of the principles of justice that the three hypothetical contracts generate. However, it might well be that there is no need for establishing a contractual monism and hierarchical relationship between these contracts. Perhaps a pluralist approach is satisfying enough. Anyway, the development of the idea of a hypothetical global contract is out of reach for this book.
[120] See chs. 3.1 and 3.2 below.
[121] See RAWLS, J. *A Theory of Justice*, §§ 26-8.

disaccommodation, new integrations, etc. It is rational and fair to leave an exit door difficult to open.

Beyond the reasons for rational choice of these principles, the veil of ignorance could provide a sort of categorical imperative of Kantian inspiration in relations between one nation and another.[122] If nations are communities with a certain moral character and are endowed with a certain abstract right to self-determination in a similar way to individuals, by analogy the categorical imperative can be applied, prudently and conditionally, to the relations between the nations within the same multinational State.[123] According to this nationalist categorical imperative, nations ought to treat each other as ends rather than means. Nations can indeed be means for their members, but they should not be so for other nations. In the original position, the morally equal contracting parties want to secure self-respect based on the principles of justice.[124] Self-respect entails mutual respect under the veil of ignorance and, accordingly, a desire to regard and treat themselves as ends and not as means. Nevertheless, the hypothetical multinational contract defines a sense in which nations regard and treat each other as ends, provided that they regard and treat their members as ends in themselves and not as means. The right to national self-determination will therefore vary to the same degree as the nation respects the principles of justice (in particular, the *Principle of need for liberal nationalism* and the *Principle of respect for human rights and protection of minorities*). That is to say, nations should have more or less right to self-determination depending on whether they are more or less just.[125]

This idea of self-respect and of respect for other national identities serves to illustrate why recognition of internal self-determination on the part of the nations within a multinational State is not enough in terms of justice. As seen earlier, from a Taylorian perspective, the idea of respect leads to a moral right to, and duty of, recognition. To put a conflict in terms of respect and recognition of others is to put

[122] See RAWLS, J. "Kantian Constructivism in Moral Theory", in *Collected Papers*, p. 318. MANCINI, P.S. *Della nazionalità*, pp. 63-5.
[123] On the idea of nations as communities with a certain moral character, see § 1.2.2 above and § 1.3.3 below.
[124] RAWLS, J. *A Theory of Justice*, § 29.
[125] See § 1.2.5 below.

it in terms of original equality between nations.[126] Hence, nations that conclude a hypothetical contract behind the veil of ignorance demand respect and recognition, not mere condescension and mercy.[127] Since having only a right to internal self-determination could be understood as a form of condescension or mercy towards minority nations, the contracting nations behind the veil of ignorance would demand equal recognition and a qualified right to unilateral secession. Arrogance, condescension and mercy are values or attitudes which do not fit in properly with a contract theory of justice that uses the veil of ignorance. All three tend to appear when the subjects know their superiority over the others (something which the veil of ignorance would prevent).

1.2.5. Liberal nationalism as a requisite for secession

Justice as multinational fairness does not require an injustice perpetrated by the parent State. Instead, all that is needed is to be a minority nation and to prove that requisites for secession reflected in the hypothetical multinational contract are fulfilled (sometimes only by showing indications). In response, the parent State can plead procedural, substantive and material exceptions based on the principles of the hypothetical multinational contract to oppose secession. Both the *Principle of need for liberal nationalism* and the *Principle of respect for human rights and protection of minorities* constitute substantive requisites for secession (during the secession process, during the constituent process and once the powers of the new State have been constituted). These principles preclude secession if the secessionist group is an illiberal nation willing to oppress or exploit some minorities on its territory or if it wants to practise some kind of illiberal or ethnic nationalism with the support of the institutional structures of the new State. Hence, liberal nations and nationalisms would hold a right to secede, whereas illiberal nations and nationalisms would enjoy only some degree of internal self-determination.

[126] The original moral equality between nations implies a kind of basic moral equality which could be compatible with the existence or moral acceptability of non-basic (or superficial) inequalities once the veil of ignorance is lifted.
[127] TAYLOR, C. "The Politics of Recognition", p. 70.

Nationalism is both *contextual* (it responds and adapts to circumstances) and *protean* (it can take many forms).[128] *Liberal nationalism* is more open, plural, inclusive and tolerant than *illiberal nationalism*.[129] Before describing liberal nationalism any further, four points must be made clear. First, liberal nationalism is a complex balance between recognition of the cultural particularities of national communities and the universal values of liberty and equality enshrined in human rights.[130] Second, liberal nationalism is a more common position than generally assumed in the day-to-day politics of liberal and democratic States.[131] Third, the liberal-illiberal nationalism dichotomy should not be confused with the civic-ethnic nationalism dichotomy.[132] Fourth, since every society and culture (including those thought of as more liberal) has illiberal features, the question of which nationalism is liberal and which is illiberal is a grey area and a matter of degree. It is therefore important who has the power to classify any nationalism as liberal or illiberal.[133]

It is time to try to define liberal nationalism more precisely. (1) Liberal nationalism regards culture as a crucial dimension of political life and, therefore, advocates that political entities can reflect a specific national culture. (2) Liberal nationalism does not set out to impose coercively a national identity on those who do not share it; instead, it tends to use persuasion to promote nation-building. (3) Liberal nationalism respects the expression of opposing national identities – in particular, it should respect both secessionist and unionist claims. (4) For liberal nationalism, the definition of national community is often based on individual will and feelings,

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[128] MOORE, M. *The Ethics of Nationalism*, p. 3.
[129] KYMLICKA, W. "Territorial Boundaries", p. 260 *et seq*.
[130] Similarly, TAMIR, Y. *Liberal Nationalism*, p. 79.
[131] *Ibid.* p. 10. NORMAN, W. *Negotiating Nationalism*, pp. 1-3.
[132] Kymlicka rejects that liberal nationalism is a synonym of civic nationalism or of ethnic nationalism. Civic nationalism is based merely on sharing certain political and democratic principles, whereas liberal nationalism often goes beyond this by promoting the national language, culture and identity. This promotion is compatible with liberalism, and differs from non-liberal nationalism in its degree of openness, respect and inclusiveness. Accordingly, the difference between civic and ethnic nationalism seems to be a difference of substance or type: civic nationalism and civic nations often set out from the fallacy of the ethnocultural neutrality of the State, whereas ethnic nationalism strongly denies such neutrality. Ethnic nationalism, being linked to race, religion and ancestors, remains closed to new members. Both illiberal and ethnic nationalism are generally opposed to the spirit of liberalism, since individual will, feelings and actions play a more marginal role in deciding who is in or outside the group. See KYMLICKA, W. "Territorial Boundaries", p. 273. KYMLICKA, W. *Politics in the Vernacular*, pp. 24, 41.
[133] Norman propounds a list of tests to evaluate the admissibility of nationalist policies which could possibly be adapted for the purposes of evaluating the *Principle of need for liberal nationalism* and the *Principle of respect for human rights and protection of minorities*. See NORMAN, W. *Negotiating Nationalism*, pp. 53-7.

family and residence, language and culture, history and myths – it rarely requires belonging to any particular race, religion or blood line. (5) Liberal nationalism tends to have a thinner conception of national identity than illiberal nationalism, in order to open such identity to diversity and dissent. (6) Liberal nationalism is aware of the disadvantages suffered by cultural minorities and willing to compensate for them – consequently, adopting forms of liberal multiculturalism. (7) Liberal nationalism is and should be prepared to accept equal recognition and self-determination of other nations and, especially, of national minorities.[134] At this point, it should not be controversial to agree that minority nations in western democracies very often defend forms of liberal nationalism, such as many Quebecers, Scots and Catalans.[135]

Secession will rarely give birth to a homogeneous nation-State, but will reorganize the pattern, size and balance of the groups.[136] If a minority nation becomes an independent State, national and ethnic minorities will probably still exist and new ones might arise (at the very least, there would be a minority which would still identify with and feel bound to the parent State). This is one of the reasons why the contracting nations would agree the need for liberal nationalism, respect for human rights and protection of minorities as conditions to secede. Aware of the political, social and cultural pluralism that may still exist or be generated after secession, the contracting nations would reasonably accept those conditions. Concurrently, the interaction of the three hypothetical contracts and the will to find the *compatibility in parallel* between them would push the contracting nations to make the right to secede conditional on the need for liberal nationalism and respect for human rights.[137] The contracting nations would also favour the protection of minorities in the multinational contract because they acknowledge the importance of recognizing

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[134] On the definition of liberal nationalism, see TAMIR, Y. *Liberal Nationalism*, p. 163. KYMLICKA, W. *Politics in the Vernacular*, pp. 39-41. COUTURE, J.; NIELSEN, K.; SEYMOUR, M. (ed.) *Rethinking Nationalism*, p. 601-5.

[135] KYMLICKA, W. *Politics in the Vernacular*, p. 209. Importantly, saying that nationalism or secessionism is ethnic should be distinguished from saying that the support for nationalism or secessionism depends on ethnic factors. For example, although liberal nationalism tends to be dominant in Catalonia, ethnic factors such as language, the place of birth or the geographical origin of the parents seem to be statistically significant when it comes to determine the support for secession and for the holding a referendum on the issue. Yet, the statistical relevance of ethnic factors to explain support for national self-determination does not mean that such nationalism or secessionism is ethnic or illiberal. See § 1.3.3 below.

[136] MILLER, D. *Citizenship and National Identity*, p. 118. BUCHANAN, A. "Theories of Secession", p. 45. KYMLICKA, W. *Multicultural Citizenship*, p. 191.

[137] See § 1.2.4 above.

group identities and rights (for national identity and rights are one type of this wider claim). Ultimately, since contracting nations would ideally aim to create a liberal-democratic multinational State, it would be irrational to design the right to secede as a way to escape from liberalism and democracy.

Consequently, fear of violation of the human rights of the future minorities which will be created and lack of the sufficient pluralism required by a liberal democracy would be reasonable arguments for the parent State (provided it is a liberal democracy) to object to secession.[138] The commitment of liberalism to individual autonomy favours a moral right to secede that gives the national minority "external protections" (against the national majority in the parent State) rather than "internal restrictions" (against its own minorities).[139] This is because the intolerant character of a cultural community undermines the reasons to support cultural membership.[140] In this regard, Justice as multinational fairness praises the value of autonomy over the value of tolerance. Put simply, there is no obligation to tolerate the secession of a nation that does not respect the personal autonomy of its members. Case-by-case analysis will be necessary to make sure that, as could happen with other group rights, the moral right to secede as an external protection does not become a dangerous instrument for internal restriction.

Possibly, liberal colonial powers would never have granted independence to many colonies if the requisites of need for liberal nationalism, respect for human rights and protection of minorities had been strictly applied.[141] This should be a reminder that those requisites are a matter of degree, evolutionary and dialectical. For instance, colonial powers were neither as liberal nor as democratic as they are today. The requisites are often dialectical in the sense that trying to become more liberal might mean being less democratic, greater protection for individual rights might

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[138] Once under liberal democracy, it may be wise "to think freedom less necessary in great things than in little ones, if it were possible to be secure of the one without possessing the other". See TOCQUEVILLE, A. *Democracy in America*, Vol. 2, ch. VI.

[139] While "*external protections*" are group rights designed to protect the group from the decisions and acts of the majority, "*internal restrictions*" are group rights designed to restrict dissent and internal pluralism. KYMLICKA, W. *Multicultural Citizenship*, pp. 35-44. However, it is not always easy to distinguish external protections from internal restrictions in practice. What is more, an act can be both external protection and internal restriction.

[140] KYMLICKA, W. *Liberalism, Community and Culture*, p. 197.

[141] Secession of colonies, however, is to be tackled under nonideal theory. See ch. 1.4 below.

come at the expense of group rights, and so on. Moreover, many liberal nationalists are prepared to accept being a little less free and less equal at individual level in order to be freer at national level. In general, the objective of liberals should not be to dissolve illiberal nations but, instead, to liberalize them (especially remembering that the liberal nations of today were illiberal in a not too distant past).[142] To liberalize the seceding nation, the parent State could make secession conditional on establishing effective internal and international mechanisms for monitoring and safeguarding human rights and protecting minorities.[143] In general, newly seceded States are more malleable by international influence than pre-existing States, among other reasons because they are seeking recognition as (lawful) States. The international society therefore has more chance of protecting minorities in seceded States than in pre-existing States.[144]

In order to defend granting the right to secede to liberal nations and nationalisms only, the value of diversity could work as an argument both for and against secession.[145] The value of diversity can be an argument in favour if secession increases the number of societies and, in this way, enriches the global diversity. However, the secession of an illiberal nation or nationalism could result in a decline of diversity at national level as well as interrupting intellectual and cultural flows because of new impermeable frontiers. To enhance global diversity and respect internal diversity, Justice as multinational fairness would grant the right to secede only to liberal nations and nationalisms.[146] If the parent State rejects external self-determination claiming the nation or nationalism is illiberal, it should tolerate internal self-determination insofar as it allows the parent State to remain guarantor of dissenters and minorities. Yet, the parent State cannot encourage illiberal options and practises in order to trump secession.

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[142] KYMLICKA, W. *Multicultural Citizenship*, p. 94.
[143] For example, submitting to international conventions and courts for recognition and protection of human rights, such as the European Convention on and the European Court of Human Rights.
[144] BUCHANAN, A. *Introduction* in MACEDO, S.; BUCHANAN A. (ed.) *Secession and Self-Determination*, p. 5. WELLMAN, C.H. *A Theory of Secession*, p. 126. On international recognition, see ch. 2.3 below.
[145] Inspiration drawn from BUCHANAN, A. *Secession*, pp. 32-3.
[146] If the binary distinction between *liberal* and *illiberal* nation proves difficult to apply, it could be of theoretical interest and of practical utility to think about adding the category of *decent* nonliberal nations in a way similar to *The Law of Peoples* by Rawls.

While the value of personal autonomy would prevent secession, the value of tolerance would reasonably require a degree of capacity for internal self-determination. Moreover, totally removing or over-drastically reducing the rights to national self-determination of the illiberal nation would also have a negative impact on the personal autonomy of its members. Like States, nations should have more or less right to self-determination, depending on whether they are more or less just.[147] Since national communities are not purely voluntary associations, their legitimacy is not derived from express and unanimous consent. Hence, national self-determination ought to be in accordance with hypothetical consent, which requires respect for hypothetical contracts. In particular, the *Principle of need for liberal nationalism* and the *Principle of respect for human rights and protection of minorities* can be required in so far as the parent State practises liberal nationalism, respects human rights and protects minorities. That is to say, these principles can work as causes to oppose secession as long as the majority nationalism of the parent State is liberal and provided that the parent State respects human rights and protects its minorities.

"All too often, the formerly persecuted become the persecutors", Buchanan warns.[148] Indeed, it is intuitive and empirically verifiable that oppressed groups often become oppressors or abusers. Unfortunately, a nonideal context before seems to increase the possibility of a nonideal context reappearing again afterwards.[149] In contrast, Roland Vaubel responds: "There is no reason to assume that the majority of people in the seceding region will tend to be less tolerant than the majority in the predecessor State."[150] But even if intuition and utility warn against empowering oppressed national minorities, Justice as multinational fairness disapproves placing additional requisites or limits on the current victims.[151] Otherwise, it would be punishing them for being victims. In sum, the greater likelihood of future abuse by

[147] *Mutatis mutandis*, BEITZ, C.R. *Political Theory and International Relations*, Part 2.
[148] BUCHANAN, A. "Theories of Secession", p. 45.
[149] In similar vein, NIELSEN, K. "Liberal Nationalism and Secession", pp. 112-3.
[150] VAUBEL, R. "Secession in the European Union". Vaubel believes that no human rights problems would be encountered if Scotland, Catalonia, the Basque Country, Flanders, Corsica or South Tyrol decided to secede. Unlike Buchanan, he argues that the right to secede would be a good instrument for protecting minorities.
[151] In similar vein, WELLMAN, C.H. *A Theory of Secession*, p. 126.

the seceding nation is not enough to prevent secession from an illiberal, oppressive or abusive parent State.

A further reason to grant the right to secede exclusively to liberal nations and nationalisms and make it conditional on respect for human rights and protection of minorities is to prevent secession being used as a means to revoke liberal democracy. Liberal democracies suffer from the inherent paradox that their tolerance of pluralism and respect for human rights could bring them to an end even following democratic processes. On this point, it seems morally legitimate to allow democratic liberalism to set limits to liberty and democracy in order to protect itself from those who want to destroy it. By way of example, Article 17 of the European Convention on Human Rights prohibits any State, group or person from seeking the protection of the Convention to engage in any activity or perform any act aimed at the destruction of any rights and freedoms set forth in it or at their limitation to a greater extent than is provided for in the Convention. Accordingly, liberal-democratic States (in which the predominant State nationalism is liberal) may fairly block the secession of illiberal nations and nationalisms. Contrariwise, illiberal States (with predominantly illiberal nationalism) should not be able to block such secession.[152]

In a fragment of *The Law of Peoples*, the right to secede of the southern States of the USA just before the American War of Secession is addressed.[153] According to Rawls, the South had no such right, since the ultimate objective of this secession was to perpetuate the institution of slavery.[154] Therefore, the defence of slavery denied the southern States any moral right to secede.[155] Such a secession motive is contrary to Rawls's internal principle of equal basic liberties and his international principle of honouring human rights. In addition, whether the secession of the southern States was a democratic claim can be questioned, given that close to half of

[152] Even if the illiberal parent State could not morally impede the secession of an illiberal nation, it is still appropriate for the international society to make recognition of the new State conditional on practising liberal nationalism to turn it into a liberal State. See ch. 2.3 below.
[153] Instead of calling it American "Civil War", the term secession is more revealing. A distinction is drawn between the American War of Independence (18th century) and the American War of Secession (19th century).
[154] RAWLS, J. *The Law of Peoples*, § 4.2, note 45.
[155] For a similar interpretation of Rawls, see RADAN, P. "Lincoln… and Secession", p. 72.

their inhabitants were slaves.[156] Accordingly, it cannot be deduced from Rawls that the Confederation of southern States ought to have a just cause for secession based on previous injustices, but, instead, that such an unjust motive prevented any moral right to it. This approach seems similar to that taken under Justice as multinational fairness.

Patten believes that when the State establishes arrangements that extend a fair level of recognition and self-government for the national minority, there should be no right to secede.[157] If members of the minority nation are already recognized as a group with self-governing powers, the principle of equal recognition between national majority and national minority may be satisfied. In that case, granting the right to secede for national minorities which already enjoy appropriate levels of self-government would disrupt or disturb equal recognition.[158] This approach is to be questioned through six steps. First, Patten's theory of secession is rooted in his reappraisal of liberal neutrality. He thinks it is possible and compulsory for the State to be neutral towards the distinct cultures living in it. But, even if accepting that States can and should behave and reason in a nationally neutral way, the complexity of such aim and the existence of circumstances and reasons making the State depart from this principle are not to be forgotten.[159] Second, why cannot there be some sort of equal recognition within the newborn State? Both the *Principle of need for liberal nationalism* and the *Principle of respect for human rights and protection of minorities* are appropriate to ensure fair recognition and accommodation of the different cultural groups within the newborn State. Third, Patten seems to underestimate the powers of the parent State and the international society to put conditions on the terms of the secession and the constitutional beginning of the emerging State.

Fourth, in the original position to settle a multinational State, the contracting nations behind the veil of ignorance would seem more comfortable to agree a qualified primary right to secede rather than a right to secede as a remedy to unjust recognition and accommodation. Hence, Justice as multinational fairness claims

[156] RAWLS, J. *The Law of Peoples*, § 5.4.
[157] See § 2.1.5 below.
[158] PATTEN, A. *Equal Recognition*, pp. 251-3.
[159] See § 1.2.2 above.

equal recognition between nations more than equal recognition between members of those nations. Even though one may claim that Patten's theory can be sustained through the hypothetical multinational contract, it might fit better in a hypothetical contract between persons in which the primary goods include, for instance, culture, identity or, more precisely, national identity and self-government.[160] The latter is thus a more individualist approach. Fifth, given the difficulty of both analysing recognition and accommodation in a purely objective test and finding a proper referee to adjudicate on these secession cases, increasing or decreasing the democratic requisites becomes a more gradual, refined and pragmatic way to deal with it.[161] In other words, the more unjust State treatment of minority nations is, the lesser the requirements to secede ought to be.[162] Finally, Patten's proposal is applicable in an all-or-nothing fashion, whereas Justice as multinational fairness applies in a dimension of weight. Thus, while the former suffers a lack of gradualism, the latter not only gives an answer to the existence of a right to secede but also to the conditions and requisites to exercise it.

According to Margalit and Raz, the absence of effective international machinery to protect the interests of minority nations justifies granting them a unilateral right to secede.[163] Since remedial theories impose an obligation to prove an injustice to secede, they need an independent and impartial referee to judge whether just causes for secession concur. In contrast, a procedural approach to the right to secede may better deal with the lack of an impartial judge or arbitrator.[164] Since it is rare to find (and even difficult to design) such a referee, the biased referee argument seems, at first glance, strong against such theories. In particular, lacking an appropriate Court (internal or international) would tilt the balance towards a unilateral right to secede,

[160] This sort of hypothetical contract is drafted in WEINSTOCK, D. "Constitutionalizing the Right to Secede", p. 198-9. Ideally, according to Weinstock, the members of a future multinational State would make secession possible only in those cases in which fundamental group-specific interests are really at risk. However, because of the lack of a proper tribunal to judge whether these interests are really imperilled, the parties would agree on a right to secede under certain procedural constraints.
[161] In terms of recognition, sometimes the letter of the Constitution and the rest of the laws can give a false impression of fair accommodation. Often recognition and accommodation depend on political culture, behaviour, symbology, mutual understanding and historical interpretation. This makes it even more difficult to find an objective test and pushes for a more subjective approach based on the perceptions and preferences of the members of the minority nation expressed through a deliberative democratic process.
[162] See § 1.4.9 below.
[163] MARGALIT, A.; RAZ, J. "National Self-Determination", p. 461.
[164] BUCHANAN, A. *Secession*, pp. 138-9.

notwithstanding the obligation of principled negotiation to seek agreed ways. Either as an alternative or as a complement to a unilateral right to secede, a constitutional clause could provide for international mediation or arbitration in such cases.[165] Be aware, nonetheless, that international organizations also tend to have a bias against secession, since they are generally made up of States (whose representatives tend to represent the majority nations in their States).[166] This is why a more procedural theory of secession (based, in particular, on the principle of democracy) gains strength because impartiality seems better protected when judges, arbitrators or referees decide on more procedural than substantive matters.

A purely procedural theory of secession, however, would hardly be morally satisfactory.[167] In particular, various clauses and principles of the hypothetical multinational contract require a substantive or value judgement which is more than merely procedural or formal: (1) Evaluation of whether the territory that wants to secede is a nation often requires analysing a mix of objective political, historical and cultural elements, as well as subjective identity elements. (2) Evaluation of the *Principle of viability and compensation* needs material, empirical and normative assessment. (3) Evaluation of whether the multinational State can deny secession because the nation is not liberal, because of violation of human rights or because there is a danger for minorities, among others, involves a highly complex judgement. (4) Evaluation of how just or unjust State treatment of minority nations is in order to increase or lessen the requirements to secede also requires much more than simply procedural appraisal.

1.2.6. The place amongst the theories of secession

There are two main groups of theories: (1) *remedial theories*, which understand the right to secede as a right only to react to, remedy or repair injustices or grievances;

[165] In similar vein, Article 60 of the 2003 Constitution of the former State Union of Serbia and Montenegro and the role of the EU (and of the Council of Europe) in implementation of the democratic standards of the independence referendum of Montenegro. See §§ 3.1.1, 3.4.2 and 3.4.3 below.
[166] Moreover, in the words of Vaubel, "the bureaucrats in international organizations expand their power and prestige by preaching the virtues of political centralization". VAUBEL, R. "Secession in the European Union".
[167] See MILLER, D. *Citizenship and National Identity*, pp. 112-3.

(2) *primary theories*, which conceive the right to secede as a primary, general right that exists even without violation of other rights.[168] Primary theories of secession are usually subdivided into: (2.1) *ascriptive*, which assign the right to secede to national communities or similar groups;[169] and (2.2) *elective* or *choice*, which focus on the principles of democracy, of popular sovereignty, of political self-determination and of freedom of association as legitimizers of a general right to secede.[170] This classification can work as a model but does not exclude mixed theories or theories that combine elements, borrow arguments or include nuances from other theories.[171]

Buchanan's remedial-right-only theory of secession sets out to follow and complement Lockean theory on the right of revolution: as a remedy of last resort, people have a right to constitute a new government when they are submitted to serious injustices (often identified with serious violations of their human rights). More specifically, a unilateral moral right to secede would exist only as a reaction to selective tyrannies.[172] This sort of theory tends to be restrictive and more focused on moral foundations for international law, arguing the need for a normative theory

[168] The terminology *just-cause-theories* is avoided since there may be a bias in favour of theories that conceive the right to secede as a mere reactional right to certain injustices and grievances (often serious, manifest and limited causes). Nevertheless, primary theories do not plead the right to secede without a cause, but are rooted in principles such as of nationality and of democracy. To call some theories just-cause-theories diminishes the legal and moral value of the opponent theories. The principles of nationality and of democracy are denied, indirectly, the value of just causes. In the end, the terminology *remedial v. primary theories* intends to avoid this ideological bias and so be more descriptive.

[169] Not all ascriptive theories need to be nationalist theories, even though they usually are. One can picture, for instance, a federalist theory of secession claiming the right to secede of the federated units without necessarily considering them to be nationalities. An additional reason to use the term *ascriptive* rather than *nationalist* is that the former seems to miss that defending unionism is often a form of nationalism. See COSTA, J. "On Theories of Secession", p. 73. MOORE, M. *The Ethics of Nationalism*, p. 163.

[170] Although the terminology might vary, authors generally agree on the classification of theories. See BUCHANAN, A. "Theories of Secession", pp. 31-61. Some convergence points between remedial and primary theories are explored in BRANDO, N.; MORALES, S. "The Right to Secession", pp. 107-18.

[171] In particular, comprehensive theories may have different approaches regarding ideal and nonideal theory, regarding morality and legality, and regarding international and constitutional law.

[172] BUCHANAN, A. "Theories of Secession", p. 36. In addition to such unilateral moral right to secede, the following rights to secede would also be morally acceptable: (1) constitutional secessions – secessions by virtue of a constitutional right; (2) consensual secessions – negotiated and agreed between the parent State and the seceding territory; and (3) secessions that result from a union in which sub-State units had retained a right to withdraw – "the agreement by which the state was initially created out of previously independent political units included the implicit or explicit assumption that secession at a later point was permissible".

with a "minimal realism".[173] As will be seen, many remedial theories are centred on, and to a large extent legitimize, the existing international law.[174] In contrast, Justice as multinational fairness focuses on ideal constitutional law of liberal democracies based on the Rawlsian idea of realistic utopia.[175] Under Justice as multinational fairness, unlike remedial theories, secession is not only morally permitted if significant and persistent injustices are present, since making secession difficult seems more reasonable than making it impossible. Therefore, injustices do not determine the existence of a right to secede, but the requirements to exercise it. The more just the State treatment of minority nations is, the more qualified the right to exit ought to be.

Many warn that secessions increase national conflicts, for the creation of a new State generates new minorities within it and also because some members of the newly independent national community will usually remain within the borders of the rump State. Democratic, pacific and legal secession which meets the requisites of the hypothetical multinational contract should not give rise to persecution of the former persecutors by the previously persecuted. By contrast, if secession is not a rational and fair result of morality and of law, but is obtained through effectivity and force, it is easier for this problem to arise. Moralizing and legalizing the right to secede would and should avert and discourage persecution, oppression, violation and intimidation.

Some criticize that the members of the seceding nation remaining within the borders of the parent State would be left in an even weaker position.[176] This criticism assumes that a smaller minority would be likely to be mistreated more harshly than a bigger minority. A smaller minority could be, however, less of a threat in the eyes

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[173] Ibid. p. 42. See also BUCHANAN, A. *Justice, Legitimacy and Self-Determination*, chs. 1.V, 8.III.
[174] That said, some remedialists, such as Buchanan and Norman, have proposed a constitutionalization of the right to secede. See BUCHANAN, A. *Secession*, ch. 4. NORMAN, W. *Negotiating Nationalism*, ch. 6. NORMAN, W. "From quid pro quo to modus vivendi...", pp. 186-201. See § 3.1.1 below.
[175] This realistic utopia is, to a certain extent, illustrated and posited in Article 50 of the TEU, which establishes the unilateral right of each Member State to withdraw from the EU if, after a period of time, no exit agreement has been reached. What is more, the recognition of this right shows that the hypothetical multinational contract is not so far from reality. Among other reasons, Member States may not have been prepared to transfer (more) sovereignty to the Union without explicit recognition of this sort of right to secede. See § 3.1.1 below and BOSSACOMA, P. *Secesión e integración*, § 3.
[176] MILLER, D. *Citizenship and National Identity*, pp. 118-21.

of the majority and can therefore be treated better.[177] From a more institutional perspective, the newborn State and the parent State would both become guarantors of the rights of their national minorities left outside the borders. Residents of the new State who do not feel part of it could possibly refuse the new citizenship and, consequently, remain citizens of the parent State.[178] Members left beyond borders would probably be allowed to enter the newborn State as privileged immigrants. From a more personal perspective, members outside the borders could also benefit from the creation of the new State. Despite not physically residing in the new State, they could live in it in less tangible, more spiritual ways – they could read and write the new press and literature generated, they could trade and strengthen their professional position by capitalizing on their cultural connections with the new State, and so forth. In today's virtual times, it is ever more possible to take part in and contribute to national culture from a distance. In liberal-democratic contexts, the cultural identity of members outside the borders can be protected, reinforced and guaranteed thanks to the creation of a new State.

In respect to international law, Buchanan argues that his remedial theory is compatible with the international principle of the territorial integrity of States, which he considers fundamental. Although territorial integrity is not one of the eight fundamental principles of international law according to Antonio Cassese, sovereignty and non-intervention are.[179] Thus, the former can be understood as part of the latter.[180] In any case, the ICJ has sidelined territorial integrity as a principle forbidding secession, confining it to relations between States.[181] Beyond positive law, nor is the principle of territorial integrity one of the eight fundamental principles of Rawls's ideal international law.[182] Likewise, territorial integrity would not be a fundamental principle of a hypothetical multinational contract.

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[177] VAUBEL, R. "Secession in the European Union".
[178] See BOSSACOMA, P. "Who Would the Citizens… Be?".
[179] See CASSESE, A. *Self-Determination of Peoples*, pp. 333-7. A similar list of fundamental principles can be inferred from Articles 1 and 2 of the Charter of the United Nations.
[180] According to Resolution *26/25 (XXV)* of 1970 of the UN General Assembly on Principles of International Law, the principle of sovereign equality of States includes the principle of territorial integrity: "In particular, sovereign equality includes the following elements: ... (d) The territorial integrity and political independence of the State are inviolable".
[181] The ICJ Advisory Opinion on Kosovo states that the principle of territorial integrity can be applied only to relations between States. See ch. 2.2 below.
[182] See § 1.2.2 above.

The principle of territorial integrity is closely linked to the principle of non-intervention. Unlike the former, both Cassese and Rawls include the latter in their fundamental principles of positive and ideal international law, respectively. Charles Beitz argues that the principle of non-intervention ought not to be applied with the same intensity to every State: *prima facie*, unjust States should not enjoy the same degree of protection against foreign intervention since they do not deserve the same degree of autonomy.[183] In similar vein, Buchanan denies the principle of territorial integrity to unjust States by granting a right to secede to territories suffering from selective tyranny. Conversely, he defends the principle of territorial integrity of just States in order to preserve the rights, security and stability of their citizens' expectations. In addition, according to Buchanan, the territorial integrity of just States creates an incentive for individuals to take part in the political process, while removing the possibility of using the right to secede as a political threat or veto power. His theory suffers, however, from an excessive individualism that ignores the dynamics of majority and minority nations and the value of national self-determination. This criticism will be built up in the course of this book. For the moment, just two lines of argument to oppose it will be offered:

1. The interests of the pro-secession group cannot be reduced to individual interests. The group interests are, to some degree, independent from individual interests. Even if the group interests are connected to the members' interests, there is no perfect correlation.[184] On top of that, individuals identify with public authority better when the latter is established in a morally legitimate way in line with the principle of self-determination of peoples. The ideal of collective self-determination cannot be reduced to preservation of citizens' rights, security and expectations. Justice as multinational fairness is not limited to individual rights and interests, but also includes group rights and interests. As States are not nationally neuter, fair treatment of the various nationalities should allow democratic questioning of the territorial scope of political authority. At the same time, nationalism, as intense democratic identification of the citizen with the polity, promotes higher levels of trust, cooperation, fraternity and solidarity between compatriots.[185]

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[183] See BEITZ, C.R. *Political Theory and International Relations*, Part 2.
[184] MARGALIT, A.; RAZ, J. "National Self-Determination", pp. 449-50.
[185] See § 1.3.3 below.

2. Tension between individualism and republicanism. There is some contradiction between Buchanan's liberal-individualist defence of territorial integrity and his defence of deliberative republicanism intended to force citizens to take part in the political process of a State which they do not feel as their own. The republican tradition of democracy does not shield free citizens behind high protective walls, but conceives them as active participants in the shaping of the polity.[186] Therefore, deliberative democracy should allow democratic questioning of the geographical area in which democratic debate should take place. In addition, secession can contribute to deliberation in another democratic framework, since understanding, trust and participation may grow when national identity and feelings coincide with State boundaries.[187]

What is more, the right to secede may increase deliberation by rebalancing the majority and minority nations within a multinational State. In this regard, not only the incentives of the minority nations should be considered but the incentives of the majority nation as well. Following this concern, we should be aware that if the minority nation's threat of exit is absent or very limited, members of the majority nation have little incentive to take seriously the voice of that minority.[188] Thus, when the threat of secession is morally acceptable, the right to secede can make a positive contribution to respecting and safeguarding national pluralism. In fact, the right to secede can also contribute to multinational consensual democracy.[189]

In contrast, Buchanan claims that the recognition of a primary right to secede would be contrary to the progress of territorial decentralization of powers. He believes that a theory that would give self-governing units the right to secede would create an incentive for centralized States to oppose decentralization. This objection raises

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[186] PHILPOTT, D. "In Defense of Self-Determination", p. 357.
[187] Deliberative democracy as a type of democracy that, beyond citizens' *votes* and *negotiation* between factions, incorporates the value of *deliberation.* Deliberation goes beyond negotiation since it aims at more than reaching an agreement to solve a specific question, by trying to reach a kind of moral and legal consensus from discussion of sincere arguments and reasons and taking the other parties' arguments seriously. In Sunstein's words, deliberative democracy "is meant to combine political accountability with a high degree of reflectiveness and a general commitment to reason-giving". SUNSTEIN, C.R. *Designing Democracy*, pp. 6-7.
[188] PATTEN, A. *Equal Recognition*, p. 268.
[189] See § 3.1.1 and ch. 3.2 below.

three questions. Is territorial autonomy as a form of internal self-determination enough to exclude secession as a form of external self-determination? Following Daniel Weinstock we can call into question the "reduction assumption", according to which there are no goods attached to statehood that cannot be obtained by means of power-sharing arrangements such as federalism.[190] As long as the international society is mainly formed by independent States and their organizations, it seems reasonable that minority nations expect to have their own sovereign State and consider that having some territorial autonomy is not enough.[191]

Is political decentralization morally better than secession? The answer is neither clear nor easy but there is an indirect way to respond. The hypothetical multinational contract recognizes a right to secede for contracting sub-State nations, whether or not they are recognized self-governing units, as long as they fulfil the seven requisites for secession. This contract stresses that multinational federalism ought to recognize the right to secede and be capable of remaining united after this recognition. In other words, the litmus test of proper multinational federalism is to preserve the union after constitutionalizing the right to secede. In addition, legal powers should be understood as scarce goods or resources in federal theory and practice. Therefore, competences can hardly be allocated to many tiers of government and still consider all these layers to possess meaningful forms of political autonomy.

What kind of incentives and disincentives can a right to secede produce? First, recognizing a right to secede does not necessarily cause secession, but possibly more devolution of powers and other forms of internal self-determination, as was the result of the Scottish referendum on independence. Quite paradoxically, a right to secede can work as an incentive to improve multinational integration, provided that union is not understood as uniformity. In general, a qualified right to secede could be compatible with the ultimate aim of an ever closer humanity. Even if a world government was possible, it would take the form of an international

[190] WEINSTOCK, D. "Constitutionalizing the Right to Secede", pp. 189-90.

[191] Moreover, in contexts where competences are transferred to international or supranational organizations, State central authorities (unwilling to lose power) may react either invading competences of sub-State units or exercising the powers of supra-State institutions through inter-governmental action. See BOSSACOMA, P. *Secesión e integración*, § 5.

(con)federation with internal territorial borders. Finally, a right to secede may allow the progress of international federalism without the fear of having no way back.[192]

Justice as multinational fairness agrees with remedial theories that the right to secede can be useful to prevent and end injustices suffered by minority nations. It disagrees, however, that the right should be limited to this. If the right to secede could be grounded only on serious moral damage, this would lead to a kind of sanctification of suffering. Although Justice as multinational fairness does not limit the right to secede to a response to injustices perpetrated by the parent State, it takes the latter seriously, for the presence of grievances reduces the requisites for secession. As State injustices make secession easier, justice as multinational fairness will incentivize fair behaviours as well as disincentivize unfair conducts.[193]

Broadly, Justice as multinational fairness identifies closely with ascriptive theories by assigning a general, primary and democratic right to secede to national communities. A theory based on national self-determination is more helpful to explain the phenomenon of the creation of new States than a theory based on an abstract right to political self-determination.[194] Ascriptive theory has a stronger connection with empirical reality than elective theory since, very often, pro-secession claims have been, and still are, built upon nationhood.[195] As we move away from secession to repair an injustice, in practice we draw closer to secessions and pro-secession demands based on the principle of nationality.[196] However, as

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[192] "Some kind of qualified escape clause would almost certainly be necessary today to get any independent State to agree to surrender a significant degree of its sovereignty to join a new State or superstate organization, even a free-trade agreement." NORMAN, W. *Negotiating Nationalism*, p. 209. For instance, recognition of the right to secede from the EU (first implicitly and now explicitly with Article 50 of the TEU) has allowed, and should continue to allow, the Member States to attribute more powers to the EU. See § 3.1.1 below and BOSSACOMA, P. *Secesión e integración*, § 5. FERRERES, V. "Does Brexit Normalize Secession?", pp. 148-51.

[193] See ch. 1.4 below.

[194] See SORENS, J. *Secessionism*, especially ch. 2 and Appendix. MOORE, M. *The Ethics of Nationalism*, pp. 137-8. COSTA, J. "On Theories of Secession", p. 66. From an empirical standpoint, Sorens shows that *ethnonational minorities* concentrated on a territory generate most pro-secession demands. Thus, nationalist theories allow a better understanding of the underlying motivations of pro-secession movements.

[195] MANCINI, S. "Secession and Self-Determination", p. 486. In practice, territories in which a referendum on secession is held or is demanded coincide with the territories on which cultural or ethnic minorities live. Therefore, in most cases, the right to secede is assigned on the basis of nationality.

[196] This is especially so in the western liberal-democratic world (Quebec, Scotland, the Basque Country, Catalonia, etc.).

Christopher H. Wellman points out, when a theory of secession is formulated, the aim is normative, not descriptive.[197] Yet, normative theory should neither be created in a social vacuum nor be designed to apply in the realm of pure ideas. For Wayne Norman, elective theories are ascriptive theories free of the moral complications of ethnicity.[198]

Curiously, while Buchanan bases his remedial theory on the right to revolution defined by Locke, Harry Beran justifies his elective theory with the need for consent to generate political obligations in the Lockean sense of a social contract. In other words, for Beran, the State and its territorial scope ought to be based on the continued consent of its people. Consent to form (part of) a State is not irreversible, but essentially revocable. Nevertheless, there are both theoretical and practical problems. A parent State based on unanimous consent is just as unlikely as a secession decided democratically by unanimity. If consent were the only basis for political obligations, many individuals would not be bound by it.[199] Moreover, recursive application of the principle of consent could lead to anarchy.[200] If a democratic instrument such as a secession referendum is meant to legitimize the exit, consent should be understood as a matter of degree and interpretation.[201] This would lead to the question of how much consent is necessary to secede and the answer would depend on the interpretation of the context.

For Locke, the consent that would legitimize political obligations is given tacitly by remaining or residing within the territorial borders of a State, thereby enjoying the benefits it gives.[202] In short, the Lockean version of tacit consent is based on non-emigration.[203] If the right to emigrate is already costly and problematic at individual

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[197] WELLMAN, C.H. *A Theory of Secession*, pp. 114-5.
[198] NORMAN, W. "Ethics of Secession", p. 37.
[199] No individual has expressly given consent to a real social contract. Many did not vote at all or voted against the constitutions of their States. Many individuals do not vote in periodic elections and in referendums. Many have voted or voiced support for anti-establishment parties, movements, forces, etc. A theory that would require unanimous consent to generate political obligations should allow voters to be exempted from them. Only if they were offered this option in advance could they be bound by the election results.
[200] RUIZ SOROA, J.M. "Regular la secesión", p. 191.
[201] See KUKATHAS, C. *The Liberal Archipelago*, pp. 203-4.
[202] LOCKE *Two Treatises of Government*, ch. VIII, §§ 112-22. For Philpott, though, tacit consent is compatible with self-determination. PHILPOTT, D. "In Defense of Self-Determination", p. 368.
[203] Criticising tacit consent, Dworkin writes: "Consent cannot be binding on people, in the way this argument requires, unless it is given more freely, and with more genuine alternate choice, than just

level, at collective level it could be even more complicated for the following reasons: (1) it could entail very high economic costs; (2) there are no more habitable territories on Earth under no State sovereignty;[204] and (3) given that all the habitable territories are under the sovereignty of one State or another, which State would be willing to allow a whole new community to emigrate to its territory for the purpose of self-government? In this context, the right to secede could be a liberal alternative to the right to emigrate which would offer the possibility of collectively refusing Locke's tacit consent.[205] In the end, the difficulties of a whole national group emigrating and settling somewhere else in the world could be a pragmatic moral argument for recognizing a right to secede.[206]

Since the right to secede under Justice as multinational fairness sets out from a hypothetical multinational contract, political obligation is based on hypothetical consent. That is to say, there will be a political moral obligation when reality coincides largely with what would have been agreed in this hypothetical contract, from an original position behind the veil of ignorance. Therefore, the consent to belong to the multinational State does not have to be explicit, but such consent is revocable by minority nations, provided they fulfil the seven requisite principles for secession. In general, while the legitimacy of a private law association would

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by declining to build a life from nothing under a foreign flag. And even if the consent were genuine, the argument would fail as an argument for legitimacy, because a person leaves one sovereign only to join another; he has no choice to be free from sovereigns altogether." DWORKIN, R. *Law's Empire*, pp. 192-3. Rawls writes of the difficulties and costs of individual emigration: "the government's authority cannot be evaded except by leaving the territory over which it governs, and not always then. (...). For normally leaving one's country is a grave step: it involves leaving the society and culture in which we have been raised, the society and culture whose language we use in speech and thought to express and understand ourselves, our aims, goals and values; the society and culture whose history, customs and conventions we depend on to find our place in the social world. In large part we affirm our society and culture, and have intimate and inexpressible knowledge of it, even though much of it we may question, if not reject. (...) the right of emigration (suitably qualified) does not suffice to make its [the government's] authority free". RAWLS, J. *Political Liberalism*, p. 222. For a critique of Lockean tacit consent related to the right to secede, see WELLMAN, C.H. *A Theory of Secession*, pp. 8-9.

[204] *Grosso modo*, on the entire planet no habitable *terra nullius* remains which could be occupied as an original form of peaceful acquisition of sovereignty over a vacant territory. BROWNLIE, I.; CRAWFORD, J. *Brownlie's Principles of Public International Law*, pp. 220, 250-2.

[205] If Locke's controversial theory of tacit consent is accepted, the right to emigrate is turned into an individual strategy and the right to secede into a collective strategy to reject the tacit consent to political obligations. In short, both would be rights to exit the existing legal order.

[206] On the other hand, if a parent State were to deprive its citizens of the right to emigrate, this could strengthen the right to secede of its citizens and national groups, as occurred in the USSR. BUCHANAN, A. *Secession*, pp. 31, 70-3. Although the political community can shape its own population controlling immigration, it cannot shape it controlling emigration. WALZER, M. *Spheres of Justice*, p. 39.

depend on the explicit consent of its members, the moral legitimacy of a public law association would ultimately depend on its conformity with the hypothetical consent.

Beran's elective theory defends a primary right to secede based on the principles of liberty, popular sovereignty and majority rule by a group concentrated in a given territory. For him, as liberalism is an essentially individualist philosophy in which people are entitled to self-determine and self-govern themselves, sovereignty should be understood as an individual right exercised collectively. Therefore, the territorial borders cannot be either unchanging or irrevocable. Territorial unity ought to be based on the consent of all the citizens, unlike secession, which could be exercised democratically by a subgroup concentrated in a given territory. Under Justice as multinational fairness, the multinational State should be based on a sort of consent (hypothetical and tacit) of all nations that make it up, unlike secession, which could be a unilateral way of leaving in so far as the seven requisites for secession are fulfilled. The consent would be hypothetical in the sense that the multinational contract would not need to be a real, historical contract. There would be tacit consent as long as the exit option is not triggered.

Defenders of an elective theory often claim a moral right for people who have been living on a territory for a long time to obtain sovereignty over it. In this respect, the analogy with a kind of moral right to usucaption (acquisition by continuous use of properties or rights similar to adverse possession) could be explored. Largely, in continental European civil law, usucaption requires four kinds of possession: (1) as master or holder of the right; (2) public; (3) peaceful; and (4) uninterrupted.[207] This analogy should normally fail, at least because possession would not be as holding a right to sovereignty (not *à titre de souverain*), but as exercising a right to autonomy. One theoretical possibility which could be considered is to substitute this lack of

[207] See, in particular, Article 531-24 of the Civil Code of Catalonia and Articles 1941 and 1959 of the Spanish Civil Code. Similarly, in common law, adverse possession seems to require possession which is: (1) effective or actual; (2) open or public; (3) peaceful – in the sense that the owner has the opportunity to contest freely the possession or occupation but is not doing so; (4) hostile to the interests of the true owner – this explains why it is called adverse; (5) uninterrupted or continuous; (6) exclusive – it seems unlawful to claim adverse possession by multiple claimants. The requirement of effective or actual possession, which is exercised through corporeal occupation manifesting the dominion over the property as an average owner of a similar property would, could be a similar requirement to possession as master or holder of the right.

possession as sovereignty-holder by alleging a fair democratic title to claim it. Although usucaption has evolved over centuries, it typically places great weight on possession as master or holder of the right, leaving just title or good faith as elements which may shorten the period of possession necessary to usucapt. In the end, though, this sort of analogy should not make us confuse land and property rights with territory and jurisdictional authority.[208]

For some elective theorists, the right to secede is a sort of instantiation of freedom of association. While the positive facet of this freedom includes the right to create new associations and to join ones already created, its negative facet includes the right not to associate and to stop being part of those associations. On the one hand, the positive facet is related to the creation of a new State, understanding the State as a political association of paramount importance. On the other, the negative facet is related to withdrawal from a State. Similarly to the option for individuals or groups unilaterally and freely to leave an association, there could also be the possibility of unilaterally, but not unconditionally, exiting a State. From a contract theory of the State at the service of individuals and groups, it is intuitive to acknowledge a right to secede and to create a new State inspired by the fundamental right to political association. Nonetheless, Wellman, who defends an elective theory based on political self-determination, rightly warns that an unlimited freedom of association would lead directly to anarchy.[209] Justice as multinational fairness is thus based on a hypothetical consent and it endorses a qualified right to exit.

For Buchanan, a theory of secession based on a right to political association could apply only to secede from a union created by bottom-up consent (and, thus, would require the associates to be sovereign political entities previously).[210] A moral right to political association, however, should not require so, as the following examples may show. Imagine that in a non-liberal-democratic period of history workers had been forced to join a State-run trade union. After a transition to liberal democracy, if the State itself does not abolish the trade union, the right to freedom of association will allow the affiliates to leave it whenever they want. As another example,

[208] BUCHANAN, A. "The Making and Unmaking of Boundaries" in BUCHANAN, A.; MOORE, M. (ed.) *States, Nations, and Borders. The Ethics of Making Boundaries*, pp. 232-40.
[209] WELLMAN, C.H. *A Theory of Secession*, pp. 7-9.
[210] BUCHANAN, A. *Secession*, pp. 35-6.

imagine that the charter of an association constituted in pre-liberal-democratic times stipulates that the affiliates' children will automatically become affiliates once they reach the age of majority. After a transition to liberal democracy, if the charter is neither annulled nor amended, freedom of association will allow affiliates' descendants to refuse or waive membership. In general, a full right to freedom of association should maintain an effective right to exit for affiliates and stop associations from erecting too high exit barriers. The value of liberty dictates that the exit walls from the association ought to be scalable.

Having ruled out any individual right to secede, the question is which groups should enjoy a right to secede. It would not be reasonable to give a primary right to secede to a political association of citizens united simply by high per capita income, nor to a neighbourhood of rich people, even if they were many and concentrated in a given territory.[211] One advantage of an ascriptive theory of secession is, thus, that the nation contains objective or objectifiable elements that impede pro-independence political associations for reasons open to criticism. Although some nations are richer than others, they are not mere associations of rich people. In this regard, a theory that assigns the right to secede to nations is more restrictive than a theory based on pure choice. Ascriptive theory demands a collective dimension which elective theory does not require. Since Beran believes that multinational States are ideally more attractive than uninational States, he rejects secession based on national self-determination.[212] However, Justice as multinational fairness, starting from a hypothetical multinational contract, holds a theoretical compatibility between the multinational State and the moral right to secede of minority nations. In more practical terms, if minority nations hold a qualified right to secede, this could probably incentivize more recognition and accommodation of national pluralism within States.

There are interfaces between ascriptive and elective theories. The liberal nation is largely defined by national consciousness, by shared feelings of belonging to the

[211] See SUNSTEIN, C.R. "Constitutionalism and Secession", pp. 648-61.
[212] BERAN, H. "A Liberal Theory of Secession", pp. 21-31. Wellman, by contrast, is more in favour of national self-determination, as the national communities can easily become States politically empowered to exercise effective sovereignty thanks to the fraternal force of nationalism. WELLMAN, C.H. *A Theory of Secession*, ch. 5.

same community which are connected to individual sentiments, beliefs and preferences. These subjective elements mean that the liberal nation is rather democratic in essence. At the same time, the principle of nationality needs the confluence of the principle of democracy in order to claim statehood, as the secession claim needs the support of clear democratic majorities on the seceding territory. What is more, Justice as multinational fairness draws on and is fed by various contributions of elective theories. First, the principle of free political association inspires the hypothetical multinational contract as a multinational *pactum societatis*. Second, Justice as multinational fairness incorporates democratic instruments typical of elective theories to specify the territory of the new State with the aim to include as many secessionists and as few unionists as possible.[213] Third, elective theories set the basis for the material limits to the right to secede which the hypothetical multinational contract reflected and adapted through the *Principle of territoriality* and the *Principle of viability and compensation.*[214]

1.2.7. The excessive fragmentation objection

The principle of protection of minorities works, at the same time, as a legitimizer, guider and delimiter of Justice as multinational fairness. Accordingly, it requires that the seceding nation should be willing to allow separation and secession on its territory.[215] Since secession could give rise to new national minorities in the newborn State, the seceding nation must be prepared not only to respect human rights and protect minorities but also to allow the national minorities on its territory to separate from the new independent State in order to rejoin the parent State or to secede, if the requisites of the hypothetical multinational contract are met, to create a new State. This brings us to the traditional objections of excessive fragmentation and unlimited secessions.

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[213] Secession may be more democratic if the will to secede is expressed both via representatives and via referendum. The *Principle of democracy* should give similar weight to both representative and participatory democracy. See §§ 3.3.1 and 3.4.1 below. In addition, as nations have not always existed and will not remain unchanged forever, another function of the principle of democracy is to cope with the non-static nature of the existence and will of the nation.

[214] BERAN, H. "A Liberal Theory of Secession". POGGE, T.W. "Cosmopolitanism and Sovereignty". WELLMAN, C.H. *A Theory of Secession.*

[215] In similar vein, see BERAN, H. "A Liberal Theory of Secession", p. 21.

If nation-States were the only way of realizing the right to national self-determination, it would remain the privilege of only a fortunate few.[216] Gellner and Buchanan insist that there is not enough physical space in the world to give statehood to every nation in the form of a viable State. Therefore, satisfaction of the rights of some would be detrimental to the rights of others and could lead to anarchy. In this regard, these authors argue that such political fragmentation would be economically impracticable or too costly.[217] A softer version of this objection may consider that, despite there are more nations in the world than possible States, we should be more willing to consider a qualified right to secede together with other options to accommodate national pluralism.

The objection of excessive fragmentation could be accentuated if nations' preferences are considered adaptive. That is to say, institutionalization of a right to secede based on national self-determination could generate an increase of secessionist movements, if the preferences of nations (like those of individuals) are, to some extent, rational and depend on the feasibility of the target. If an interest seems unfeasible, our preferences tend to adapt to a feasible one and, conversely, if an interest seems feasible, we will probably take it up as one of our preferences. In this way, a kind of domino effect could occur insofar as secession is perceived as more or less feasible. In support of this effect, contemporary history shows that secessions do not happen slowly and steadily over the course of time, but in jerks. Indeed, secession and country formation processes tend to be "lumpy" and to occur in geographical clusters.[218]

The objection of excessive fragmentation can be countered. First, recognition of a right must not be confused with exercising it.[219] Second, defending a primary right to secede does not mean defending an unlimited and unconditional right. Third, a

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[216] TAMIR, Y. *Liberal Nationalism*, p. 9.

[217] GELLNER, E. *Nations and Nationalism*, pp. 42-8. For Gellner, since there are about 8000 languages in the world, applying the nationalist principle *cuius regio eius lingua* the globe could end up fragmented into too many States. BUCHANAN, A. *Secession*, pp. 49-50, 102-4. BUCHANAN, A. "What's So Special About Nations?", in COUTURE, J.; NIELSEN, K.; SEYMOUR, M. (ed.) *Rethinking Nationalism*, pp. 291-3.

[218] ALESINA, A.; *et al*. "Economic Integration and Political Disintegration", p. 1285.

[219] By way of example, depositors have the right to withdraw their money, but if everybody tries to do so at the same time the bank will not be able to satisfy the actual demand. This factual impossibility neither prevents nor discourages the existence of bank deposits and the right to withdraw money from them.

qualified right to secede is compatible with general support for multinational federalism, since it promotes recognition and accommodation of minority nations. Fourth, although in *advanced democracies* secessionist claims tend to be common and conducted through democratic channels, they are rarely supported by qualified majorities.[220] In such democracies, typical pro-secession movements are ideologically moderate, use electoral methods, can lead to political decentralization but hardly to uncontrolled political disintegration.[221] Some predictive theories explain convincingly why secessionist claims are low and will remain low in consolidated liberal democracies.[222] Fifth, the greater the level of international or supranational economic integration, the more viable political disintegration will be.[223] Sixth, some pro-secession movements claim separation from the parent State but demand more integration at a supra-State level (such as the EU).[224] Seventh, a comprehensive empirical study found that, in the whole world, there are not thousands of *ethno-national minorities* concentrated in a given territory (but 283) and not most of these groups have secessionist organizations (only 107).[225] If this research is accurate, the objection of excessive fragmentation regarding a qualified right to secede ascribed to nations could be exaggerated.

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[220] Support is rarely qualified partly because the obstacles and costs of leaving are copious and serious. See BOSSACOMA, P. "Secession in Liberal-Democratic Contexts".

[221] SORENS, J. *Secessionism*, p. 74.

[222] In particular, Dion's model predicts that secessionism will hardly be a majority, since it would be necessary for the pro-secession group to fear the parent State and trust its secessionist project. According to him, these two requirements rarely coincide in well-established democracies. DION, S. "Why is Secession Difficult…?", pp. 269-83. See § 3.1.1 below.

[223] In other words, "trade liberalization and average country size are inversely related" and, consequently, "the "globalization" of markets goes hand in hand with political separatism." Looking at global trade on a broad scale, territorial borders are stuck in historical periods when protectionist policies predominated. ALESINA, A.; *et al*. "Economic Integration and Political Disintegration", pp. 1276-96. In this regard, Buchanan's objection that secession causes interruption of international trade is empirically dubious. BUCHANAN, A. *Secession*, p. 2. Although trade is often easier within the borders of a State, small States have a greater interest in free trade and capital movements than larger States. Small States depend more on imports and, since they can have no influence over world market prices, their optimum customs duty tends to be zero. VAUBEL, R. "Secession in the European Union".

[224] The weaker Member States are in fact, the easier and more rational it is to claim and to extend the legal, political and economic powers of the EU. Sometimes, minority nations such as Catalonia have preferred autonomy to independence in order to have access to or keep control of the domestic market of the parent State. Nowadays, however, some western minority nations seem to defend economic liberalization and free trade more strongly than their parent States. Since the EU has established a common market, some minority nations feel viable and safe within this framework.

[225] SORENS, J. *Secessionism*, pp. 56, 71-2. According to Sorens, the most numerous national groups in a State tend to be less secessionist, as does the second most numerous if the first has less than 60% of the population. These big groups in divided societies concentrate on the struggle for central government power and not on secession. This could perhaps be one reason for the relatively low levels of secessionism in Africa (p. 158).

The recognition of a right to secede in liberal-democratic constitutions could be less chaotic than the recognition of the international right to secede for colonies and the resulting decolonization process.[226] Although granting the right to external self-determination of colonies played a large part in the dismantling of multinational colonial empires, multinational liberal-democratic federations should not be expected to face the same fate as colonial empires if a (constitutional or international) right to secede were recognized to the national communities that make them up. Unlike colonial empires, liberal-democratic multinational federations are usually founded on agreements and compromises between territories and government tiers. There are pacts and norms that divide powers vertically and are usually under the guardianship of courts. Such covenants usually require participation by, and often consensus between, the various layers of government before they can be amended. Thus, democratic processes take place in both the federal and federated tiers of government and the self-governing units and their citizens take part in formulating the general will of the central government. In addition, the usual territorial continuity of multinational federations makes them more reasonable and practical than the former colonial empires.

The excessive fragmentation objection and some of the counter-arguments raise the questions of the ideal size of States and the ideal number of States in the world. With this in mind, three dimensions will be singled out in order to organize a hypothetical debate: the minimum size of the new State, the minimum size of the parent State and the maximum number of States in the world. These limits should be explored considering the excessive risks for justice, political impracticability or excessive economic costs. Nevertheless, a distinction should be drawn between arguments of normative requirement and arguments of political convenience.

Following Montesquieuan intuition, the objection of excessive fragmentation would not seem problematic if the aim is to obtain a world made up of small democratic

[226] Even if there is an initial avalanche of applications, "once this backlog will have been worked down, however, there may not be much redrawing activity as people will then be content with their political memberships, and most borders will be supported by stable majorities." POGGE, T.W. "Cosmopolitanism and Sovereignty", p. 70.

and egalitarian republics.[227] In addition, if foreign trade is a good tool for economic and social progress, nowadays small States have greater incentives to open their economies. That said, Madisonian intuition fears that small democratic republics will not be able to address the danger of *factions* properly.[228] In order to combat them, small republics lean towards a large (con)federal republic.[229] According to these two authors, since eradicating the factions would be contrary to human rights, in large federal republics it would be more difficult for them to become the majority or to exert such strong influence as they can in smaller republics. In other words, a larger State allows the existence of a higher number of factions and confrontation between them. In line with this theory, the larger a State is, the less direct contact there will be between governors and governed, and the more difficult it will be for a faction to take control of public power.[230] But if this objection is clear and unequivocal, why don't these federalists become pure centralists in order to separate public power from factions as far as possible? The answer could be that the key lies not so much in the size of the State, but in establishing a proper system of *checks and balances.* In this context, constitutionalization of the right to secede itself can be justified and work as a mechanism of check and balance.[231]

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[227] See MONTESQUIEU *The Spirit of Laws.* "As equality of fortunes supports frugality, so the latter maintains the former. These things, though in themselves different, are of such a nature as to be unable to subsist separately; they reciprocally act upon each other; if one withdraws itself from a democracy, the other surely follows it. True is it that when a democracy is founded on commerce, private people may acquire vast riches without a corruption of morals. This is because the spirit of commerce is naturally attended with that of frugality, economy, moderation, labour, prudence, tranquillity, order, and rule. So long as this spirit subsists, the riches it produces have no bad effect. The mischief is, when excessive wealth destroys the spirit of commerce, then it is that the inconveniences of inequality begin to be felt." Vol. I, Book V, ch. VI.

[228] *Faction* is used to refer to the majority or minority group of a society that promotes and fights for an opinion, a belief or a private or party interest opposed to the rights of the rest of the citizens, to the general interest or to the shared principles of justice. This definition was inspired by Madison's: "By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." MADISON, HAMILTON, JAY *The Federalist*, No. 10, p. 43.

[229] Hamilton (*The Federalist*, No. 9, p. 39) bases his thoughts on a quotation from Montesquieu: "It is, therefore, very probable that mankind would have been, at length, obliged to live constantly under the government of a single person, had they not contrived a kind of constitution that has all the internal advantages of a republican, together with the external force of a monarchical, government. I mean a confederate republic. (...). As this government is composed of petty republics, it enjoys the internal happiness of each; and with respect to its external situation, by means of the association, it possesses all the advantages of large monarchies." MONTESQUIEU *The Spirit of Laws*, Vol. I, Book IX, ch. I.

[230] See MADISON, HAMILTON, JAY *The Federalist*, No. 9 and No. 10.

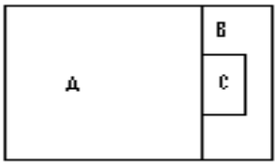
[231] For example, to check and balance a general tendency of (con)federations to centralize over the years and protect the self-government of some permanent minorities. See VAUBEL, R. "Secession in the European Union".

A common argument of socialist inspiration is that formal independence would probably create new forms of subordination. In this regard, Joseph Stalin emphasized as a requirement for exercising the right to secede that the territory must have at least one million inhabitants to avoid falling under the control of imperialist forces.[232] According to a socialist framer of the Spanish Constitution, a right to national self-determination in the form of secession would not create a new independent State but an entity which would be even more dependent on the acts of other public and private corporations.[233] However, the more supranational and international peace, cooperation and integration there is, the more viable political disintegration may become. Even if secession were neither beneficial economically nor expedient politically, this would not usually be enough to impede it, but simply to discourage it. Nevertheless, if secession resulted in greater national cohesion, it could generate more loyalty, cooperation and solidarity between citizens.[234]

The excessive fragmentation objection, however, may lead to certain reasonable material limits to the right to secede: (1) the seceding nation – population plus territory – is not big enough to assume the normal responsibilities of an independent State; (2) occupies a territory not located on the borders of the parent State; (3) occupies a territory which is economically or militarily essential for the parent State; (4) occupies a territory with a disproportionately high share of the country's wealth.[235] These limits stem from the *Principle of territoriality* and the *Principle of viability and compensation* of the hypothetical multinational contract. The former reflects that the political world is organized territorially.[236] Territorial continuity, concentration and proximity are, *prima facie*, necessary to guarantee the rule of law,

[232] In addition to this requirement to secede, Stalin also demanded the republics to have a compact majority and to be a borderland of the USSR (not encircled by Soviet territories). Moreover, Stalin subordinated the right to secede to the communist cause. In his words: "the right of self-determination cannot and must not serve as an obstacle to the working class in exercising its right to dictatorship. The former must yield to the latter". See BUCHHEIT, L.C. *Secession*, pp. 101, 124.
[233] SOLÉ TURA, J. *Autonomies, Federalisme i Autodeterminació*, p. 125.
[234] See § 1.3.3 below.
[235] BERAN, H. "A Liberal Theory of Secession", pp. 30-31.
[236] MARGALIT, A.; RAZ, J. "National Self-Determination", p. 458.

democracy and welfare.[237] The *Principle of territoriality* could, though, pose some problems as this simple model with nations A, B and C may show.



The first problem assumes that nations A, B and C form a single multinational State, where A has the largest territory and population. In this case, B could secede unilaterally in line with the *Principle of territoriality*, but C would have problems since it would not be located on the borders of the multinational State. Unilateral secession of C would create a ring- or screw-shaped multinational State formed by A and B. The borders of C would be encircled by the parent State, which would be contrary to the ideal principle set out above. Nonetheless, a number of pro-secession strategies would be open to C: (1) a negotiated, consensual or constitutional secession instead of unilateral; (2) a secession agreement with B in order to secede together; (3) a dissolution or general dismemberment of the multinational State. The second problem arises from nations A, B and C forming three different States that want to unite in a single multinational State. Since A would be the majority nation and C would not be located on the confines of the multinational State, only B would have a moral right to secede unilaterally under ideal Justice as multinational fairness. However, A or C could agree to unite upon the condition of being granted a legal right to secede. In particular, this right could be enshrined as an eternal or entrenched constitutional clause. Both problems show the importance of the

[237] Here is a brief and simple illustration of the institutional and practical relevance of the principle of territorial concentration. For the purposes of the rule of law, legislation must have some kind of territorial continuity and delimitation. In general, individuals should be able to move freely throughout the territory of the State with a certain degree of legal homogeneity and security. Without supra-State integration like the EU, it would be complicated to manage a situation in which, in a single day, most individuals cross various State borders. It would be too risky and costly to have their legal affairs and offences ruled by different legal orders. Moreover, laws need to be enforced by police, courts and other public authorities with certain territorial monopoly of force. Democracy is government of the people, by the people and for the people concentrated in a given territory. It would be very difficult to rule democratically a fragmented territory with no, or extremely porous, borders. For instance, governing colonial empires or a world State democratically would require generous territorial autonomy. The welfare state would, in turn, be complicated to manage without territorial concentration. In a fragmented State, education, healthcare and other social services could not be provided independently, but would have to be pooled between States. Extra costs, ineffectiveness, disagreements, overexploitation and free riding could be everyday problems. In addition, designing and enforcing an ambitious redistributive taxation system would be complex in the absence of territorial concentration. This discussion will continue in § 1.3.3 below.

geographic and demographic context of nations to determining their moral right to unilateral secession.

The *Principle of viability and compensation* is based on the moral right to prevent anarchy and secure a fair exit settlement. Overcoming anarchy and the state of nature is the founding purpose and essential duty of law and politics. Therefore, the parent State and the international society cannot allow secession to generate a new permanent state of nature, especially if in that state the life of every individual would be "solitary, poore, nasty, brutish, and short".[238] Additionally, beyond anarchy and war, the state of nature may lead to and legitimize the rise of a tyranny or dictatorship. Until rights, interests and duties of people can be effective in the absence of State, the *Principle of viability and compensation* shall remain a requisite for secession.[239] In the real world, these principles and limits should not be applied on an all-or-nothing basis, but in a gradual and balanced way. Moreover, many material problems lend themselves to reparation or compensation.[240]

When the requisites for secession are not fully met, the moral obligation to procure internal self-determination for the minority nation will remain. In fact, the *Principle of internal self-determination* gains importance when unilateral secession is not possible. For instance, regarding the *Principle of territoriality*, internal self-determination in the form of territorial autonomy or self-government could be a suitable solution if the seceding nation is not located on the confines of the parent State. If the seceding nation is not concentrated in a given territory (*i.e.* is spread throughout the parent State), internal self-determination could be provided through minority rights and, in particular, through institutional mechanisms for representation drawn from consociational democracies. As for the *Principle of viability and compensation*, if the seceding nation does not satisfy the material requisite to become an independent, self-sufficient State, as might be the case of some indigenous peoples or inhabitants of small islands, internal self-determination is again a significant alternative.[241] In today's world, however, the standard for

[238] HOBBES *Leviathan*, ch. XIII.
[239] See WELLMAN, C.H. *A Theory of Secession*, chs. 2-3.
[240] See § 1.3.4 below.
[241] See MILLER, D. *On Nationality*, pp. 116-7.

viability should be low.[242] Military, economic and political self-sufficiency, for instance, may not be required to secede in international contexts where military alliances, economic integration and political union can ease independence.

1.3. The principle of nationality

1.3.1. Nations as encompassing groups

Regarding the subjects of a moral right to self-determination, Margalit and Raz proposed a broad concept of "encompassing group" with six relevant characteristics for holding such a right:[243]

1. The encompassing group has a common character and culture which include multiple relevant aspects of life such as common language, traditions, rituals, ceremonies, festivities, myths, legends, heroes and artistic trends. [244] Consequently, encompassing groups have a "pervasive culture" (in the words of Margalit and Raz), or a "societal culture" (in Kymlicka's terms) or "integrating culture" (in Kai Nielsen's words).[245] This sort of culture is similar to a primary good in the Rawlsian sense since it provides, among other things, a context of choice.[246]

2. This pervasive, societal or integrating culture marks the members of the group and the people growing up among them, also in their personal decisions. The group culture is thus relevant at personal level. This common culture provides a collective identity through socialization. This collective identity has historical continuity and

[242] See BUCHHEIT, L.C. *Secession*, pp. 230-4.
[243] MARGALIT, A.; RAZ, J. "National Self-Determination", pp. 443-8.
[244] Nonetheless, in the next section we will observe that the *structure* of nations as encompassing groups is at least as important as their *character* as such groups.
[245] These authors define encompassing, pervasive, societal and integrating cultures similarly. As these adjectives indicate, these cultures provide their members with meaningful ways of life spanning a wide range of human activities (social, educational, religious, recreational, economic, etc.) in both public and private spheres. In this way, these cultures are solid structures on which their members can base their life plans. KYMLICKA, W. *Multicultural Citizenship*, pp. 76, 80. NIELSEN, K. "Liberal Nationalism and Secession", pp. 124-5.
[246] See KYMLICKA, W. *Liberalism, Community and Culture*, ch. 8. NIELSEN, K. "Liberal Nationalism and Secession", p. 125.

this shared history unites the group. The existence of the group, though, does not depend on all the members sharing this identity derived from the cultural tie.[247]

3. Qualification for membership depends, to a large extent, on mutual recognition. Such mutual recognition tends to endorse a weak form of consent, as individuals should view themselves as members of that group.[248] To be or not to be a member, however, does not depend on express, unanimous, individual consent.

4. The status of member of the encompassing group is important when it comes to self-identification. Being a member of an encompassing group is relevant at not only personal but also external level, for others perceive the individual as one of their own or not. It is a sort of primary source of identification and recognition. Encompassing groups are constitutive of personal identity and, therefore, the wellbeing of members of a constitutive community is affected by the successes and failures of their individual fellow members and of the group as a whole.[249] Fortunately, contemporary liberalism has learned from the communitarians that individual wellbeing depends to a large extent on the health of different non-contractual groups to which individuals belong.[250]

5. "Membership is a matter of belonging, not of achievement".[251] Belonging rarely stems from demonstrating particular capacities, skills or accomplishments, but often from involuntary facts such as the place of birth as well as more or less voluntary acts such as marriage, migration and residence. According to Margalit and Raz, to be a good Irishman is certainly a merit, but to be an Irishman is not. Generally, an individual does not choose to be a member of an encompassing group, but belongs

[247] If religious groups are also understood as, possibly, encompassing groups, they should be distinguished from national groups. Religious communities can be more exclusive, as they tend to require adherence to a particular belief. By contrast, (liberal) nations are more inclusive, because, generally, the group culture does not require members to share any conception of the good. Likewise, (liberal) nationalism does not require sharing a political ideology (members can be liberal, conservative, socialist, and so on) or religion (members can be Catholic, Protestant, Jewish, and so forth). What really matters is the will to live side by side and to be identified as a community of individuals with mutual sympathies who inhabit the same territory, share some memories and wish to govern themselves on secular (as opposed to spiritual) affairs.
[248] KUKATHAS, C. *The Liberal Archipelago*, p. 201.
[249] TAMIR, Y. *Liberal Nationalism*, p. 96.
[250] WELLMAN, C.H. *A Theory of Secession*, p. 49.
[251] MARGALIT, A.; RAZ, J. "National Self-Determination", p. 446.

to it because of who he or she is.[252] Although encompassing groups are based on a certain collective conscience of belonging and recognition, these communities constitutive of personal identity are neither necessarily involuntary nor essentially voluntary.[253] Since membership of encompassing groups, in general, and of national communities, in particular, does not generally stem from contracts, capabilities, talents, achievements or political values, it provides members with a wide range of personal choice as well as a secure and lasting sense of identity and belonging.[254] Therefore, this enables liberal theory to turn national encompassing groups into appropriate units to distribute and guarantee freedom and equality notwithstanding natural, social and political differences among their members.[255]

6. The encompassing group is anonymous. It is not a small group in which everyone knows each other, nor is it based on face-to-face relations. It could be called an imagined group because it is too big for all the members to have a direct personal relationship with all the others. But a group that is *imagined* does not mean that it is *imaginary*.[256] Belonging to encompassing groups demands general, as opposed to individual, characteristics. Moreover, since membership is not necessarily exclusive, individuals can belong to more than one encompassing group at the same time.[257]

The self-determination theory of Margalit and Raz is based on a liberal nationalism because they consider that the encompassing groups are relevant for recognition,

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[252] Miller argues that, for the most part, nationality, or national identity, is something involuntary, unchosen and unreflectively acquired. He goes on to qualify this by saying that in some cases people choose their nationality, for example, following migration. MILLER, D. *On Nationality*, p. 43.

[253] TAMIR, Y. *Liberal Nationalism*, ch. 1. Individuals who form part of certain communities constitutive of identity can decide to cease to form part of them. For instance, emigration makes it possible to cease to be a member of a national community. Nations and States are neither voluntary associations nor communities of fate. Some members are born, by destiny, in a nation and State and, to a certain extent, remain members of it by their own will. Indeed, not changing can also be a choice and a form of exercising individual will.

[254] That belonging to a national community does not depend on sharing common political values, see § 1.3.3 below.

[255] In similar vein, KYMLICKA, W. *Multicultural Citizenship*, pp. 105-6.

[256] In particular, considering nations as imagined communities does not imply that they are false, fictional, unreal, fabricated and non-existent. See ANDERSON, B. *Imagined Communities*, p. 6. MOORE, M. *The Ethics of Nationalism*, p. 13. KEATING, M. *The Independence of Scotland*, p. 12.

[257] In multinational polities, both competition and complementarity occur frequently between citizens' identification with one nation or another. Competition and complementarity between belonging to different nations as encompassing groups do not mean that belonging to these groups is normally and preferably an individual act resulting from thought and reflection.

respect and development of the identities, rights and interests of their members. Building on J.S. Mill's argument about individual liberty, the moral right of the encompassing group to self-determination relies on the intuition that each group is the best judge of its own interests. There is a genus-species relationship between encompassing groups and nations, the former being the genus while the latter the species.[258] However, nations are so significant species of the genus that some wonder whether the notion of encompassing group is a redefinition of the concept of nation in broader terms.[259]

According to Margalit and Raz, encompassing groups need the following requirements to have a unilateral right to secede: (1) they should aim for the wellbeing of their members; (2) their will to secede must be shared by a substantial majority in the territory, "reflecting deep seated beliefs and feelings of an enduring nature"; (3) they are likely to respect the basic rights and fundamental interests of the inhabitants of their territory; (4) they ought to prevent or minimize gravely damaging the legitimate interests of other countries when seceding and building a new State.[260] The last requirement is clearly connected with the *Principle of avoiding serious damage to third parties* of Justice as multinational fairness which provides that, as a result of secession, no such damages shall be caused to third parties which have no reasonable duty to bear them. If the third parties have no duty to bear them, such damages shall be repaired or compensated for. If reparation or compensation is not possible, it may then be fair to impede secession.

Some may reasonably doubt whether this principle would be part of the hypothetical multinational contract in which the aim of the national communities is to pact the principles of justice for their multinational State.[261] Since the

[258] Encompassing groups can include both national and ethnic minorities. These species of this genus will be discussed in the next section.
[259] In this regard, Buchanan classifies the theory of secession of Margalit and Raz as an ascriptive theory based on the principle of nationality: "thus Margalit and Raz appear to embrace the Nationalist Principle when they ascribe the right to secede to what they call 'encompassing cultures', defined as large-scale, anonymous (rather than small-scale, face-to-face) groups that have a common culture and character that encompasses many important aspects of life and which marks the character of the life of its members, where membership in the group is in part a matter of mutual recognition and is important for one's self-identification and is a matter of belonging, not of achievement." BUCHANAN, A. "Theories of Secession", p. 38.
[260] MARGALIT, A.; RAZ, J. "National Self-Determination", pp. 457-60.
[261] See § 1.2.2 above.

contracting nations in the original position are mutually disinterested, strict contractual rationality could refuse to take into consideration the legitimate interests of third parties. Arguably, as the nations behind the veil of ignorance would know the existing international law, they could be aware that, under such law, any State which causes damage to another must compensate for it. They would also bear in mind the importance of international recognition for claiming and consolidating statehood. This said, the principle of avoiding serious damage to third parties could be part of the hypothetical contract of *The Law of Peoples*, for Rawls generally admits that his statement of principles is incomplete and specifically claims that the Law of Peoples should specify the right to independence (including secession).[262] If so, the idea of compatibility in parallel between hypothetical contracts could help to endorse this principle.[263] Beyond contractualism, this principle could be upheld by an ideally rational and impartial spectator.[264] Despite the methodological doubts, the intuition that such principle of justice is rational and fair does not seem excessively controversial in theory (regardless of the controversies which it may raise in practice).

The potential of the concept of encompassing groups lies in various points. Defining nations as encompassing groups emphasizes some general group structure beyond certain particular group character. The characterization of encompassing groups also highlights the perceptions and consciousness of individuals as subjective elements of the definition, since "in matters of respect, identification, and dignity, subjective responses, justified or not, are the ultimate reality so far as the wellbeing of those who have them is concerned."[265] These structural and subjective elements of nations as encompassing groups could be a kind of interface between ascriptive and elective theories. Moreover, the open texture and vagueness of this concept are of interest to

[262] RAWLS, J. *The Law of Peoples*, § 4.2.
[263] See § 1.2.4 above.
[264] Although great philosophers such as Hume used the "ideally rational and impartial spectator" method to extract the principles of justice, Rawlsian contractualism or constructivism is preferred here because, amongst other reasons, in the latter method the contracting parties are autonomous to agree their principles of justice. Justice as multinational fairness, drawing on Kant and Rawls, rejects a heteronomous moral theory and seeks an autonomous method to construct the fundamental principles of justice which have to govern societal co-existence. Moreover, the method is based on rational and reasonable deliberation and choice between free and equal beings. See RAWLS, J. "Kantian Constructivism in Moral Theory" in *Collected Papers*, p. 311. RAWLS, J. *A Theory of Justice*, p. 161.
[265] MARGALIT, A.; RAZ, J. "National Self-Determination", p. 454.

identify nations for the purpose of territorial self-determination in different contexts. Despite such vagueness, understanding nations as encompassing groups may be useful to distinguish them from other groups of individuals, such as social classes, who are not to be granted any right to territorial self-government.[266] Last but not least, the conceptualization of encompassing groups is important to defend why liberal theory should be interested in such groups to form States and other self-governing units.

1.3.2. National and ethnic minorities

A distinction between two types of cultural minority should be drawn, although both of them could fall under the definition of encompassing group discussed in the previous section: *national minorities*, which normally stem from previously self-governing peoples incorporated into a larger State who typically wish to maintain themselves as distinct societies; and *ethnic minorities*, which normally stem from arrivals of individuals and families from other countries as a consequence of migration who typically wish to integrate into the host society. This distinction makes it possible to identify two types of multicultural State: *multinational States* and *polyethnic States*.[267]

For Kymlicka, nation may mean, in a sociological sense, "a historical community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and culture".[268] Accordingly, he defines *national minorities* as "groups that formed a complete and functioning society on their historical homeland territory prior to being incorporated into a larger State".[269] Kymlicka tries to emphasize the *structure* more than the *character* of national communities.[270] Character is based more on the specific traits and contents of each national community, whereas structure is based more on the production, reproduction and modification of traits and contents. That is to say, the capacity to

[266] *Ibid*. p. 448.
[267] KYMLICKA, W. *Multicultural Citizenship*, ch. 2. MIRA, J.F. *Crítica de la nació pura*, ch. II.
[268] KYMLICKA, W. *Multicultural* Citizenship, p. 11.
[269] This definition of national minorities includes indigenous peoples. KYMLICKA, W. *Politics in the Vernacular*, p. 20 and ch. 6.
[270] See KYMLICKA, W. *Liberalism, Community and Culture*, ch. 8. TORBISCO, N. *Group Rights…*, p. 165.

engender, transmit and alter a tradition might be more relevant than the tradition in itself.[271] While character tends to focus on actuality (*present-past*), structure should encompass both actuality and potentiality (*past-present-future*).[272]

If the emphasis is placed on structure rather than on character, both national consciousness and shared will for self-government gain greater relevance. National consciousness and collective desire for self-government are key elements in the definition of nation or nationality, which dates back to the romanticism of the 1800s and is still very much alive today.[273] According to Pasquale Stanislao Mancini, consciousness of nationality is a feeling that the nation itself acquires and which "makes it capable of constituting itself internally and manifesting itself externally".[274] National consciousness is an essential factor, but is not sufficient for a group to be defined as a nation.[275] Without disdaining that the nation is a *cluster concept* which requires subjective feelings of belonging to the group, a combination of objective elements which are neither necessary nor sufficient on their own can often be identified, such as history, traditions, customs, laws, institutions, leaders

[271] When Patten rethinks about the notion of *culture*, he expounds what he calls a *social lineage account*. From this account, there is a *distinct culture* when a group of people share with one another the subjection "to a set of formative conditions that are distinct from the formative conditions that are imposed on others". Precisely, this exposure by some group of people to a common and distinctive set of formative conditions and influences is similar to what we identify as structure. In this vein, Patten insists that "what is distinctive about a particular culture is the historical lineage of its formative institutions and practices". PATTEN, A. *Equal Recognition*, pp. 50-2.

[272] Character has also been presented in a past-present-future approach nonetheless. Otto Bauer stressed that every "nation has a national character". Bauer's nation was a community based on common ancestry and, more important, common culture. However, in line with his socialist ideology, he defended an "evolutionary national policy" which called for the development and evolution of the national character. His understanding of the national character was therefore dynamic rather than static. BAUER, O. "The Nation", pp. 41, 69.

[273] See MILL, J.S. *Considerations on Representative Government*, ch. XVI.

[274] "It is the *cogito ergo sum* of the philosophers applied to nationality". MANCINI, P.S. *Della nazionalità*, p. 39. In similar vein, Rovira i Virgili wrote in 1932: "national consciousness is the decisive element which demonstrates the existence of a nationality and which gives it spiritual and political strength". "Without consciousness there is no genuine personality. Without national consciousness, territory is just a landscape, history is a phantom, law is a routine, language is just a dialect. Such elements, reduced to materiality, do not and cannot form a nation. They are a body, but soul is needed for the Nation to exist." ROVIRA i VIRGILI, A. *El principi de les nacionalitats*, pp. 17, 37.

[275] TAMIR, Y. *Liberal Nationalism*, p. 65. In similar vein, see CALHOUN, C. *Nations Matter*, p. 39: "Without the subjective component of self-understanding, nations could not exist. Moreover, once the idea of nation exists, it can be used to organize not just self-understanding but categorizations of others."

and representatives, language, popular culture, some ethical values, art, festivities, myths, and territory, whether current or ancestral.[276]

Norman tries to find certain converging points: (1) nations are a kind of human community; (2) they are neither States nor mere ethnic groups but many nations have ethnic elements and many of them have or desire statehood attributes; (3) nations cannot be identified by any particular set of properties but tend to have, or claim to have, a homeland and shared memories; (4) they are "imagined communities" or, more explicitly, "communities of sentiment"; (5) a significant number of their members believe they form a nation and deserve some kind or degree of self-determination.[277] The last points relate a sentiment of belonging with the idea of nationalism as a normative claim, but nationalism needs nations as the main subjects of its discourse. This leads to problems of endogeneity and circularity. What came first, nations or nationalism? These problems are difficult to avoid because nations are social constructions and social constructions cannot escape from normative claims and, at the same time, normative claims are not usually created in a social vacuum. They tend to nourish each other.

According to Miller, the nation is a community (1) constituted by shared belief and mutual commitment; (2) extended in history; (3) active in character – *i.e.* a community which thinks jointly, acts collectively and generates obligations; (4) connected to a particular territory; (5) with a distinct public culture – a "national character" made up of political principles, social norms, cultural traits and ideals, etc.; (6) and with aspirations towards political self-determination.[278] In short, nations generally are historical, territorial and cultural communities of obligation with political ambitions.

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[276] WELLMAN, C.H. *A Theory of Secession*, p. 98. Although myths are often similar across different nations, this resemblance might not deny the existence of the latter but stress once again the importance of structure over character. Because the relevance of myths may not lie in their originality or uniqueness but in the shared, deep-rooted and durable conviction that they are *our* myths and, for that, they bind us together as a community. All this seems to bring us to Abadal's *mythomoteur* (*i.e.* myths as creators of identity and sustaining of the group). See ARMSTRONG, J.A. *Nations Before Nationalism*, pp. 291-3. SMITH, A.D. *The Ethnic Origins of Nations*, p. 15. As we will see in the next section when criticizing the so-called *constitutional patriotism*, something similar might be said regarding moral and legal values in the sense that we do not need them to be genuine and unique for identifying the presence of a nation.

[277] NORMAN, W. *Negotiating Nationalism*, pp. 4-5.

[278] MILLER, D. *On Nationality*, chs. 2-4.

The concept of *multinational State* can be looked at from factual and from legal or institutional angles. A *de facto multinational State* can be explained by the existence of different nations within the same polity. Factual multinationality is a frequent, and not always peaceful, phenomenon bound up with the creation of modern States and which can be the result of involuntary acts such as conquest or marriage, as well as federal and other kinds of pacts. More bound up with agreed unions, there is the legal or institutional idea of multinational State. A *de jure multinational State* ought to respect and recognize its national diversity and safeguard it both legally (normally by means of constitutional law) and institutionally (often by means of institutions of self-rule and shared-rule). A *de jure* multinational State should recognize and accommodate two or more *demoi* (as *societal cultures*) in the same polity.

On the other hand, according to Kymlicka, the *polyethnic State* is born basically from migration. Consequently, the *polyethnic State* is a State in which *ethnic minorities* produced by movements of individuals or families are found.[279] Since the term *ethnic minorities* may include the descendants of immigrants who were born in the country to which their parents emigrated along with successive generations who perceive their identity as closely related to the same groups, the terms *immigrant groups* and *ethnic minorities* can often be used synonymously.[280] Along similar lines, Joan Francesc Mira proposes using the term *ethnos* for non-complex, non-modern territorial societies (non-State societies) and the term *ethnic group* or *ethnic minority* for non-territorial communities within modern States. By contrast to the specific term *ethnos* or the general term *people*, the author would reserve the term *nation* strictly for societies which are sufficiently developed, in terms of internal

[279] While Kymlicka speaks of *ethnic minorities* in *Multicultural Citizenship*, his later works compiled in *Politics in the Vernacular* often refer to such minorities as *immigrant groups*. In Miller's view, ethnic minorities do not necessarily stem from migration. According to Miller, an ethnic group is a community formed by common descendants who share cultural traits, such as language and religion, which differentiate them from outsiders. Often "a nation emerges from an ethnic community which furnishes it with its distinct identity". That said, the national community can incorporate different ethnicities, as the American nation, which subsequently incorporated Irish, Italian, and other ethnic groups to its Anglo-Saxon origins. Ethnic identities are more cultural than political, since ethnic groups do not normally aspire to become self-governing political communities. MILLER, D. *On Nationality*, pp. 19-20. MILLER, D. *Citizenship and National Identity*, pp. 127-8.
[280] TORBISCO, N. *Group Rights…*, pp. 201-2.

complexity and division of labour, to organize themselves territorially around cities.[281] He draws the following distinction between ethnic and nation groups:

> When there is territory which the group considers its own (as its 'homeland') and formal political autonomy or an aspiration to obtain it, we should not speak of *ethnos*, at least in a 'modern society', but of nationality or regionality in a lower degree. (…) Puerto-Ricans in New York pose an *ethnic* problem, but Puerto Rico itself poses a *national* problem. (…) In the Kingdom of Spain, the gypsies might give rise to ethnic conflicts, but the Basques present a national conflict. All around the world, Jews can form ethnic groups, but in Israel they are a nation.[282]

Accordingly, it might be inaccurate to talk about an ethnic minority when the cultural group considers that a territory is its own and aspires to gain formal political autonomy. An ethnic group is more likely to aspire to: (1) recognition of same civil rights – and, in the course of time, political rights; (2) equal opportunities in socio-economic terms; (3) maintaining ascription to, and the character of, the group; and (4) influencing, as such groups, common institutions. Hence, the challenge does not consist of developing different forms of territorial autonomy for ethnic groups, but of adapting laws, institutions and practices in order to make immigrants feel (more and more) at home in the receiving country without requiring complete cultural assimilation.[283] They often prefer to be integrated instead of assimilated or separated.

Inter-State migration can be either voluntary or forced.[284] One example of an involuntary movement is the situation of the Afro-American community in the USA as a consequence of the slave trade with Africans. First slavery and then physical segregation, together with economic and social inequalities, prevented fair integration of the black community. The difficulties with legal, political, economic and social integration gave birth to the nationalist, self-determinist and secessionist

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[281] According to Mira, ethnic groups are based on a combination of basic ascription, lineage, culture and differentiated consciousness. MIRA, J.F. *Crítica de la nació pura*, pp. 69-70, 113-4. *Ethnos* is a Greek word meaning people, which could come from *ethos*, which means norm or custom. Regarding the etymology of nation, see § 2.1.4 below.

[282] MIRA, J.F. *Crítica de la nació pura*, pp. 61-2.

[283] *Ibid.* pp. 62-3. TORBISCO, N. *Group Rights…*, p. 202. KYMLICKA, W. "Liberal Multiculturalism as a Political Theory…".

[284] Although voluntary nature can often be questioned from an economic materialism point of view.

language of the "Black State".[285] However, this claim to statehood failed partly because the Afro-Americans living in the USA were not a nation, were not concentrated territorially and their genuine demands were equal rights and opportunities. It is therefore difficult for violation of the rights of a racial group to lead *de facto* to secession.[286]

Nonetheless, an ethnic minority can become a national minority, as illustrated by the British settlers all around the British Empire, the Spanish settlers in the different territories of the Spanish Empire and the French settlers in Quebec. They had no intention of integrating into the society receiving them, as immigrants normally do, but set out to reproduce the society from which they came, creating a new society with all its institutions.[287] Despite this, the distinction between ethnic minority and national minority is relevant for the purposes of theorizing about the morality and legality of self-determination and secession. Ethnic minorities generally wish to integrate without being totally assimilated. In other words, they normally aspire to equal rights and opportunities and demand no more than respect and recognition of a certain different identity. By contrast, national minorities typically aspire to territorial self-government, whether in the form of internal or external self-determination.[288] They want to secure their survival as distinct societies from that formed by the national majority.

The principle of territorial self-government implies a *principle of differentiation* which demands a significant recognition and accommodation of national minorities. By contrast, the most classical claims of ethnic minorities are for equal treatment and opportunities, non-discrimination or often (temporary) positive discrimination on grounds of historical injustices. In this regard, instead of demanding differential treatment like a national minority, ethnic minorities are more likely to demand equal treatment, rights and opportunities. While racial and ethnic spheres of equality may reject distinction, asymmetry, exclusion and separation, multinational equality often

[285] KYMLICKA, W. *Multicultural Citizenship*, pp. 24-5. The nationalist claim for a "Black State" was voiced, above all, in the southern States of the USA in the 1930s, and it was revived a few decades later under the leadership of Malcolm X.
[286] See § 2.1.3 below.
[287] KYMLICKA, W. *Multicultural Citizenship*, p. 15.
[288] TORBISCO, N. *Group Rights…*, p. 202.

acclaims them.[289] To a lesser extent than national minorities, ethnic minorities will also seek certain recognition and accommodation of their differentiated identity, but rarely claim territorial self-determination.

Some consider excessively categorical to base a theory on the mere distinction between national and ethnic minorities. Some supporters of radical multiculturalism propose understanding and treating ethnocultural groups as a continuous flow or gradual process of interpretation: as a *multicultural continuum*.[290] While recognizing that an ethnic minority can become a national minority or community, Kymlicka sustains that there are deep and relatively stable differences between the two. Differences not merely of degree, but of type. Immigrant groups rarely give rise to nationalist movements.[291] But if they are not accepted into the host society, they may end up embracing nationalism and separatism. Systematic discrimination and segregation may even encourage ethnic minorities to concentrate territorially and create institutional structures similar to national minorities.

Having reached this point, one criticism could be that the differential treatment between national and ethnic minorities is based on a mere empirical distinction between what one minority or the other normally claims. Such criticism recalls that the demands made by one minority or another can largely be explained by what they think that they can obtain.[292] As human preferences are adaptive, any normative theory should be based not on what groups are demanding, but on what they have the right to demand. The following would be a start to answering this criticism. While the national community claims the right to self-determination on its territory, the ethnic community does not normally claim, nor does it have a moral right to claim, the right to self-determination on a territory in a first historical moment.

[289] See BOSSACOMA, P. "An Egalitarian Defence of Territorial Autonomy".
[290] See TORBISCO, N. *Group Rights…*, p. 218.
[291] KYMLICKA, W. *Politics in the Vernacular*, pp. 56-60, 242. Here immigrant groups must be understood in the restrictive sense: as groups which emigrate from their countries voluntarily – not slaves; and as immigrants to the exclusion of settlers. Internal immigrants – from within the same multinational State – who are members of the majority nation but emigrate to the minority nation do not tend to create new nationalist movements, but sometimes preserve or increase their previous State national identity and State nationalism.
[292] MOORE, M. *The Ethics of Nationalism*, p. 106. Although making this criticism, Moore justifies the different treatment in this way: fairness requires that the minority nations be compensated, because they normally have national self-determination projects of their own which are incompatible with the majority nation and this dictates that they should be treated differently from other types of minorities (pp. 130-1).

Citizenship, and the attendant political rights, are acquired in the course of time (as illustrated by the passage to obtain the status of citizen), unlike other human rights (the holding of which does not depend on the status of citizen). Thus, as a political type of right, the right to territorial self-determination is also generated gradually, with the passage of time. In addition, the bond between the nation and the land in which it was born and has developed cannot be underestimated (understanding land as the ancestral or historical territory where the social and political institutions exerted and exert their influence).[293]

Intuitively, the right to national self-determination is normally perfected and consolidated with the passage of time, based on sedentary location in a given territory. As the Latin aphorism says, *prior in tempore, potior in jure* (better known in Common law tradition as "first in time, first in right"). Nevertheless, the community which first occupied the territory and the principle of democracy as a requisite for exercising national self-determination do not always fit together harmoniously. There can be a problematic tension between the temporal priority (which supports the demand for self-determination on the part of the national community which occupied the territory first) and the principle of democracy (which supports the demand for self-determination on the part of the newly arrived ethnic community that, with the passage of time, has become the majority national community in the territory traditionally occupied by the older national community).[294]

Having defended the normative relevance of time and land, the next stage is to consider whether the decision to emigrate counts as voluntary. One of the normative arguments used by Walzer and Kymlicka to deny ethnic minorities the right to

[293] "Nations look for countries because in some deep sense they already have countries: the link between people and land is a crucial feature of national identity". WALZER, M. *Spheres of Justice*, p. 44.

[294] In cases such as these, various measures can be taken: (1) grant a right of internal self-determination to the traditional national community; (2) give the oldest national community a right of veto or of non-application of the legislation of the parent State in its community or territory; (3) if the ethnic community became the majority as a result of colonialism or violent occupation, it could be appropriate to adjust the normal rules of the principle of democracy under which every individual has to have a vote, as it would be just to give greater value to the votes of the original colonized inhabitants; (4) conversely, in cases where the ethnic community became the majority as a result of involuntary relocation, such as the slave trade, adjustment of the "one man, one vote" principle in favour of the oldest national community seems intolerable.

national self-determination rests on that they emigrated voluntarily.[295] In general, a higher margin of choice differentiates ordinary immigrants from refugees. Beyond that, since it is still not clear how voluntary the decision to emigrate is, let us take as an example a situation not rare even within advanced liberal democracies. Imagine that a family runs out of money because both parents lose their jobs as a result of a severe economic crisis. In order to raise their children and give them a proper education, parents are forced to sell their house for a low price and move to a very modest apartment in a deteriorated neighbourhood. Although the choice to sell their house is strongly conditioned or even determined by the circumstances, *prima facie* this would not be a vitiated consent, at least legally speaking.

Generally, inspired by private contract law, it seems that the existence of consent can be denied or challenged when there is violence, force, intimidation, deceit, abuse or manifest error. Therefore, it seems plausible to interpret in a broad way what a voluntary decision is or should be. Most immigrants, rather than refugees, fit in the hard choice context that these parents had to take in order to raise their family. In some Continental civil law regimes, these parents could rescind the contract if the buyer paid them an amount far below the market price. We may understand this as an abuse or as a deceit of the buyer. Analogously, if receiving States impose abusive conditions for integration or lie on what these conditions consist of, they can be called into question. On the other hand, if the family was forced to sell by threat of illegal and severe punishment of some of their members, this would clearly vitiate their consent. The latter situation resembles more the case of refugees than that of ordinary immigrants.[296]

If or when the previous arguments are not strong enough to consider the migration itself voluntary, the choice of country of destination can be deemed a more voluntary decision. Therefore, instead of the decision to emigrate in itself, the decision on which country to emigrate to seems a better foundation for a duty of

[295] KYMLICKA, W. *Multicultural Citizenship*, pp. 62-3, 96-9.
[296] See PATTEN, A. *Equal Recognition*, ch. 8. The author offers a compelling account to explain why immigrants' choice should count as voluntary, why immigrants can alienate their cultural rights and why the receiving society is morally permitted to give priority to national groups over immigrants in allocating scarce cultural rights. His last argument allows him to conclude that, even in cases where migration is not voluntary, the receiving State can prioritize the self-determination rights of the former over the latter.

integration (not of complete assimilation) on the part of the immigrant, accompanied by renunciation of the right to national self-determination. Another option would be generally to consider acceptance by the receiving country to be an act of grace, conditional on integration of the immigrant and renunciation of national self-determination.[297] In this context, it is crucial to remark that the receiving country generally accepts individuals and families rather than whole societies or entire communities.[298] Otherwise, granting to immigrant groups self-determination rights over a piece of territory would imply giving them a right to colonize partially the receiving country.[299] For all these reasons, it is not wise to place excessive burdens on the countries receiving immigrants, just because of the fraudulent or culpable behaviour of the countries of origin.[300]

Finally, there are various more institutional and utilitarian grounds for this integration and renunciation: (1) national minorities tend to be concentrated territorially in a way that makes territorial self-government possible, whereas immigrants and ethnic minorities do not normally show the same pattern and degree of territorial concentration. (2) By prioritizing national minorities over immigrants, a State is imposing a disadvantage on the latter that, in any case, has to be imposed on some group of people given the impossibility of extending strong rights to self-determination to all groups.[301] (3) If immigrants and ethnic minorities did not have this obligation of integration and renunciation of national self-determination, as a general rule, this would inevitably lead to even greater closing of State frontiers. (4) And, the more open the frontiers are, the more choice of country of destination

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[297] On the acceptance of immigrants as a liberty of States, see WALZER, M. *Spheres of Justice*, ch. 2. However, Walzer's theory on immigration and naturalization seems to have certain incoherence: it is a theory based on the protection of cultural membership that ends up only protecting *political* membership (*i.e*. the State and its national majority) rather than *cultural* membership (*i.e.* the cultural minorities within the State). See KYMLICKA, W. *Liberalism, Community and Culture*, ch. 11.

[298] This is a significant difference between immigrants and settlers. The colonizing people and settlers have no intention of adopting the nationality of the territory which they colonize, but instead set out to recreate a complete society anew. By contrast, immigrants are normally ready and willing to take the nationality and citizenship of the receiving country. Consequently, to treat immigrants as national minorities would be to treat them as settlers. See KYMLICKA, W. *Multicultural Citizenship*, pp. 78, 95.

[299] KYMLICKA, W. "Liberal Multiculturalism as a Political Theory…". BAUBÖCK, R. "Beyond Culturalism and Statism", p. 27.

[300] That said, the better receiving States fulfil their duty to assist burdened societies in establishing just political and social regimes, the more legitimate is the limitation of cultural rights to immigration. In similar vein, WALZER, M. *Spheres of Justice*, p. 48.

[301] PATTEN, A. *Equal Recognition*, p. 294.

immigrants have. The next section will show how, amongst other roles, territorial frontiers perform the function of protecting the national identities of States.

1.3.3. A defence of national self-determination

In an international society largely dominated by States, the right of a national community concentrated in a given territory to decide on its independence should be considered an instrument to obtain the ideal of self-determination.[302] A look at today's territorial boundaries between liberal democracies shows that the principle of nationality plays a significant role in their lines. Nations might not correspond unequivocally to States, but there is a close correlation. For Hegel, nations have a tendency to form States, but reaching that destination may take a long time and some may not succeed.[303] Quite often nations emerged before the current States, but it is also true that States have created or adapted their nations. Despite many States being *de facto* multinational, one purpose of frontiers can be related to the principle of nationality – both nation-building and nation-keeping. Indeed, territorial borders are frequently given the function of protecting the national cultures within them, especially the dominant national culture. This national pluralism can be attributed more to an accident of history than to a quest for multinational justice. That is to say, although numerous nation-States have wanted to impose themselves over their minority nations, the latter have tenaciously resisted assimilation.[304]

According to the principle of nationality, national boundaries and State boundaries should coincide or tend to coincide.[305] This is a kind of political principle which defends consistency between the national unit and the political unit.[306] This principle could be interpreted, at least, in two ways. One interpretation could empower States to build a nation within their frontiers. In the early stages of the nation-States, the nation-building was often to the detriment of individual and

[302] MARGALIT, A.; RAZ, J. "National Self-Determination", p. 441.
[303] See HEGEL *The Philosophy of History*, pp. 75, 419. HEGEL *Philosophy of Right*, §§ 347-51.
[304] KYMLICKA, W. "Territorial boundaries", pp. 253-4.
[305] "It is in general a necessary condition of free institutions that the boundaries of governments should coincide in the main with those of nationalities". MILL, J.S. *Considerations on Representative Government*, ch. XVI.
[306] In similar vein, see GELLNER, E. *Nations and Nationalism*, p. 1.

minority rights. Contemporary liberalism, partly because of the unfeasibility and complexity of States being ethnoculturally neutral, tends to accept nation-building, provided that certain basic rights of individuals and minorities are recognized and respected. Another interpretation of the principle of nationality therefore implies recognition of the right to internal and external self-determination of minority nations. Since States are not nationally neuter, national self-determination is a kind of demand stemming from Justice as multinational fairness. In the end, these two interpretations are connected. They become two sides of the same coin.

Those who believe no territorial boundaries should exist could argue that we should not take the trouble to study the moral and legal arguments for redrawing them. Even if some reject frontiers for cosmopolitan reasons, their present existence creates a need for a theory to study their lines, albeit only as a transitional measure, with the ultimate aim of abolishing them. The purportedly cosmopolitan criticism that the right to secede is a breach of the principle of equality between citizens is, to a certain extent, distorted by the fact that all too often the specific line of frontiers has been the result of unjust and arbitrary events. A brief defence of the existence of territorial boundaries will now be offered to develop a more than transitional justification of the need to study how to (re)draw the boundaries.

Territorial boundaries perform the function of delimiting a physical area within which a group of inhabitants and its government assumes responsibility for its territory, especially the production of its land and industries, the size and distribution of its population and its environmental sustainability in the medium and long term.[307] Frontiers also serve as a functional framework for exercising democracy, for safeguarding rights and liberties, for providing welfare, and for excluding, penalizing or repressing free riders, wrongdoers and delinquents. In this respect, States and their borders serve to assign special responsibilities and obligations to protect and promote the interests of their citizens.[308] Drawing inspiration from the *tragedy of the commons* theory, if no specific people and government were responsible for the territory, this could easily lead to over-exploitation of resources, lack of investment, over-population and environmental

[307] RAWLS, J. *The Law of Peoples*, § 4.3.
[308] GOODIN, R.E. "What is so Special about Our Fellow Countrymen?", pp. 680-2.

calamities.[309] Last but not least, frontiers perform the function of protecting and promoting national communities and cultures.[310]

There are at least two objections to this defence of territorial boundaries. First, these tragedies have happened and will continue to occur despite the existence of borders. One answer could be that these issues are considerably attenuated when territories are ruled by liberal-democratic peoples. Employing a counterfactual argument, one could imagine that these problems would be greater without these frontiers. This leads on to the second objection: these tragedies would be addressed more rationally and fairly by a global democratic republic. This objection seems reasonable. Nevertheless, it is dubious whether such a worldwide republic would be a desirable ideal in democratic and plurinational terms. Moreover, even if such a republic did exist, it would be best that it took the form of a multinational (con)federation, thus preserving certain territorial boundaries.[311] Indeed, the mentioned tragedies should be tackled at both internal and international level.

Let us return to the link between territorial boundaries and the principle of nationality. John Stuart Mill defended the suitability for the territorial boundaries of (representative) governments to coincide with those of nationalities. This appropriateness arose from the tension which Mill perceived between national pluralism and (representative) democracy. In this regard, he was pessimistic about the capacity of multinational societies to govern themselves democratically. For

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[309] HARDIN, G. "The Tragedy of the Commons", pp. 1243-8.

[310] See WALZER, M. *Spheres of Justice*, ch. 2. This function is drawn from and limited by liberal nationalism. By way of example, nationalism dictates that individuals born within the State frontiers or members of the nation who live in the diaspora should be given preference to acquire citizenship ahead of other immigrants, whereas liberalism dictates that protection of the national community and culture ought to give way to political refugees facing severe and unjust condemnation in their own country.

[311] Even a cosmopolitan like Kant advocates, in his Second Definitive Article of a perpetual peace, that the law of nations should be founded on a federation of free States. According to him, this federation of peoples would not be an international State (with the risk of inescapable tyranny), but a group of States, confederation or partnership. See "Perpetual Peace", pp. 102-5. "The Metaphysics of Morals", pp. 165, 171. Both in: KANT, *Political Writings.* For Kelsen, "There can be no doubt that the ideal solution of the problem of world organization as the problem of world peace is the establishment of a World Federal State composed of all or as many nations as possible. The realization of this idea, however, is confronted with serious and, at least at present, insurmountable difficulties". "Only wishful thinking and ignorance of decisive facts allow us to underestimate the extraordinary difficulties we must encounter in organizing such a World Federal State; especially is this true if its constitution is to have a democratic character." KELSEN, H. *Peace through law*, § 1. See also POGGE, T.W. "Cosmopolitanism and Sovereignty", p. 63.

Mill, without a certain homogeneity, the government would be coercive. The principle of democracy had to go hand in hand with the principle of nationality, as he believed: "Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist". Thus, according to him, "where the sentiment of nationality exists in any force, there is a *prima facie* case for uniting all the members of the nationality under the same government, and a government to themselves apart".[312]

Democracy needs mutual understanding, trust and loyalty. A common language certainly helps to understand one another and often facilitates trust and loyalty.[313] As Mill insinuated and later authors theorized, a common national identity may serve to develop the liberal ideals of equality, justice and democracy.[314] Equality and justice are attained more easily when they are the fruit of the feelings of trust, loyalty and solidarity which unite members of the same national community, especially if we accept that such community generates special obligations often more intense and extensive than our general obligations to humanity.[315] Anderson sees the nation as an imagined "horizontal comradeship" which generates such fraternity that its members are often willing to give their lives for it. He reminds

[312] MILL, J.S. *Considerations on Representative Government*, ch. XVI. At the end of the chapter he adds: "From that time, if the unreconciled nationalities are geographically separate, and especially if their local position is such that there is no natural fitness or convenience in their being under the same government (as in the case of an Italian province under a French or German yoke), there is not only an obvious propriety, but, if either freedom or concord is cared for, a necessity for breaking the connection altogether." In the late 20th century, Walzer argued that if the community is so radically divided that a single citizenship is impossible, then its territory must be divided too. WALZER, M. *Spheres of Justice*, p. 62.

[313] See HOBSBAWM, E. *Age of Empire*, ch. 6. ANDERSON, B. *Imagined Communities.*

[314] From a liberal egalitarian perspective, see KYMLICKA, W. "Territorial Boundaries", p. 249 *et seq*. From a socialist perspective, see LENIN, V.I. "The Right of Nations to Self-Determination".

[315] It is not that we cannot nor should not have feelings of solidarity towards the whole of humanity. Nevertheless, in both descriptive and normative terms, a common identity, a past consisting of shared victories and defeats, a present consisting of constant relations and a will for self-government, together, in the future generate a more intense union with our nation than with humanity as a whole. It is similarly legitimate to feel special moral obligations towards your family and friends that are more intense than towards a fellow national, fellow citizen or stranger. See MILLER, D. *On Nationality*, ch. 3. COUTURE, J.; NIELSEN, K.; SEYMOUR, M. (ed.) *Rethinking Nationalism*, pp. 623-5.

cosmopolitan critics that nations inspire love, often of a sort that allows great sacrifices.[316]

Nationalism promotes fraternity and solidarity and, thus, smooths the operation of the welfare State.[317] The common national identity establishes a special relationship between donor and receiver which, despite the anonymity, produces solidarity, as the sacrifice is considered to be 'for one of us'. These special obligations between fellow nationals take firmer shape when State and nation correspond to a large extent, since State powers and actions are crucial to ensure the ties and public goods promoted by nationalism.[318] Historically, even to this day, liberal egalitarianism and nationalism often go hand in hand.[319] Although nationalist theories do not necessarily include any particular conception of social justice, the relationship between nationalism and egalitarianism is detected not only in liberal egalitarian doctrines, but also in socialist egalitarianism and non-egalitarian liberalism. From radical egalitarianism, Lenin observed that the national movements constructed as movements of the masses had contributed to overcoming the old regime, in an initial phase of liberation from and democratization of capitalism.[320] In theory, Marxist-Leninist communism was an internationalist ideology, but in practice, especially from World War II on, socialist revolutions and the States which emerged from them came to be defined in national terms such as China, Vietnam and

[316] This love, he follows, is shown in the great cultural productions of nationalism – such as poetry, prose, drama, music and plastic arts – of all forms and styles. ANDERSON, B. *Imagined Communities*, pp. 7, 141. Anderson links racism and antisemitism to class ideologies more than to nationalism (pp. 149-50).
[317] TAMIR, Y. *Liberal Nationalism*, p. 96.
[318] MOORE, M. *The Ethics of Nationalism*, p. 37.
[319] This is illustrated by the development of liberal egalitarianism in small nation-States in Europe, such as Sweden, Norway, Denmark or the Netherlands. This does not mean that nation-States are necessarily more egalitarian. For example, although there is more national division in Canada, Belgium and Spain than in the USA, the former are more egalitarian. The presence of a State-wide national consciousness helps to develop welfarism and redistribution policies together with other factors such as the ethics of the nation or nations, and the institutional set-up including electoral, political party, collective bargaining systems. In addition, multinational States usually equip themselves with the institutions of consensual democracies and the need for a broad consensus can create barriers to extensive economic redistribution between citizens and territories. That said, economic redistribution can take place within the sub-State nations in such a way that high general redistribution is obtained.
[320] See § 2.1.2 below.

Cuba.[321] In the end, communism exploited the feeling of "horizontal comradeship" which nationalism creates.

From non-egalitarian liberalism, some understood nationalism and socialism as "inseparable forces".[322] The *neoliberal* Friedrich A. Hayek wrote that although socialism was internationalist in the realm of ideas, it became "violently nationalist" when put into practice.[323] The same author also criticized national boundaries for generating differences in standards of living which become a source of friction between nations. Hence, he defended the creation, expansion and gradual proliferation of multinational federations and an international political authority (also in the form of a federation) vested with the minimum powers without which it would be impossible to preserve peaceful relations.[324] Hayek seems to follow the line mapped out before him by Lord Acton. Certainly, some classical liberals have, on occasion, come out against the principle of nationality. Acton considered that "the coexistence of several nations under the same State is a test, as well as the best security of its freedom", reasoning that "liberty provokes diversity, and diversity preserves liberty". For Acton, the presence of different nations under the same polity has effects similar to the independence of the Church within the State. That is to say, Acton thought that checks and balances between nationalities could watch over negative liberties.[325] Albeit against the principle of nationality, he defended that State patriotism is an ethical patriotism. Acton's political nation, the State, is the sole creator of political obligations and, as such, the sole holder of political rights.[326] Against these theses, we should recall that while the liberal State may be non-confessional, it cannot be non-national. Today, liberal nations and nationalism are and should be capable of encompassing and accommodating a wide cultural,

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[321] ANDERSON, B. *Imagined Communities*, p. 2. Socialist movements and States have tended to become national not only in form but also in substance. This is also the place to recall the Latin American revolutionary motto "*Patria o muerte*". Anderson warns that even the Soviet authorities imposed a kind of Russian nationalism (p. 46). Interestingly, in 1924, Otto Bauer argued that socialism allows the "full self-determination by the nation", which for him means the complete realization of the nation as a cultural community of all members, as happened "in the era of clan communism". BAUER, O. "The Nation", in particular, pp. 48-51.
[322] HAYEK, F.A. *Law, Legislation and Liberty. Volume 2. The Mirage of Social Justice.* p. 134.
[323] HAYEK, F.A. *The Road to Serfdom*, pp. 105-7.
[324] *Ibid.* pp. 163-76.
[325] ACTON, J.E.E. "Nationality", par. 19.
[326] *Ibid.* pars. 23-5.

political and social diversity. Acton's final thoughts are more in tune with a State nationalist than a multinationalist.

Giuseppe Mazzini exclaimed "*La Patria è una Missione, un Dovere comune*".[327] In similar vein, Ernest Renan exalted "*une nation est donc une grande solidarité, constituée par le sentiment des sacrifices qu'on a faits et de ceux qu'on est disposé à faire encore*".[328] More academically, Miller argued that nations are ethical communities which give rise to special obligations between their members which are often more intensive and extensive than those that bind us to the rest of human beings.[329] Although it might seem intellectually purer and more attractive to adopt an *ethical universalism* instead of an *ethical particularism*, several reasons could justify special obligations between fellow nationals.[330] And these special obligations

[327] MAZZINI, G. *Scritti*, p. 462. According to Mazzini, this common duty arising from sharing a national consciousness is important because without it (and without faith in God) universal suffrage can turn into a system for numerical oppression, of the more over the less. MAZZINI, G. *Doveri dell'uomo*, p. 17. Similarly, Mancini said that conservation and development of nationhood was not only a right but also a legal duty for Humanity. MANCINI, P.S. *Della nazionalità*, p. 41.

[328] RENAN, E. *Qu'est-ce qu'une nation?*, p. 29.

[329] MILLER, D. *On Nationality*, chs. 2 and 3. In similar vein, see TAMIR, Y. *Liberal Nationalism*, p. 98.

[330] (1) *Reasons based on the sociability of human nature:* since human beings are cultural, gregarious and contextual individuals and since most of them have limited altruism, an intensification of altruism towards one's own culture, community and context seems intuitive. (2) *Sentimental and psychological reasons related to identity and fraternity:* sharing a national identity, which is an important part of our own individual identity may engender and legitimize special obligations. If special obligations stemming from friendship, love and family ties are acknowledged and accepted, why should we not recognize and accommodate special obligations stemming from other fraternal ties such as patriotism and nationalism? "However attractive a conception of justice might be on other grounds, it is seriously defective if the principles of moral psychology are such that it fails to engender in human beings the requisite desire to act upon it", wrote Rawls in *A Theory of Justice*, p. 398. Thus, ethical humanism can be excessively demanding. (3) *Reasons based on the community and its attendant obligations:* some special obligations may honour ties of affection and fraternity, instead of a justice founded on purely impersonal criteria. Common sense gives certain priority to the 'we feelings'. "Political association, like family and friendship and other forms of association more local and intimate, is in itself pregnant of obligation." See DWORKIN, R. *Law's Empire*, p. 206 *et seq*. (4) *Reasons based on contractualism:* if the political rights and obligations of a society are founded on some social contract, it seems reasonable that the contracting parties should enjoy special rights and obligations in comparison with human beings from other societies. Although the contract may be hypothetical, the nature and feelings of the contracting parties are important. (5) *Normative reasons based on national self-determination*: being unable to treat members of the nation differently from other human beings could negate the idea of national self-determination. If all the obligations had to be universal, there would not seem to be room for communities, nations and States. (6) *Normative reasons based on reciprocity*: the likelihood that mutual cooperation is greater between members of our own nation, combined with the moral capacity to demand extra efforts from compatriots, leads to accept more intense and extensive obligations towards fellow nationals. By contrast, universalism could lead to individualistic egoism if solidarity to foreigners were denied since no similar solidarity would be expected from them. (7) *Institutional and utilitarian reasons:* because solidarity and fraternity towards humanity are difficult to manage institutionally – imagine how complicated to establish a worldwide liberal egalitarian democracy would be, it is more realistic

to compatriots seem to be generalizable or universalizable in a similar way as to friends and family.[331] What is more, defending the moral bonds stemming from the national community does not mean replacing liberal morality and other sources of moral obligations.[332]

Interestingly, special relationships between fellow countrymen do not only operate as *magnifiers* or *multipliers* of pre-existing moral rights and duties. On the one hand, special relationships between compatriots tend to strengthen some *positive rights and duties* such as the rights to political participation, to welfare benefits and to diplomatic protection and the duties of solidarity and mutual aid. On the other, such special relationships tend to weaken some *negative rights and duties.* For instance, unlike nationals or citizens, foreigners generally do not have to bear certain patriotic and civic burdens, such as performing compulsory military service, defending the country in the event of invasion, serving at a polling station or on a people's jury and knowing the official language.[333] Even if foreigners can be excluded from certain political rights or professions and from owning land, the State's duty to protect the safety and property of foreigners on its territory shall be at least the same as its duty towards its own citizens, and, additionally, the legal situation granted to a foreigner must not be below a minimum level of civilization.[334]

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to opt for more intense and extensive special obligations towards fellow nationals. With those closest to us, we are in a better position not only to know, assess and meet their needs, but also to keep an eye on those who, because of malice, negligence, carelessness, idleness, free riding or ingratitude, do not deserve to benefit from our obligations.

[331] COUTURE, J.; NIELSEN, K.; SEYMOUR, M. (ed.) *Rethinking Nationalism*, pp. 623-5. Although the advocates of ethical universalism have normally accused the particularists of being partial, it might be appropriate to draw a distinction between partiality in the design of a norm and impartiality in its application. See MILLER, D. *On Nationality*, pp. 51-4.

[332] TAMIR, Y. *Liberal Nationalism*, p. 95. Defending certain special or particular moral obligations between members of the relevant national community is compatible with defending a principle of basic equality between persons, which is broadly accepted.

[333] See GOODIN, R.E. "What is so Special about Our Fellow Countrymen?", pp. 673-4. Goodin draws no distinction between "State" and "nation", nor between "citizenship" and "nationality" (p. 663).

[334] See KELSEN, H. *Principles of International Law*, § III.C.2. This protection of foreigners must not be confused with diplomatic protection, which gives the State both right and duty to protect its citizens, also when they are outside its frontiers. The special ties between citizens and State do not only apply within the territory of the latter. What is more, such bonds of loyalty and protection are two-way: the State has the duty to protect the citizen, but the citizen, in turn, has the duty to defend the State. Accordingly, the tie of citizenship or nationality generates heavy duties of responsibility, representation and protection. BROWNLIE, I.; CRAWFORD, J. *Brownlie's Principles of Public International Law*, p. 607.

Nationalism should be analysed in relation to democracy as well. The relationship between them seems not accidental, for only in a democracy is it possible to achieve fully the ideal of national self-determination. Nationalism, building ties between individuals and collective self-identification, could facilitate democracy by promoting mutual understanding, trust, participation, loyalty, fraternity and solidarity. Fragmented societies, especially if nationally fragmented, suffer from trust problems. Trust is one of the pillars of representative democracy. Therefore, sharing a national identity may generate trust among factions and between the representatives and the represented. By adding understanding and participation, it may facilitate deliberative and participatory democracy. Loyalty and fraternity can help democratic consensus, stability and self-restraint.[335] Let us develop it further in the following paragraphs.

National feelings arouse patriotism, which is a sort of feeling of fraternity that increases the willingness to participate altruistically in favour of the nation. Thus, nationalism not only promoted the expansion of democratic rights but also promotes the duty to participate in public affairs. Since nations, whether nation-States or other political units, often speak a common language, this makes them a primary forum to develop participatory democracy in the modern world (together with local levels). This is reinforced when many citizens are monolingual or feel comfortable discussing things in their own language only.[336] In contrast, multilingual, multinational polities, such as the European Union, tend to be more dominated by elites and technocrats. As seen, Mill noted the difficulty for representative democracy to prevail in multinational and multilingual States. Moreover, both Montesquieu and Rousseau also warned that it is difficult for big polities to be organized as republican democracies. In the final analysis, nationalism may encourage a republican form of democracy in which active citizenship is praised.

Nationalism can foster deliberative democracy. Ideally, the search for a so-called national will should be pursued by means of deliberation and consensus. A deliberation in which every party, inspired by patriotic feelings, is prepared to give

[335] See MILLER, D. *On Nationality*, chs. 4-5. CALHOUN, C. *Nations Matter*, ch. 4. KYMLICKA, W. *Politics in the Vernacular*, ch. 10. MOORE, M. *The Ethics of Nationalism*, ch. 4.
[336] ANDERSON, B. *Imagined Communities*, p. 38. KYMLICKA, W. *Politics in the Vernacular*, pp. 213-4.

ground in good will. A democratic deliberation that goes further than a vote by citizens and negotiation between factions. A deliberation aiming at agreement to resolve a specific question as well as striking a deeper consensus.[337] Trust, loyalty and fraternity should help to discuss with sincerity, publicity and respect for dissenting opinions. Minority views are better prepared to give way to the majority, thanks to the conviction that the winner today will do the same should he come out as the loser in future. Feelings of horizontal comradeship may help to take opposing ideas seriously and provide a disincentive to dictatorship by the majority. Conversely, however, strong national feelings could be an incentive for tyranny by the majority in multinational States.

According to Miller, wherever a nation-State exists, it favours development of the egalitarian and deliberative liberalism advocated by Rawls: "a shared national identity is the precondition for achieving political aims such as social justice and deliberative democracy".[338] The previous paragraphs have attempted to explain why nationalism should fit in well with liberalism and democracy, in that it promotes altruism, trust, loyalty, cooperation, solidarity, understanding, respect and self-restraint, while generating a kind of veil of ignorance in the daily plebiscite. Against liberal nationalism, some advocate "constitutional patriotism", "post-nationalism" and "civic nationalism". They all suffer, however, from similar fundamental problems as can be seen from the following points:

1. Constitutional patriotism advocates that citizenship of liberal democracies should be rooted in, built upon and legitimized by the constitutional values and the political culture, instead of being based on the national identity of a people.[339] Even though in strictly liberal terms it might seem more consistent to grant citizenship to persons who actively accept the constitutional values and political culture of a particular

[337] The match between State and nation is not directly linked to consensual democracy in the more institutional and organizational sense, since this sort of consensualism is more connected to strong pluralism and especially plurinationalism. Nevertheless, there is no normative or practical impediment to stop nation-States from deciding to adopt consensual mechanisms if they believe that by increasing the level of consensus they will improve the quality of their democracy. On the contrary, nationalism generates some values that could facilitate seeking and reaching democratic consensus.

[338] MILLER, D. *On Nationality*, pp. 82-3, 162.

[339] HABERMAS, J. "Citizenship and National Identity" (1990), Appendix II to *Between Facts and Norms*, p. 500.

society, liberal States normally prefer birth and parentage to opinions and will as criteria for obtaining citizenship.[340] Does anyone believe that citizenship will be granted to foreigners only because they share the values enshrined in the Constitution? Conversely, can natural-born nationals be deprived of citizenship because they do not share these values? Most citizens are nationals based on birth, family and residence, notwithstanding their constitutional and political values.[341]

2. If shared political values would certainly suffice for different national groups to co-exist, side by side, why is European federal integration so difficult? Why has Norway seceded and kept separate from Sweden if the two countries have similar political values?[342] Shared political principles do not seem to be the key to political unity, but *shared political identity*. Indeed, despite the convergence in political values between the Anglophone and Francophone Canadians in the closing decades of the 20th century, Quebec nationalism grew considerably.[343] This convergence does not seem a sufficient reason to question the existence of distinct political identities and the desire for sovereignty. The "demarcation" and "continuity" of the State, according to Tamir, force liberals to resort to nationalist ideas: pure liberalism cannot adequately explain either the spatial dimension or the temporal continuity of the existing States without recourse to the ideas of national community and of national self-determination.[344] What is more, most of those living in liberal democracies prefer to have less cross-frontier mobility in exchange for continuing to be free and equal members of their national cultures. That is to say, as most liberals are nationalists, they accept the territorial boundaries as safeguarding and protecting their national identity, language and culture.[345]

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[340] TAMIR, Y. *Liberal Nationalism*, p. 125.

[341] Depriving nationality because of failure to share the values set out in the Constitution could be contrary to freedom of thought and to political pluralism. In particular, depriving nationality for failure to share the values of the Constitution could turn liberal States into dangerous *militant democracies*. See BOSSACOMA, P. "Who Would the Citizens… Be?", § 10. NORMAN, W. *Negotiating Nationalism*, pp. 60-1.

[342] See ch. 3.5 below. This similarity between political values is not exclusive to Norway and Sweden, but can also be seen between Norway and Denmark. The Scandinavian, or more broadly and generally Nordic, model is often referred to for its political and organizational values.

[343] KYMLICKA, W. *Multicultural Citizenship*, p. 188. See KYMLICKA, W. *Politics in the Vernacular*, ch. 13.

[344] TAMIR, Y. *Liberal Nationalism*, p. 121.

[345] KYMLICKA, W. *Multicultural Citizenship*, p. 93.

Although sharing political principles does not create *per se* a common political identity, it can help individuals to live together. The shared political identity in liberal nationalism is a combination of bonds of language, history, myths, norms and institutions tied to a territory which generate a collective consciousness. As norms and institutions may be an important (albeit not indispensable) part of political identity, historical or current constitutional values and principles are of certain importance, especially if widely acclaimed by the citizenry. In nations such as the USA, the Constitution and constitutional history help them to discover themselves as a people.[346] Interestingly, in minority nations such as Catalonia, constitutional history has played a crucial role in forging a political identity.[347] Constitutional patriotism may, therefore, play a significant role in the forging of a common political identity. In addition, although Catalonia and Scotland as well as many other minority nations in the west have become increasingly heterogeneous and multicultural, the population feels increasingly Catalan and Scottish, more than Spanish and British respectively.[348] Cultural distinctiveness may decrease, but national identities may remain and even rise.[349]

3. Belonging to a national community does not depend on personal talents, abilities, achievements or political values. Thus, one is usually a member of a national group because of who one is, not because of what one thinks. Membership often depends on involuntary facts such as place of birth as well as more or less voluntary acts such as marriage, migration and residence. Being Catalan or Scottish does not depend on supporting certain constitutional values and principles. As seen, such membership notwithstanding personal merits and values provides members of national communities with a wide range of personal choice as well as a secure and lasting sense of identity and belonging. All this turns national communities into fitting units to develop the liberal values of freedom, equality and democracy.[350]

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[346] ACKERMAN, B. *We the People (1)*, pp. 36-7.
[347] See BOSSACOMA, P. "Un esguard…".
[348] On Scotland, see KEATING, M. *The Independence of Scotland*, pp. 41-9. On Catalonia, see Bossacoma, P.; Sanjaume-Calvet, M. "Asymmetry as a Device for Equal Recognition…" in Popelier, P.; Sahadžić, M. (ed.) *Constitutional Asymmetry in Multinational Federalism*, pp. 435-9.
[349] MOORE, M. *The Ethics of Nationalism*, p. 230.
[350] See § 1.3.1 above.

4. If constitutional patriotism is based merely on certain political and moral values, this fosters defining the nation as a project. Some critical questions then arise: Who defines this project and how? Does the nation change if the project changes? What happens with those who do not accept or participate in the project? Would they not be citizens or nationals?[351] Liberal nationalism should not make the status of citizen or national conditional on a national project. In contrast with the idea of nation as project, history shows that polarization between large collective civil options reflecting strong internal divisions of a society, such as those found in wars of religion, is a characteristic trait of modern nation-building.[352] In this respect, Otto Bauer asserted: "history no longer reflects the struggles of nations, but the nation itself appears as the reflection of historical struggles".[353] Likewise, in recent democratic times, the clash of views and interests may not be a sign of disunity but a form of (re)creating an agora, a public space where individuals behave as fellow citizens and these citizens, in turn, (re)constitute themselves as a people.[354]

5. Constitutional patriotism is linked to contract theories. In the view of Habermas, the social contract of Rousseau and Kant made it possible to uphold the idea of popular sovereignty and to transform authority into self-legislation. Accordingly, for him the social contract does not need to be founded on a homogeneous descent or form of life. Although Habermas acknowledges that the social contract is not an actual, historical pact, he seems to neglect that this contract is just a theoretical device to identify and justify the basic principles of a political society. Moreover, the principles to be agreed would depend on the type of society to which they should apply. As Rawls warned, human psychology must be taken into account when designing a theory of justice.[355] Therefore, contractualism, in general, and the social contract, in particular, should not disregard or underestimate the

[351] Beyond being incorrect and superfluous, the definition of the nation as project can be dangerous, because it favours thinking of the great destinies of certain nations to the detriment of neighbouring nations: the Manifest Destiny of the USA to populate the whole continent with a single nation (President J.Q. Adams); the German mission over the inferior Slav peoples (Engels); the Russian people's great mission in the world (Bakunin); and, in Spain, the fatherland as a unity of destiny in the universal (J.A. Primo de Rivera). MIRA, J.F. *Crítica de la nació pura*, pp. 93-5.
[352] FONTANA, J. "La societat catalana contemporània", p. 142.
[353] BAUER, O. "The Nation", pp. 60-1.
[354] See VAN MIDDELAAR, L. *The Passage to Europe*, pp. 300-6.
[355] See RAWLS, J. *A Theory of Justice*, pp. 119, 125, 398.

psychological importance of nationalism.[356] This psychological relevance is illustrated by the use of the first person plural (*We*) and the psychological force is exemplified by the first person possessives (*my people*, *my country*, *my nation*, *our land*, *our language*, *our homeland*, *our ancestors*, and so forth).

6. According to Habermas, the Constitution expresses a consensus on the fundamental political values. Even if in practice approval of a Constitution is a nation-building act, in the eyes of comparative law fundamental rights recognized in the different democratic and liberal Constitutions are more or less common to the various western States. Unlike the organic parts which basically cover vertical and horizontal division of powers, the dogmatic parts of the European Constitutions are alike and keep converging. Such convergence of constitutional bills of rights is accentuated, in general, by the Universal Declaration of Human Rights and other international conventions on human rights, and in Europe, in particular, by the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.[357]

7. Constitutional patriotism, as a sort of cosmopolitanism that rejects most forms of nationalism, has been used to oppose secession. This can, though, come in for three criticisms. The first notices that it is difficult to accept a defence of the unity of today's States and their territorial boundaries based on *cosmopolitan ideology* because most of them have followed nation-building processes. However more open, plural, inclusive and tolerant liberal nationalism is than non-liberal nationalism, nation-building is present in most contemporary liberal democracies. The second criticism is related to the disappearance of the sovereign State or its irrelevance in a global, globalized or globalizing world. Although State sovereignty might have changed, it has not vanished. Sovereign States remain the masters of most international treaties, including those which found and regulate international and supranational organizations, and tend to have voice and vote in meetings where important decisions are taken.[358] The third criticism questions why anyone who

[356] Recall that Rawls's social contract did not disregard the importance of nationalism, but worked with a simplified model of the nation-State.
[357] In this vein, BOGDANDY, A.; CRUZ VILLALÓN, P.; HUBER, P.M. *El derecho constitucional…*, p. 47.
[358] See BOSSACOMA, P. *Sovereignty in Europe*, §§ 5-7.

believes that statehood and sovereignty are irrelevant in the global context of today refuses a qualified right to secede? Instead of ferocious opposition to secession and fierce defence of the existing frontiers, it may be more rational to tilt towards indifference and moderation.

8. Constitutional patriotism is a way of legitimizing State nationalism and all too often serves to evade recognition and accommodation of national pluralism. In some States, majority nationalism has used civic nationalism partly to "crush" minority nationalism.[359] In Spain, in particular, constitutional patriotism has often been at the service of certain Spanish nationalism intolerant and disdainful of Catalan and Basque nationalisms. Sceptically, some ask whether a Spanish patriotism without *Castilianizing* pressure could exist.[360] Perhaps it could therefore be concluded, as Requejo does, that constitutional patriotism "seems imprudent in theory and malicious in practice".[361]

9. Constitutional patriotism feeds on the myth of the alleged ethnocultural neutrality of the State, but most States, both new and old, are national or nationalizing. Liberal democracies are not neuter and can hardly be neutral towards nationality and culture (for example, in relation to language).[362] Although the USA and France spring to mind when talking about constitutional patriotism and civic nationalism, historically both countries followed illiberal, and even brutal, processes of nationalization and imposition of English and French respectively.[363] Once the whole territory has been nationalized, the way is clear to preach and practise a deceptive civic nationalism and constitutional patriotism.

That said, constitutional patriotism can be of some use to sublimate and cure past atrocities perpetrated by the nation and any deficits of democratic legitimization in its constituent process (as in Germany). Paradoxically, however, in that case the constitutional patriotism is based on a previous national and cultural structure.[364]

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[359] KYMLICKA, W. *Politics in the Vernacular,* p. 273.
[360] MIRA, J.F. *Crítica de la nació pura*, p. 121.
[361] REQUEJO, F. *Las democracias,* p. 257.
[362] See § 1.2.2 above.
[363] KYMLICKA, W. *Politics in the Vernacular*, p. 244. HOBSBAWM, E. *The Age of Empire*, p. 150. PATTEN, A. *Equal Recognition*, p. 3.
[364] REQUEJO, F. *Las democracias,* p. 255.

Constitutional patriotism could also serve to deepen the integration of supranational organizations such as the EU.[365] Nevertheless, the inability of the EU to meet numerous challenges today is partly due to the lack of a European national consciousness and structure, which makes it difficult to achieve adequate levels of trust, loyalty, cooperation and solidarity.[366] For this reason, the process of European integration should be accompanied by and keep pace with construction of a European national identity. Any such European nation ought to be superposed on and inclusive of the different nationalities in Europe: a genuine *nation of nations*.[367] To achieve this, it would be good to heed Albert Venn Dicey's warning that multinational federations require a very peculiar sentiment among their citizens: "they must desire union, and must not desire unity".[368]

The processes of *State-building* and *nation-building* are closely linked: usually States intend to build nations and often nations try to build a State of their own. The lack and difficulty of national neutrality on the part of States as well as the close link between State-building and nation-building tilt the balance in favour of an ascriptive theory of secession to the detriment of an elective theory. As the democratic welfare State needs national feelings, it is better if they are present before secession and are not just fabricated afterwards. This does not rule out, forever, secession demands based on democratic choice, but a nation needs to be built first (and this nation-building would then be consolidated with statehood). Clearly, this condition is not simple, above all with regard to timing, but, in any case, the issue of building a nation would appear after secession. If there were no previous nation, would the State be cosmopolitan? If, as argued, a non-national

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[365] In fact, to a large extent, Habermas himself bases his theory on citizenship and constitutional patriotism on German reunification and European integration. HABERMAS, J. "Citizenship and National Identity" (1990), Appendix II to *Between Facts and Norms*, pp. 491-2.

[366] More specifically, think of the difficulties which the Eurozone has had with responding to the *asymmetrical economic shocks* caused by the economic crisis from 2008 on. Turning the EU into a nation of nations would bring it closer to an *optimum currency area*. The values of trust, loyalty, cooperation and solidarity which national identity brings can help to correct certain structural factors which prevent the EU from becoming an *optimum currency area* (for lack of *homogeneity*, *flexibility*, *mobility* and *solidarity*). Indeed, the coincidence, in time (Treaty of Maastricht), between establishment of European citizenship and the monetary union may not be fortuitous. Still, alongside European citizenship as a political and legal bond, if Europe is to become a sort of federal Union steps should be taken to build a plurinational European identity, a European sense of a common destiny, and so forth. See BOSSACOMA, P. *Sovereignty in Europe.* BOSSACOMA, P. "Unidades de la Unión", pp. 223-45.

[367] See VAN MIDDELAAR, L. *The Passage to Europe*, ch. 7.

[368] DICEY, A.V. *Introduction to… the Law of the Constitution*, p. 141.

State and constitutional patriotism are neither probable nor possible, what type of nationalism would it practise? Nor can the virtue of *gravitas* be underestimated.[369] The seriousness of demonstrating to itself and to the rest of the world its capacity to create an encompassing group with the abovementioned requisites will be a litmus test.[370] Although national communities are imagined, not all acts of imagination create nations.[371] They are social constructions which it is possible, but difficult, to build and dismantle.[372] Wellman, albeit defending an elective theory, recognizes that the political capacity of the seceding territory largely depends on and is reinforced by the pre-existence of the nation.[373] Ascriptive theories of secession such as Justice as multinational fairness can be more explicative, sincere and cautious than many elective theories.

In the cases of Catalonia, the Basque Country, Scotland and Quebec, their status of nation, nationality, national community or people is not generally disputed.[374] Yet, the discussion can take two inter-related directions: how should we draw the frontier of the new State? How should we solve the problem of infinite secessions? The last question is easier to answer for ascriptive theories of secession than elective theories. If the nation is the only community that can secede, there is a certain danger of excessive, but not infinite, fragmentation. This makes possible to distinguish, for example, between the secession of Catalonia and the secession of a particular municipality within Catalonia. Regarding the first question, one recurrent criticism of national theories of secession is that both the concept and the territorial limits of the nation are blurred. This objection must be answered step by step. The concept of nation being unclear or vague does not seem a sufficient reason to

[369] See § 3.7.1 below.
[370] See § 1.3.1 above.
[371] NORMAN, W. *Negotiating Nationalism*, p. 34.
[372] Nations do not emerge out of thin air, but require some pre-existing cultural material. Nations being social constructions by no means implies that they are easy to build or dismantle nor that they are infinitely malleable. See GELLNER, E. *Nations and Nationalism*, ch. 4. MOORE, M. *The Ethics of Nationalism*, pp. 8-14.
[373] WELLMAN, C.H. *A Theory of Secession*, ch. 5. See, *mutatis mutandis*, SMITH, A.D. *The Ethnic Origins of Nations*, pp. 16-8.
[374] These cases may show that it can be more complicated to define the general concept of nation than the intersubjective consensus from which a specific group is considered a nation. The qualification for membership of a national community is not necessarily exclusive. In fact, people can be and consider themselves members of more than one nation at the same time. People can also identify more or less with one of them and can change their identification from one to another. In particular, Catalonia–Spain, Scotland–UK and Quebec–Canada can be considered overlapping or nested nations. See MILLER, D. *Citizenship and National Identity*, pp. 125-31.

abandon it: democracy, justice, liberty and equality, just to give some examples, are also uncertain or hazy concepts. The territorial limits of the nation being imprecise does not preclude (re)drawing them, based on the *Principle of democracy* and the *Principle of agreement and negotiation*.

Beyond secession, the dynamic nature of the democratic will creates a normative obligation to ask citizens periodically about their political preferences. Regarding secession in particular, the non-static nature of nations (of both feelings of belonging and claims of self-government) should allow to redraw the territorial boundaries, the spatial scope on which ordinary democracy is exercised. In practical terms, it can be useful to have some form of political or administrative decentralization which, to some extent, coincides with the territorial limits of the national community. Federal, regional, provincial or other territorial divisions might be suitable as a sort of reference point to picture the possible territory of the new State. In addition to delimiting the territory, self-governing units possess institutional structures. First, having a parliament or a democratically elected assembly makes it possible to evaluate the representative democratic majority in favour of secession. Second, these official representatives may demand, negotiate and declare independence. Third, there would be no need to create all public institutions from scratch, but to expand their powers and responsibilities.[375] Therefore, federalism and vertical division of powers in general may facilitate functional and institutional issues of secession.[376] But even mere electoral constituencies may serve as starting points, since they might help to identify citizens' sentiments of belonging and preferences on self-government on a map.

In international law, these questions have often been tackled by invoking the principle *uti possidetis juris* (which could be translated as "as you possess under law"), by virtue of which internal territorial boundaries become new international frontiers. That is to say, according to this principle, the territorial boundaries which existed under the previous colonial or federal law have been maintained and come

[375] In similar vein, PAVKOVIĆ, A.; RADAN, P. *Creating New States*, pp. 13-4.

[376] A paradox of multinational federalism is that even though it offers a viable alternative to secession for minority nations, it may help to understand secession as a realistic and feasible alternative. See POPELIER, P.; SAHADŽIĆ, M. (ed.) *Constitutional Asymmetry in Multinational Federalism*.

to be considered the new frontiers under international law. In this way, the *uti possidetis* principle has served to grant the right to external self-determination to the colonized territories, but, by contrast, not to the national communities within them.[377] Likewise, in federations such as Yugoslavia, this principle granted a similar right to the federated units such as Croatia to the detriment of other sub-State units such as Kosovo.[378] For the ICJ, the main reasons for establishing *uti possidetis* as a general principle of international law were: (1) to give pre-eminence to legal title over effectiveness; (2) to achieve stability and respect for the territorial boundaries at the time when independence is gained; (3) to avoid excessive fragmentation which would put at risk the sacrifices demanded in the struggle for independence.[379]

Priority for the norm over the fact seems judicious. Nevertheless, the normative relevance of all the factual aspects cannot be underestimated. Although the *uti possidetis* principle rightly tries to limit infinite and excessive fragmentation, on occasions, it can unduly favour or prejudice either secessionists or unionists. In this respect, as the ICJ admits, the *uti possidetis* principle is in tension with the principle of self-determination of peoples.[380] The former makes the latter exaggeratedly static. The *uti possidetis* principle may generate a mistaken presumption that the internal boundaries of States are rational and just (*i.e.* a presumption that allows no evidence to the contrary). All too often, however, internal boundaries of the parent State do not correspond to Justice as multinational fairness. Not only do they not correspond to multinational justice, but also they have sometimes served to disempower or divide minority nations.[381] Rigorous application of the *uti possidetis*

[377] See § 2.1.3 below.
[378] See ch. 2.3 below.
[379] See ICJ *Frontier Dispute* case of 1986 (Burkina Faso/Mali), pars. 23-5.
[380] *Ibid*. par. 25. Regarding the *uti possidetis* principle, see ODUNTAN, G. *International Law and Boundary Disputes in Africa*.
[381] "In many cases, national minorities are correct to point out that administrative boundaries frequently have no moral basis themselves, or that they were often drawn in accordance with a moral or political conception that is irrelevant in the current political situation, or drawn by the central State in order to facilitate assimilation of the minority or its control by the dominant group. It is therefore hard to see why these boundaries should be cast in stone, as the only unit in which self-determination can take place." MOORE, M. *The Ethics of Nationalism*, p. 159. See REQUEJO, F. "Plurinational democracies, federalism and secession", p. 74. By way of example, the decisions on the geographical borders between the federated States in the USA were designed to guarantee an Anglo-Saxon cultural majority in each State. Some territorial boundaries were drawn to make sure that Indians or Hispanics were in the minority (*e.g.* Florida) while recognition of other territories as a federated State was delayed until the Anglo-Saxon settlers outnumbered the indigenous population (*e.g.* Hawaii). KYMLICKA, W. *Politics in the Vernacular*, pp. 24, 98-9. KYMLICKA, W. *Multicultural Citizenship*, p. 112.

principle could, therefore, clash with the right to national self-determination defended in this book, since democratic preferences to remain part of the original parent State or to become a new State cannot be rejected straightaway. A more conciliatory position would be to interpret *uti possidetis* as a non-conclusive presumption (*i.e.* rebuttable). That is to say, the internal territorial boundary will be legitimate and taken as the new external frontier, unless weightier reasons against it can be proved. [382]

There are legal and political mechanisms which offer some technical solution to the problems of the blurred limits of the nation and of infinite secessions without recourse to the *uti possidetis* principle as a conclusive presumption. The first, grounded on the principle of democracy to redraw the territorial boundaries, could be to hold a cascading series of referendums on secession.[383] For example, before holding a referendum on independence across the whole self-governing unit, a pact could be made that, if the pro-independence option obtains the majority needed to secede, local referendums would then be held in the municipalities, counties or provinces (or any other local entity agreed) along the border between the seceding unit and the parent State. Subsequent local referendums of this kind could be held if enough local political representatives so request or if the general referendum showed a significant majority against secession in a particular area. The results of such local referendums would have to be taken into consideration to draw the new borders.

The mechanism of holding a chain or cascade of referendums on secession is consistent with the hypothetical multinational contract and, in particular, with its *Principle of territoriality*, which requires concentration of the national minority community in a specific territory on the confines of the multinational State. The functional objective of cascading series of referendums should be to build a new State which is politically viable and concentrated in a given territory and which

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[382] This interpretation is easier to defend being aware that the *uti possidetis* principle is not *jus cogens*: "No doubt the principle is not peremptory and the states concerned are free to adopt other principles as the basis of a settlement". BROWNLIE, I.; CRAWFORD, J. *Brownlie's Principles of Public International Law*, p. 239.

[383] This is the magic formula in elective theories of secession. See BERAN, H. "A democratic theory of political self-determination for a new world order" in LEHNING, P.B. (ed.) *Theories of Secession*, pp. 32-59. WELLMAN, C.H. *A Theory of Secession*, ch. 3.

includes as many secessionists and as few unionists as possible.[384] One empirical example of this chain referendum technique can be found in the secession of the territory of Jura from the Canton of Berne to form a new Canton in the Swiss Federation.[385] In Quebec, various indigenous groups announced that they would not feel bound by the result of the referendums on sovereignty and that they would hold their own referendums on the issue. In fact, these aboriginal peoples held separate referendums on their own in which Quebec's sovereignty was widely rejected.[386]

Other legal techniques could be to create enclaves, as areas of territory within the newborn State remaining under the sovereignty of the parent State, or condominia, as pieces of territory under shared sovereignty. The *Principle of territoriality*, however, presses for leaving the possibility of creating enclaves and condominia for exceptional cases.[387] If a chain of referendums does not seem a sufficient solution, it could be complemented by creating autonomous territories safeguarded by international law mechanisms, following the models of the Aaland Islands or South Tyrol.[388] In the final analysis, border territories could democratically decide to remain part of the parent State or to become part of the newborn State.

If such border territories could be considered minority nations, they could not only decide to form part of the new State or to remain in the rump State but also to create a new independent State. If Catalonia ever secedes, Vall d'Aran could be an example of this eventuality.[389] Under Justice as multinational fairness, the case of

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[384] On this matter, WELLMAN, C.H. *A Theory of Secession*, p. 59. MONAHAN, P.J.; BRYANT, M.J. *Coming to Terms…*, pp. 16-7, 36-7. Monahan and Bryant sharply point out that any impracticalities arising from partition could hardly be blamed on the unionist approaches but they would be another complicated effect of secession.

[385] See § 3.6.3 below.

[386] See WHERRETT, J. "Aboriginal Peoples and the 1995 Quebec Referendum", pp. 4-7. DION, S. "Why is Secession Difficult…?", pp. 277-8. MONAHAN, P.J.; BRYANT, M.J. *Coming to Terms…*, pp. 37-8.

[387] Examples of exceptional cases could include geostrategic or military enclaves such as the Panama Canal and the Faslane naval base. The latter is on Scottish territory but could remain under British sovereignty in the event of secession. The case of some waters of the Gulf of Fonseca could be an example of co-ownership because of geographic reasons. Despite their exceptionality, both condominiums and enclaves can be created by explicit agreement or can arise tacitly too. See ICJ Judgements of 1992 concerning *Land, Island and Maritime Frontier Dispute* and of 1960 concerning *Right of Passage over Indian Territory.*

[388] See ch. 2.1 below.

[389] The Statute of Autonomy of Catalonia refers to the "people of Aran" and its "cultural, historical, geographical and linguistic identity". The Parliament of Catalonia passed Statute 1/2015 on the special status of Aran, which reads that "Aran is a national reality" and refers to the right of the

Aran would be treated differently to a concentration of the national majority from the former parent State as a result of relatively recent internal migration.[390] While Aranese people would be a *minority nation* in the newborn State of Catalonia, residents in Catalonia who identify themselves as Spanish (or as more Spanish than Catalan) should be considered a *national minority stricto sensu* meaning "a partial extension of a closely situated nation on the territory of another nation".[391] In fact, the members of the latter group may tend to prefer Catalonia to remain in Spain but they would be unlikely to push for developing a parallel society within Catalonia.[392]

Although this *national minority stricto sensu* would resemble an ethnic group in the sense that many of its members come from relatively recent immigration, more intense cultural rights ought to be recognized for this group than for ordinary immigrant or ethnic groups.[393] Beyond labelling them as a *national minority*, there are various reasons for granting them more intense cultural rights: (1) because of numbers and geography – many of today's Catalans' family origins stem from the rest of Spain and Spanish-speaking groups are very numerous and highly concentrated in certain municipalities; (2) because of the long societal cohabitation between Catalans and Spaniards within the same State; (3) because the immigrants from other parts of Spain emigrated to Catalonia in legitimate good faith believing they were not leaving the confines of their State. Notwithstanding this paragraph, this book tends to use the term *national minority* in a broad sense including both

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people of Aran to decide their future. According to one Aranese mayor: "If Catalan people wish to exercise, in a referendum, their legitimate democratic right to self-determination, Aran will have to stand on the sidelines of this consultation. The citizens of Aran should not be called to participate because Aran is not Catalonia. It forms part of Catalonia administratively, but is a different people. Historically, Aran constitutes a different nation to the Catalan. If the citizens of Aran were to participate in the consultation to decide the political and administrative future of Catalonia, they would be intervening in a decision which, legitimately and democratically, lies with Catalan people alone. Once Catalan people have decided what the future of Catalonia should be, it would be up to the people of Aran to decide, likewise democratically, the path to be taken for the future of Aran. When this time comes, the citizens of Aran will have to use their right to self-determination, nowadays misnamed right to decide, and decide by referendum whether they wish to remain with Catalonia or not." MEDAN, E. "Aran no és Catalunya". *El Periódico*, 19 October 2013.

[390] In addition, it is important that all decisions adopted, in one sense or the other, must be in tune, as far as possible, with the *Principle of territoriality*.

[391] See COUTURE, J.; NIELSEN, K.; SEYMOUR, M. (ed.) *Rethinking Nationalism*, pp. 46-59.

[392] If this group were more or less territorially concentrated within the borders of an independent Catalonia and it kept nationally identified and pushed to re-unite with Spain, it could also be considered a sort of *redentist* group. See ch. 1.1 above.

[393] For example, Spanish ought to be recognized as a co-official language of an independent Catalonia or, if not that, as part of Catalonia's cultural heritage, with privileged recognition by the administration and judiciary. Respectful monolingualism offering significant institutional recognition of Spanish would also be in line with liberal nationalism.

minority nations (understood as nations more or less complete that form a minority within the parent State) and national minorities in the narrow sense.

Bearing in mind the aboriginal peoples and Anglo-Saxon minorities which would remain in an independent Quebec, the Supreme Court of Canada, balances the principle of protection of minorities with the principles of democracy, federalism, constitutionalism and rule of law.[394] According to Justice as multinational fairness, protection of minorities is necessary at three different times if secession is to be fair in democratic and liberal terms: (1) during the secession process; (2) during the constituent process; and (3) once the powers of the new State have been constituted. Therefore, protection of minorities should allow the parent State to oppose secession, even *ex post facto*, when there is a real threat that they could be mistreated and the seceding nation is not prepared to accept any obligations and remedies internationally guaranteed. In the final analysis, provided the parent State respects its minorities, it is morally acceptable for it to annul secession or nascent independence if the newborn State violates or fails to guarantee due protection of minorities.

Illiberal nations should enjoy internal self-determination only. Something similar should occur if there are systematic violations of basic individual and minority rights or enough grounds to fear such violations once independence is achieved. As the principle of protection of minorities works as a legitimizer, guider and delimiter of Justice as multinational fairness, the lack of tolerance, recognition and accommodation of pluralism (cultural, political, social and religious) ought to limit secession. In principle, however, only liberal-democratic parent States which honour human rights and recognize and accommodate their minorities should be able to invoke this limit.[395] The parent State must require an equivalent level of respect for individual and minority rights, whereas third parties (in particular other

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[394] "There are linguistic and cultural minorities, including aboriginal peoples, unevenly distributed across the country who look to the Constitution of Canada for the protection of their rights." *Reference re Secession of Quebec*, par. 96. The Clarity Act reiterates the importance of protection of minorities by making them participants in the deliberations on secession. In turn, Articles 11 and 12 of the Quebec Act respecting the exercise of the fundamental rights and prerogatives of the Quebec people and the Quebec State (Bill 99) recognize the existing rights of the *aboriginal nations* of Quebec and place an obligation on the Government of Quebec to foster improvement of their economic, social and cultural conditions.

[395] See § 1.2.5 above.

States and international organizations) may require a higher level of protection in order to support or recognize secession.

Another objection to the right to secede is the internal and international instability which it would engender. The international instability seems bearable, as shown by the dismantling of empires, decolonization, disintegration of socialist federations and other phenomena which led to a multiplication of States during the 20th century. Moreover, globalization and economic integration allow greater political disintegration.[396] In turn, the internal instability produced by secession of a liberal nation could be smaller than that provoked by the continuous unrest of a minority nation which feels ill-treated, which enjoys high support for secession, which demands and pursues secession energetically and which suffers hard coercion from the parent State since the latter considers such pursuit illegal.

Internal and international instability is more bearable if it is the consequence of normative reasons rather than mere political expediency. What is more, if such normative reasoning results in either internal or international regulation, this could engender less instability (and less risk of escalation of violence) than leaving creation of new States in the realms of facticity (to arbitrary *faits accomplis*). The step from politics of facts to politics of norms is often a struggle between force and reason. In general, the requisites for secession of the hypothetical multinational contract take stability seriously: by requiring qualified democratic majorities in favour of secession, by requiring agreement and principled negotiation with the parent State, by requiring respect for basic rights of individuals and minorities, by requiring territorial concentration and certain location, by requiring capacity to exercise effective sovereignty, by requiring compensation for damages, and so on. Additional conditions and techniques may further increase stability such as setting cooling periods between attempts at secession, penalizing resort to violence, and settling disputes through international mediation and arbitration.

From a perspective closer to elective than to ascriptive theories on secession, one could weigh stability against liquidity, in order to qualify the former. Modernity

[396] See § 1.2.7 above.

seems to adopt a more liquid conception of relations, institutions and values. In our times, marriages are often dissoluble, families are heterogeneous and changing, trades and workplaces are not for a whole working life, religious creed may be changed freely, citizens can periodically depose and choose their governments, migration and changes of nationality abound, national identification fluctuates, State sovereignty is questioned from above and below. In such times, the principles of indissolubility, perpetual unity and territorial integrity of States should no longer be absolute, categorical impediments to a moral right to secede. The principle of liquidity becomes the principle of liberty when it is accompanied by values as powerful as democracy, peace, respect and dialogue. Although the principle of liberty includes the right to remain unchanged, freedom normally implies more change than absence of freedom.[397]

Nevertheless, the defence of national self-determination seems not entirely compatible with a liquid theory of secession. Such defence is partly founded on the solidity, rather than liquidity, of national feelings, belonging and structures. Evidence of such solidness is that States around the world have attempted to suppress their minority nations, but numerous national sentiments, institutions, cultures and languages still survive. Many have survived not only in liberal-democratic contexts, but also during long and cruel authoritarian and totalitarian regimes. During the 20th century, few national groups seem to have assimilated voluntarily, despite economic incentives and legal pressures to do so. The rise of liberal democracy has made it more and more difficult to eliminate national minorities by predominantly coercive means.[398] Catalonia and the Basque Country are examples of this tenacity or fortitude to maintain their existence as distinct nations – in the days of dictatorship and in times of democracy. This proves the solidity of nationhood and national ties. Perhaps nations are even more solid than States.

1.3.4. Distributive justice and secession

[397] These thoughts on liquidity are based on LÓPEZ BOFILL, H. *Nous estats i principi democràtic*, pp. 68-9, who, in turn, drew inspiration from the liquid modernity defined by the sociologist Zygmunt Bauman.
[398] KYMLICKA, W. *Multicultural Citizenship*, pp. 79, 184-5.

To oppose a right to secede, some claim that creating new frontiers contradicts the principle of equality of citizens.[399] Such categorical egalitarian objection to secession, however, should be rejected since territorial boundaries exist in the present and removing them to create a single worldwide republic is beyond a realistic utopia in any near future. Thus, perhaps instead of *creating* new frontiers, terms such as *redrawing*, *changing* or *adapting* could be more accurate. As equality tends to apply between citizens of the same State rather than between every person in the world, equality cannot constitute an absolute barrier to secession. To be consistent with this extreme egalitarian reproach, the very existence of territorial boundaries should be opposed on moral grounds. With all the more reason, current frontiers ought to be reproved since they were drawn neither liberally nor democratically, but often as the result of conquest, violence, intimidation or decisions by elites in the form of marriages, inheritance and other legal arrangements. In the end, instead of equality ever opposing secession, different visions of equality may legitimize different theories of secession.[400]

Formulated less strongly, it could be acceptable that in certain cases national self-determination in the form of secession can be in tension with principles of justice that order redistribution of wealth.[401] Since this is not the place to discuss the appropriate principles and degrees of such redistribution, Rawls's liberal egalitarianism will be taken as the reference point. In *A Theory of Justice*, the difference principle and the principle of fair equality of opportunity stipulate that social and economic inequalities between citizens are to be arranged to the greatest benefit to the least-advantaged members of society as well as guaranteeing that offices and positions are open to all with fair equality of opportunity.[402] Nonetheless, the first rule of priority, according to Rawls, establishes that basic liberties are not to be exchanged for greater economic advantages. That is to say,

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[399] See OVEJERO, F. *La seducción de la frontera.*
[400] Both remedial and primary theories of secession can be based on multinational views of equality (aiming for equality between majority and minority nations or between their members). Justice as multinational fairness, by means of the hypothetical multinational contract, is grounded on a particularly deep sense of equality among nations.
[401] See BUCHANAN, A. *Secession*, pp. 16-7.
[402] See § 1.2.2 above.

liberty can be restricted only for the sake of liberty itself.[403] While a main concern of some cosmopolitans is to further global redistribution, in *The Law of Peoples* Rawls insists on the justice and stability for the right reasons of liberal and decent societies.[404] In short, under justice as fairness, the better or worse economic results do not generally trump the principles of justice.

The question to be addressed now for Justice as multinational fairness is: Can rich nations secede unilaterally if their separation means a loss of wealth for the rump of the parent State? If so, can poor nations secede equally unilaterally? The priority of right over economic results is an idea that emerges from contractualism. Likewise, the priority of multinational justice arises before the greater or lesser economic advantages of the parent State. That is not to say, however, that Justice as multinational fairness should ignore distribution of wealth among nations. Certainly, the contracting parties will see fewer problems with redistributive justice when a poor nation wishes to secede from its parent State, insofar as it implies no significant loss of material wealth for the rump State. By contrast, secession of a rich nation can entail significant material losses for the remnant parent State and so for the other parties. Although the contracting nations behind the veil of ignorance would not grant a right to secede to poor nations alone, the contractual prudence generated by the veil would recommend a stricter interpretation of the requisites for secession in the case of rich seceding nations.

A possible solution could be to limit the moral right to self-determination for better-off nations to mere internal self-determination within the parent State. In other words, rich nations would be morally prohibited from exercising their external self-determination in the form of secession. This would be the option taken, in the original position, regarding illiberal nations and nations which violate basic rights of individuals and minorities. The priority of right and multinational justice easily admits this. In contrast, banning external self-determination for reasons of wealth

[403] See RAWLS, J. *A Theory of Justice*, §§ 39, 82.
[404] "The final political end of society is to become fully just and stable for the right reasons. Once that end is reached, the Law of Peoples prescribes no further target such as, for example, to raise the standard of living beyond what is necessary to sustain those institutions." RAWLS, J. *The Law of Peoples*, § 16.3.

and economic advantage seems counter-intuitive and disproportionate.[405] In many liberal States, the rich pay more taxes than the poor, especially under the principle of progressive taxation, but their basic liberties are not reduced. A similar scheme would be established in the hypothetical multinational contract within the *Principle of viability and compensation.* Under this principle, a secession taxation system is to be proposed and defended.[406]

Before developing the secession taxation, it is important to note that other requisites for secession could be stricter for better-off nations. Under the interest test, the rump of the multinational State has a significant material interest in the decision to secede of a rich nation in comparison with a poorer nation. Accordingly, in the light of this interest test, the *Principle of democracy* should require more deliberation and clearer majorities. Along similar lines, another related consequence of being an affluent nation should be to tighten application of the *Principle of agreement and negotiation* in order to intensify and extend this obligation to negotiate (whether to find a new constitutional framework or to pact the terms of secession). The richer the seceding nation is, the greater the need for compromise is and the less unilateral the exit should be.

Both negotiation and agreement are of paramount importance to establish a secession taxation system. This taxation system could take the form of a *secession fee*, according to which a final amount would be owed when secession is completed, or the form of a *secession tax*, according to which the seceding territory would be under an obligation to pay a quota of its wealth indefinitely or over a long period as a means of solidarity with the parent State. The objective of the latter would be to tax the difference in relative or *per capita* wealth between the new State and the rump State. By contrast, a *secession fee* would be more appropriate for paying off the investments made by the parent State in the seceding territory. The *system of secession taxation* could be reflected in the international agreement on the allocation of assets and liabilities between the seceding State and the rump State. In general, a compromise on distribution, reparation and compensation should be enshrined in a legal document with international recognition and guarantees. In particular, future

[405] In similar vein, MILLER, D. *On Nationality*, p. 115.
[406] Inspired by BUCHANAN, A. *Secession*, p. 133.

disputes over clauses of the agreement could be submitted to international arbitration.

It seems fair to raise the economic costs of exit for better-off nations. Remember that Rawls conceives a well-ordered society as a perpetually cooperative system. This is an ideal with the aim of increasing deliberation, cooperation, solidarity and loyalty between its members, which does not imply that integration and secession should be forbidden in the real world. Since these well-ordered societies are conceived as nation-States in Rawlsian contractualism, the ideal of perpetuity needs to be nuanced.[407] Hence, when the factual reality of the State is multinational, this ideal should be interpreted more provisionally. In addition, most people would choose to apply Rawls's principles of liberty and equality within their own nation.[408] Although Justice as multinational fairness tones down the most rotund interpretation of the ideal of perpetuity, the latter does nourish nurture the proposal of *secession taxation* to compensate for breaking the tie of statehood.[409]

The *Principle of viability and compensation* endorses the idea of *secession taxation* when it stipulates that: (1) "The wealth of the parent State shall not be substantially altered" implicitly refers to the secession tax.[410] (2) "If the parent State has no duty to bear the costs and damages caused by the secession, these shall be repaired, compensated for or subsidized by the new State" relates to the secession fee. (3) "If reparation, compensation or subsidization are not possible, it may be fair to impede secession" entails that secession could be legitimately stopped only if the secession taxation is not sufficient or reasonable. As certain combinations of principles and precepts may thwart institutional goals, deontological reasons should be accompanied by more teleological arguments. Normative reasoning regarding

[407] See RAWLS, J.; VAN PARIJS, P. "Three letters on *The Law of Peoples…*".
[408] See § 1.2.2 above.
[409] To take marriage as an analogy, a broad majority of westerners could agree that, ideally, it is a perpetual tie of love, cooperation and solidarity. But, in practice, this ideal or guiding principle of marriage for life is not conceived in such a manner as to render marriage indissoluble. To take the analogy further in more economic terms, *secession taxation* can work like alimony to provide compensation for the spouse who comes out less favourably from the separation or divorce.
[410] Secession cannot leave the parent State so devoid of resources that it could not guarantee the primary goods and basic interests of its members, to the extent that the parent State could not guarantee justice as fairness between its members. If this were to happen, the seceding State would deprive the parent State of self-determination. In this respect, MILLER, D. *Citizenship and National Identity*, p. 123.

institutions, especially those related to redistribution of wealth, requires attention to incentives. These obligations and limits derived from the *Principle of viability and compensation* are not only consistent with, but also promote, the institutional goals of Justice as multinational fairness. In particular, these obligations and limits deter better-off nations from seeking secession with the mere purpose of circumventing multinational solidarity and, thus, allow multinational States to pursue distributive justice among nations.

The parable of the Good Samaritan involves a duty to help others when this could prevent, alleviate or cure substantial damage in exchange for a relatively low cost.[411] Accordingly, this duty could give the parent State moral title to limit or even prevent secession if it would cause substantial damage, if that damage could be avoided and if the cost of avoiding it would be relatively low for the secessionist group.[412] Justice as multinational fairness requires to prevent one important sort of damage: the creation of either a newborn or a rump State with insufficient human and material resources to realize just institutions after secession. Such a requirement is endorsed in the first sentence of the *Principle of viability and compensation* which establish that "as a result of secession, both the newborn State and the parent State shall become territorial units objectively capable of providing sufficient public authority to exercise effective and independent sovereignty over their territory and to survive in a global context." This sufficient public authority and effective and independent sovereignty is not for the sake of power itself, but to ensure the ultimate political end of generating societies and institutions which are fully just and stable.

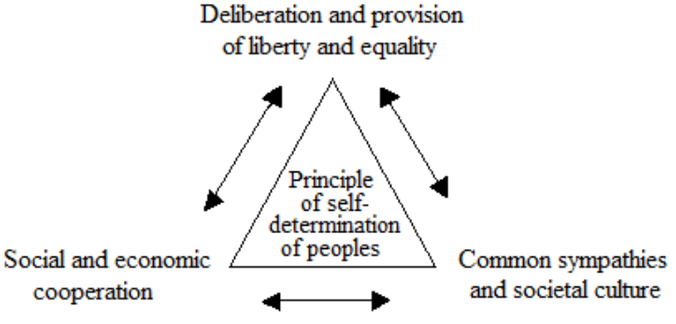
Remember that the hypothetical multinational contract has been positioned as a third hypothetical contract in between the two proposed by Rawls (the first in *A Theory of Justice* and the second in *The Law of Peoples*).[413] Similarly to Hume, Rawls considers society to be like a cooperative undertaking to obtain mutual

[411] Luke 10, 25-37.
[412] See WELLMAN, C.H. *A Theory of Secession*, ch. 2. Wellman speaks of "minimal cost" (p. 30), but the term "relatively low cost" is preferred for several reasons. Common sense, intuition and interpretation of the original source suggest that the cost must be relatively low compared with the substantial risk to the others. Although the Good Samaritan duty does not demand acts of heroism, the Samaritan people and the Good Samaritan are often said to have been poor.
[413] See § 1.2.4 above.

advantages. In relation to distributive justice, Rawls's first contract establishes a difference principle and a principle of fair equality of opportunity. The second Rawlsian contract establishes a principle of assistance by virtue of which "peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime." This duty of assistance therefore sets out to secure the minimum conditions under which liberal democracy could flourish, but not to cover the cost nor redistribute wealth between peoples.[414]

Therefore, the principle of assistance endorses a much weaker moral obligation of redistribution and solidarity than the difference principle and the principle of fair equality of opportunity. There may be several connected reasons to explain this distinction: (1) the peoples or societies to which Rawls refers are nation-States;[415] (2) members of these national societies generally enjoy common sympathies and community consciousness which differentiate them from international society; (3) Rawlsian societies are cooperative and are the main guarantors of liberty and equality; (4) on the strength of these common sympathies, cooperation, and guarantee of liberty and equality, Rawls defends a sort of principle of self-determination for peoples;[416] (5) for better or for worse, being free and independent peoples implies that each people take responsibility for its own decisions; and, to close the circle, (6) the causes of the wealth of peoples "lie in their political cultures and in the religious, philosophical, and moral traditions that support the basic structure of their political and social institutions, as well as the industriousness and

[414] See RAWLS, J. *The Law of Peoples*, §§ 4, 15-6.
[415] See § 1.2.2 above.
[416] The first principle of *The Law of Peoples* reads: "Peoples are free and independent, and their freedom and independence are to be respected by other peoples." A sort of Rawlsian defence of the principle of self-determination could be illustrated by the figure set out below. As can be seen, each vertex of the triangle feeds, and is fed by, the others:



cooperative talents of its members" more than in asymmetry in the global distribution of natural resources.[417]

The *Principle of multinational solidarity* is in some place between the difference principle and the principle of fair equality of opportunity (in *A Theory of Justice*) and the duty of assistance (in *The Law of Peoples*).[418] Solidarity ought to be present in every State and it often distinguishes States from some international organizations.[419] Multinational States should establish certain forms of solidarity compatible with other forms of solidarity at the national level, for minority nations generate intense bonds of fraternity that should not be neglected. These philosophical reasons, combined with the experience of comparative federalism, show that solidarity between citizens does not necessarily follow the same patterns as solidarity between territories. Consequently, the *Principle of viability and compensation* is to be interpreted in accordance with the *Principle of multinational solidarity*. Therefore, the former should imply a weaker duty of multinational solidarity between the newborn State and the predecessor State, which should also lie in between the abovementioned Rawlsian principles (thus, in between intra-State and inter-State redistribution). Historical and cultural bonds, former ties of

[417] RAWLS, J. *The Law of Peoples*, § 15.3. In similr vein, see KANT, "The Metaphysics of Morals", in *Political Writings*, p. 166.

[418] When speaking about multinational States or supranational organizations like the EU, Rawls seems to indicate that there might be an intermediate position between these principles. RAWLS, J.; VAN PARIJS, P. "Three Letters on *The Law of Peoples…*".

[419] Despite leaning towards an ethical particularism based on the ties of community and justice as reciprocity stemming from cooperative ties and the bonds of society, there may be a series of more or less intensive obligations which should be extended beyond reciprocity schemes and beyond the boundaries of the society in question. That is to say, there should also be redistribution in favour of persons or communities who do not produce profits, contribute or cooperate, and who do not, and perhaps will not, bring any benefit (for example, in favour of the incapacitated and of the least-developed nations). As regards redistribution between persons who, in principle, form part of a society but do not participate in the relations based on reciprocity within it, the fact that they are under an obligation to obey, at the risk of sanctions, seems sufficient to sustain a certain redistributive justice. See § 1.3.3 above. Consequently, the theory of distributive justice adopted here is not based exclusively on community, reciprocity and mutual benefit. However, when there is a clearly continuing system of cooperation (increasing the ties of community and the obligation for fair play), the obligation for distributive justice can become more intense and extensive, above all in institutional and practical terms. That said, in a globalized and interdependent world, a strong cooperative context stretching beyond State frontiers also exists, at both regional and world levels. For this reason, justice as reciprocity can also bring with it a moral obligation for redistribution and solidarity between peoples. See BEITZ, C.R. *Political Theory and International Relations*, Part 3 and Afterword (1999). In this context, where international law and politics impose more and more obligations on all sides, the obligations to obey, at the risk of sanctions, derived from them can also increase the redistributive obligations. See BUCHANAN, A. *Justice, Legitimacy, and Self-Determination*, Part 1.

citizenship, previous cooperation, investments made by the predecessor State, legitimate interests regarding some natural resources, and so on, might be reasons for maintaining a certain degree of solidarity after secession.[420]

By virtue of the principles of coherence and reciprocity, if the parent State claims and agrees an obligation for solidarity with the newborn State, they may both remain bound reciprocally by this obligation for distributive justice. This might be so in particular if they had agreed on a *secession tax* rather than a *secession fee*. In other words, if the better-off nation has a moral duty of solidarity and it is fulfilled, would this duty also bind the parent State if the newborn State were to fall into economic decline? If not, perhaps such a moral duty of solidarity should not be overstressed.

Up until this point, the analysis has been rather ideal. However, if the seceding unit suffered injustice committed by the parent State, the question of distributive justice is to be reconsidered on the basis of nonideal theory. Nonideal contexts include when the parent State has occupied the seceding territory by military or violent means, when the parent State has continuously violated the human rights of people of the seceding territory, when the seceding territory forms part of the parent State as a colony, when the parent State has been practising economic exploitation and marginalization.[421] Following secession in nonideal circumstances like these, the seceding territory would be under no *prima facie* obligation for justice towards the parent State (or, as a minimum, this obligation would be significantly reduced).[422]

These nonideal contexts, in which the duty of distributive justice disappears or diminishes, will be grasped better after reading the next section. For the moment, the following idea of penalty should suffice: the wilful grievances which the parent State has committed or inflicted on the seceding territory evaporate or minimize the

[420] In general, in cases of internal secession (within a federal State to form a new federated State), the federal solidarity which would remain may be sufficient and no more than a mere secession fee ought to be agreed. See § 3.6.3 below. Likewise, if the seceding State were to remain in an international organization with high levels of solidarity, as may be the case of the EU, perhaps such solidarity, complemented by a secession fee, would suffice.
[421] See ch. 1.4 below.
[422] The duty of distributive justice can reappear over the course of time if the injustice was committed in the distant past. See § 1.4.2 below.

obligation for distributive justice. This gradual conception of distributive justice produces right incentives since it deters mistreatment of minority nations and rewards fair multinational States. In particular, the possibility of losing the *secession taxation* as a consequence of injustices committed against the seceding territory should encourage the parent State to continue, or even to start, treating the seceding territory with economic justice. A further advantage of the *secession taxation* is that the rise in secessionism would not strike fear into the parent State which could prompt it to exploit or marginalize economically the increasingly secessionist territory. In other words, if the parent State knows that it shall receive economic compensation if a rich nation eventually secedes, this will generate confidence to continue investing and treating fairly in economic terms the territory where the support for independence is rising.

A final consideration concerns the distinction between the argument of distributive justice and the *argument of legitimate defence.* The latter would serve the parent State only in cases of morally unjustified violent aggression by the secessionist group or against secessions which would impede the survival of the parent State. Consequently, survival founded on legitimate defence ought to be understood restrictively, by contrast to viability and compensation based on the argument of distributive justice. Yet, analogously, wilful injustices which the parent State has committed against the seceding territory evaporate or minimize the argument of legitimate defence, even to the extent of losing the legitimate right to survival.

1.4. Complementary causes to legitimize secession

Remedial theories permit secession only as a reaction to established injustices. As previous or ongoing moral damage would be necessary to justify unilateral secession, these theories endorse a kind of sanctification of harm. By contrast, Justice as multinational fairness defends a primary right (not only remedial) to secede based on national self-determination. Justice as multinational fairness, however, acknowledges important normative consequences of grievances and moral wrongs. The basic thesis is that the more unjust the State treatment is, the lesser the requirements to secede ought to be. Accordingly, the term *complementary causes*

will now be introduced to describe accessory justifications for secession, which are neither essential nor necessary to engender a right to secede.[423]

Pleading some of the complementary causes described below can be useful to legitimize, claim and exercise the right to secede. Complementary causes can serve many purposes: (1) They can help to show that the secession claim is not based on an illegitimate cause. (2) They can help to convince supporters of remedial theories that it is not a *vanity* secession – *i.e.* one without what they would deem as a just cause.[424] (3) They can reduce, minimize or exclude some requisites for secession. In some circumstances, these causes can be serious enough to act as *independent causes* to legitimize and claim secession, with no need to base it on the principles of nationality and democracy. (4) They will offer an eclectic theory of secession open to dialogue with remedial theories. In the following sections some important complementary causes will be discussed.

1.4.1. Colonialism and imperialism

International law on self-determination of peoples recognizes a right to secede for colonized territories. Since this cause is already accepted under international law, it will be addressed in Part 2. Because of what will be explained there, minority nations such as Quebec, Scotland, the Basque Country or Catalonia cannot be considered a colony. First, there is no territorial discontinuity between them and their parent State. Second, the basic individual rights of their members are generally respected. In particular, their members can participate in the democratic processes to shape the general will of the central government, something that inhabitants of colonies could not often do. Third, they are recognized as a distinct society, nation or nationality and granted territorial autonomy exercised through a parliament and an executive. However, as later discussed, the definition of colonies and the

[423] In similar vein, PHILPOTT, D. "In Defense of Self-Determination", pp. 375-8.
[424] NORMAN, W. "Ethics of Secession", pp. 52-6. NORMAN, W. *Negotiating Nationalism*, pp. 187-8. Although the idea of *vanity* secessions may be of theoretical interest, Costa criticizes its practical relevance since the real costs of secession are too high to allow vanity secessions. COSTA, J. "On Theories of Secession", p. 80. Justice as fairness endorses a much deeper criticism of what a just cause is, claiming that not only the suffering of injustices constitutes "just causes" to secede.

justification of their right to secede are rather ambiguous and arbitrary.[425] For the time being, let us leave it with the words of Lee Buchheit:

> International law is thus asked to perceive a distinction between the historical subjugation of an alien population living in a different part of the globe and the historical subjugation of an alien population living on a piece of land abutting that of its oppressors. The former can apparently never be legitimated by the mere passage of time, whereas the latter is eventually transformed into a protected status quo.[426]

1.4.2. Occupation and domination

Occupation and domination by violence, force or intimidation, similarly to colonization, are accepted as causes for secession under international law. Nowadays, the right of conquest as a title to extend sovereignty over new territories contravenes international law. In particular, it violates the international principles of self-determination of peoples, non-intervention, territorial integrity and non-use of force.[427] This cause for secession, as well as colonialism and imperialism, illustrate that, on occasions, causes for secession can be so strong on their own that they can prevail independently of the principles of nationality and democracy (*i.e.* not as complementary but as independent causes). For example, a territory that has recently been occupied illegally does not need to be a national community nor to decide democratically that it wants to recover its independence.

International law leaves open important questions such as: for how long does an illegal occupation legitimize a right to external self-determination? When and how does an illegal occupation transform into a protected status quo? The answer to these questions is relevant in both theoretical and practical dimensions. For instance, French Canada may have been incorporated into English Canada by conquest, but the French had previously conquered part of Canada from the Natives Americans (some of whose descendants can still be identified). This could be an example of the

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[425] See § 2.1.3 below.
[426] BUCHHEIT, L.C. *Secession*, p. 18.
[427] UN General Assembly Resolution 2625 (XXV) of 1970 stipulates: "The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal." See ch. 2.1 below. In similar vein, BROWNLIE, I.; CRAWFORD, J. *Brownlie's Principles of Public International Law*, p. 242.

problem of eternal return. In a positive sense, the passage of time may work as a kind of correction of occupations and conquests without just title. In a negative sense, the action held by the illegally occupied people to question the occupation or to reclaim their independence may evaporate in the course of time.[428]

At this point, a distinction should be drawn between an action (writ) to claim ownership of a territory and an action (writ) to recover or restore possession thereof. Following Margalit and Raz, while a claim to self-determination resembles the former, a claim against illegal occupation or intervention is more similar to the latter. In line with the international prohibition on illegal use of force, they argue that military invasion or violent occupation give rise to a possessory right to have the *status quo ante* restored. Rather than protecting the essence of national self-determination ("the ultimate soundness of one's title"), the right to restore the situation prior to the illegitimate occupation results from the protection of international public order. Although invocation of the right to self-determination is not necessary, it may help to claim that the previous possession enjoyed just title.[429]

Actions to recover or restore possession cannot be used against the parent State that has governed a territory at length, despite the territory was seized by violence, force or intimidation. Possessory rights apply only against recent occupiers. Once the possessory actions reach the limitation period, an action to claim ownership on the moral and legal basis of the international principle of self-determination of peoples could be brought. In Continental civil law at least, possessory actions usually expire before actions to claim ownership.[430] However, the latter also perishes with the passage of time. In this way, both statutes of limitations (first of the possessory claims and then of the ownership claims) protect the current parent State and its citizens against being unfairly punished for the misdeeds of their ancestors (or, more precisely, for the wrongs of their ancestor elites).[431] In general, all legal actions reach their limitation periods at some point. All legal claims evaporate over time. Actions to recover sovereignty over a territory should be no exception.

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[428] In similar vein, CASSESE, A. *Self-Determination of Peoples*, ch. 7, especially pp. 188-9.
[429] MARGALIT, A.; RAZ, J. "National Self-Determination", p. 442.
[430] This is the rule in both Catalan and Spanish Civil Codes.
[431] In similar vein, MARGALIT, A.; RAZ, J. "National Self-Determination", p. 459. BUCHANAN, A. *Secession*, pp. 87-91.

Statutes of limitations, as deadlines after which legal actions cannot be enforced, may frustrate some morally fair claims. Nevertheless, statutes of limitations of actions may answer both substantive and practical conceptions of justice. They answer the former by protecting the legitimate expectations of third parties acting in good faith. They answer the latter by protecting the principle of legal certainty and stability. In addition, limitation periods prevent eternal return and, thereby, litigation about old causes which could be hard to prove and judge. Although in some cases time may help to reveal the truth, direct witnesses become indirect over the years, the facts are determined by historians instead of jurists and history sometimes turns into myth. In particular, Buchanan suggests that the international society should adopt a rule or a convention which presumes the legitimacy of existing States' claims to territory, "subject to the proviso that these claims can be defeated by strong evidence of unjust taking occurring within but not earlier than, say, three or four generations".[432] Justice as multinational fairness favours a gradual decline of the normative strength of the complementary cause of forceful occupation with the passage of time.

For pragmatic reasons, legal systems tend to make statutes of limitations to claim ownership coincide with acquisition of property by usucaption or adverse possession in order to avoid leaving goods without an owner once this action reaches its time limit. To this end, civil law can stipulate that actions to claim ownership shall not evaporate until another person usucapts the right.[433] Limitation periods reflect the legal intuition that the deeds (often misdeeds) are rectified over time and that legal certainty protects third parties acting in good faith. In Continental civil law, usucaption has evolved over centuries placing greater weight today on possession as master or holder of the right, relegating just title and good faith to secondary elements which may shorten the period of possession necessary to usucapt.[434] In Common law, adverse possession usually requires an effective or

[432] BUCHANAN, A. *Secession*, p. 88.
[433] *E.g.* Article 544-3 of the Civil Code of Catalonia.
[434] In general, classical Roman usucaption seemed to be a mechanism to rectify acquisitions made in good faith but suffering from formal defects or lack of ownership on the part of the transferor. Usucaption therefore demanded title and acquisition in good faith. Later, in parallel, a provincial institution called *praescriptio longi temporis* was developed which worked as an acquisitive prescription, in that it prevented claims from owners who had refrained from interrupting a lengthy

actual possession, which is exercised through corporeal occupation manifesting the dominion over the property as an average owner of a similar property would.[435] This requirement may be similar to possession as master or holder of the right. Therefore, it seems that both usucaption and adverse possession could be applied to States to protect the new generations who took no part in the forceful occupation, as well as legal certainty in general. However, both usucaption and adverse possession usually require peaceful possession. In Continental civil law, peaceful possession generally means non-violently acquired possession.[436] It can also be interpreted as meaning that the owner has the opportunity to contest freely this possession or occupation but does not do so. If peaceful possession is interpreted in these or similar senses, it becomes complicated to appeal to these legal institutions as forms analogous to acquisition of sovereignty over a territory by violence, force or intimidation.[437] In general, the principle of effectiveness of current international law, which consists of exercising the effective monopoly of force over a territory and a population, takes us away from the analogy with usucaption and adverse possession.[438]

To conclude, in cases of occupation and domination by violence, force or intimidation, it seems prudent to draw an analogy with actions to recover or restore possession, actions to claim ownership and with the limitation periods of such claims, but inappropriate to draw an analogy with acquisition of property by usucaption and adverse possession.

1.4.3. Serious and persistent violation of human rights

Most moral theories of secession accept this cause as a trigger for the right to secede. Specifically, the right to secede as a reaction to a violation of the human rights of members of a national community is closely linked to remedial theories

possession. In the end, the two institutions were joined during the time of Justinian, discarding proof of title but demanding good faith. This evolution seems to have reinforced the value of legal certainty.

[435] Basic requirements of usucaption and adverse possession are listed in § 1.2.6 above.

[436] For example, Article 441 of the Spanish Civil Code.

[437] See BUCHANAN, A. *Secession*, pp. 90-1.

[438] See ch. 2.3 below. Actually, international law recognizes 'prescription' as a mode of acquisition of territorial sovereignty which requires public, peaceful and persisting possession *à titre de souverain* plus acquiescence (*i.e.* no reaction or no protest) by the previous sovereignty-holder. See BROWNLIE, I.; CRAWFORD, J. *Brownlie's Principles of Public International Law*, pp. 229-35

and to the moral right to revolution. Liberal philosophies tend to maintain that citizens hold a moral right to revolution when the State does not respect the basic rights of its citizens.[439] In particular, this moral right to revolution could be invoked in cases of flagrant and systematic violation of Rawls's first principle of justice: "Each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others".[440] In this regard, in the same way that citizens of a State would have the moral right to revolt against a government which neither respects nor guarantees their fundamental rights, members of a national community would have the right to secede from a parent State that selectively violates their fundamental rights.[441] Unfortunately, respect for individual human rights by the parent State is not sufficient to ensure fair multinational treatment, since it only prevents extreme forms of nation-building by the State against its national minorities.[442]

This cause *per se* would legitimize citizens of a territory (whether or not they are members of a minority nation) to secede if they are being treated differently from other citizens with no objective and reasonable justification, provided that such selective discrimination is severe and enduring.[443] A selective violation of the human rights of the members of a specific community (especially of a minority nation) is more easily accepted as an appropriate cause for secession than a violation of human rights that does not selectively discriminate between members of various (national) communities. This latter case would be a just cause to revoke the government, but not to secede, since the grievance could neither be imputed to the citizens of the parent State as a whole nor to the members of the majority (national) community.[444] The Rawlsian principle of equal liberty is more flagrantly and manifestly violated when the violation of liberties is selective, in contrast to cases where all citizens and members of the various (national) communities are equally deprived of the same degrees of freedom. By contrast, it is less complicated to

[439] See LOCKE *Two Treatises of Government.*
[440] RAWLS, J. *A Theory of Justice*, p. 53.
[441] BUCHANAN, A. *Secession*, p. 51.
[442] KYMLICKA, W. *Politics in the Vernacular*, p. 80. KYMLICKA, W. *Multicultural Citizenship*, pp. 2-6.
[443] International law seems to be predisposed to accept this as a cause for secession as well as grave violations of the duty to respect and protect minorities (Aaland Islands doctrine). See § 2.1.2 below.
[444] In this vein, BUCHANAN, A. *Secession*, pp. 112-3.

accept that serious and persistent violation of human rights could work as a complementary cause, even if it is not implemented selectively.[445] Actually, if this complementary cause were accepted, it would create a disincentive for parent States to violate human rights while helping to liberate part of humanity from blatantly unfair treatment by the State.[446]

Another controversial question would be to agree on the length of time for which action in the form of secession is valid against a *serious and persistent violation of human rights*. While the right to take action in the form of secession would remain as long as the grave and systematic violation continues, the controversy would arise on whether and when the right is time-barred once the violation of human rights has ceased. Once again, this raises the issue of evaporation of actions against injustices because of the passage of time.[447] Although it would seem rational to defend that the right to secede must remain only as long as the injustice persists, this criterion could be excessively rigorous on the victims. Justice as multinational fairness favours a gradual decline of the normative force of the cause of *serious and persistent violation of human rights* over time, especially when it works as a complementary cause. Therefore, the right to take action in the form of secession could maintain some normative strength until a new constitutional order respectful of human rights has been consolidated and minorities cannot reasonably fear more violations of this kind.[448] Even if a liberal and democratic regime has been established, grave, systematic and selective violations of human rights may maintain, however weak, some long-term effects as complementary cause.

1.4.4. Economic exploitation and marginalization

[445] At least it would be easier to defend, in relative or comparative terms, that the seceding nation fulfils the *Principle of need for liberal nationalism* and the *Principle of respect for human rights and protection of minorities*. Moreover, the parent State could not oppose these exceptions.
[446] A last pragmatic argument would be that secession could weaken the government of the parent State so much that a general citizens' revolution would be facilitated. In this regard, the first secessions of the former Yugoslav and Soviet Republics triggered the fall of their respective federations and, notwithstanding the difficulties and limitations, the creation of many liberal-democratic States. Yet, empirical exploration of this intuition would be needed, since secession could also weaken the general resistance against an oppressive government.
[447] See § 1.4.2 above.
[448] The last of these criteria can be assessed from the severity and duration of the periods of violation of human rights.

Under Justice as multinational fairness, the *Principle of non-discrimination* and the *Principle of multinational solidarity* would prohibit discriminatory schemes against some national minorities. Schemes that work only for the benefit of the national majority without objective and reasonable justification would be discriminatory. Under Buchanan's remedialism, "discriminatory redistribution" would be a morally legitimate cause for secession. According to him, discriminatory redistribution consists of "implementing taxation schemes or regulatory policies or economic programs that systematically work to the disadvantage of some groups, while benefiting others, in morally arbitrary ways".[449] Thus, for economic exploitation or marginalization to be considered as legitimizing or complementing a claim to secession, they must entail disadvantages as well as other differences that cannot be morally justified. The still more difficult issue to resolve is whether an excessive redistribution can be arbitrary. According to Justice as multinational fairness, excessive multinational solidarity can infringe the *Principle of multinational solidarity* if it is not compatible with or does not leave any space for national solidarity, since the latter form of solidarity ought not to be neglected.

Another aspect that complicates the evaluation of discriminatory and excessive redistribution is the subjective perception produced by national identity. As observed earlier, national identification and the ethical bond of nationality make it possible to accept more intensive redistribution schemes.[450] In other words, the stronger the feeling of belonging to a nation, the further away complaints of excessive redistribution move (but not necessarily of discrimination). Conversely, as national identification decreases, the perception of excessive redistribution increases. In turn, discriminatory redistribution may reduce national identification. In one direction or the other (or in both!), this is what seems to have occurred in Catalonia in recent decades – the Spanish national identification has progressively decreased and the Catalan increased, while the perception of unfair economic treatment has risen. The solution to this problem of subjective perception would seem to be to appeal to the moral objectivity of the external observer, but

[449] BUCHANAN, A. *Secession*, p. 40. In a similar vein, SUNSTEIN, C.R. *Designing Democracy*, p. 108.
[450] See § 1.3.3 above.

unfortunately there are no clear morally acceptable redistribution parameters. The path taken here is to rely more on a primary theory of secession based on national self-determination.

Economic exploitation occurs when the redistribution of wealth is discriminatory (or excessive) towards certain groups.[451] Economic exploitation focuses more on taxation and investment schemes and other economic programs. Under the *principle of ordinality*, the parent State ought to guarantee that the application of the levelling mechanisms does not alter the position of the minority nation or sub-State unit in the pre-levelling ranking of per capita incomes.[452] Accordingly, the principle of ordinality is linked to the ranking of per capita earnings before and after application of the levelling (with the control variable of having similar levels of fiscal pressure). This principle could be a minimum test that inter-territorial solidarity should pass, since it grasps the intuition of political morality that nobody can be forced to show solidarity to such an extent that the receiver immediately becomes richer than the donor.

Economic marginalization is a form of discriminatory redistribution more difficult to prove with objective data. Economic marginalization could include all decisions and acts with no direct economic, fiscal or budget content but which could extensively and intensively affect the economy of a country, such as policies preventing, deterring or excluding the development of industries, harbours and airports.[453] Economic marginalization could also take the form of injustices in investments in human and social capital.[454]

The complementary cause of discriminatory redistribution may have some connection with the cause of *serious and persistent violation of human rights.* However, as long as it is difficult to consider discriminatory redistribution between territories a violation of human rights, discriminatory redistribution would be a legitimate cause for secession as a violation of the mutual advantage established by

[451] SUNSTEIN, C.R. *Constitutionalism and Secession*, pp. 648-9, 659-61.
[452] See Article 206.5 of the Statute of Autonomy of Catalonia.
[453] For example, a policy of non-development of a major airport based on the parent State's refusal to sign international treaties to open new international flights.
[454] When these acts and decisions have an economic, fiscal or budget content, they can be included in the economic exploitation balance.

the social contract (since this contract forbids exploitation of one group to the benefit of another).[455] In similar vein, if discriminatory redistribution would not be in breach of the *Principle of non-discrimination*, it could be in contravention of the *Principle of multinational solidarity* of the hypothetical multinational contract, since multinational solidarity shall not be discriminatory towards national minorities (nor work only for the benefit of the national majority without objective and reasonable justification).

The secession of the North American colonies from the British Empire was based, among other causes, on discriminatory redistribution. According to the citizens of these colonies, British trade policy was designed to favour the metropolis of the Empire at the expense of their interests.[456] That they had no representation in the Westminster Parliament suggested that this discriminatory redistribution was likely to continue indefinitely. Interestingly, many of these North Americans considered themselves members of the same cultural, political and legal community as the metropolis, as is clear from their upholding of "the rights of Englishmen". Hence, forcing them to pay taxes without enjoying parliamentary representation at Westminster created a comparative grievance.[457] A main slogan leading to secession was: "No taxation without representation".[458] Therefore, it was a secession justified by discriminatory redistribution together with the mismatch between the tax obligations and the principle of representation.

A similar phenomenon can be observed in the secession of the colonies in Central and South America from the Spanish Empire. Throughout the 18th century, the so-called enlightened despotism of the new Bourbon dynasty raised taxes, tightened tax collection, promoted migration from the peninsula (from the metropolis to the colonies) and restricted intra-American trade, while simultaneously strengthening the peninsula's monopolies over trade. At the same time, the top offices were reserved for citizens from the peninsula (metropolitans), almost always rejecting indigenous, mixed-race and even Creole candidates. Under these conditions (plus

[455] See BUCHANAN, A. *Secession*, pp. 38-45. HALJAN, D. *Constitutionalising Secession*, ch. 5. HAYEK, F.A. *The Road to Serfdom*, pp. 64-5.
[456] BUCHANAN, A. *Secession*, p. 45.
[457] The list of grievances in the Declaration of Independence of 4 July 1776 includes: "For imposing taxes on us without our consent".
[458] See ARENDT, H. *On Revolution*, ch. 5. As regards "the rights of Englishmen", see ch. 4.

strong North American influence), nationalisms and secessionism arose that were based not on distinctive linguistic, cultural or historical traits (as in the Old Continent), but on the abovementioned economic and political discrimination. Despite their cultural identification with the peninsula, the American Creole elite rejected the rules and authorities imposed from overseas.[459]

At this point, let us consider a right to secede based on economic efficiency arguments. Even if after secession both the new independent State and the rump parent State would improve their position, a unilateral right to secede would not always be justified *per se*. As a general rule, the holder of a right (on the understanding that the parent State holds the right to conserve its territorial integrity) is under no moral obligation to act in a way that maximizes economic prosperity. Therefore, greater economic efficiency would not *per se* be a decisive moral argument to justify unilateral secession or force the parent State to accept secession, but it would play a moral role subordinate to a moral justification of a higher order.[460] Nonetheless, the better economic outcomes argument could work as a positive political incentive to the *Principle of agreement and negotiation*. Consensual secession is definitely easier in this scenario.

According to justice as fairness, there should be a priority of right over economic results and aggregated utility.[461] Conversely, a utilitarian approach could consider secession morally justified if it results in greater wealth and welfare both for members of the seceding nation and for those who remain within the parent State. From such utilitarianism it would make no sense to allow the parent State to act against economic rationality understood as greater general welfare. Utilitarian theories of secession could, however, produce immoral results in at least two cases: (1) when, on grounds of economic efficiency, a right to secede is granted to illiberal nations which will presumably violate basic rights of individuals and minorities and (2) when the parent State could impede secession based only on the greater prosperity of its citizens. In general, utilitarianism tends to over-emphasize

[459] See ANDERSON, B. *Imagined Communities*, ch. 4.
[460] BUCHANAN, A. *Secession*, pp. 45-8.
[461] See § 1.3.4 above.

economic rationality, at the expense of the liberty and equality of individuals and minorities.[462]

To overcome these problems with utilitarianism, a moral justification based on Rawlsian methodology has been applied, which can be summed up as follows: a primary right to secede (subject to multiple requisites) is justified on the basis of the liberty and equality of nations (liberal nationalism) for self-determination. Such a right is derived from a hypothetical multinational contract between nations behind the veil of ignorance, which would ensure justice not only as rationality (utilitarianism), but also as fairness (contractualism). Justice as multinational fairness, thanks to the original position and the veil of ignorance, endorses a sort of nationalist categorical imperative which requires nations to treat each other as ends rather than means.[463]

1.4.5. The right of minority nations to self-protection

Justice as multinational fairness is grounded on national self-determination since: (1) States are not nationally neuter but often national or nationalizing; (2) the national community works as a framework for our autonomy as individuals; (3) being a member of a nation can lend greater significance to our individual acts, for they can constitute collective successes or failures; (4) national diversity is one of the richest sources of cultural diversity in the world; (5) nations have inherent and instrumental value because of some of the values and public goods they produce, such as trust, loyalty, fraternity and solidarity; (6) *national identity* is a significant part of the identity of individuals and failure to respect it could affect individuals' welfare and even be a way of inflicting harm.[464] In this light, if a minority nation wants to secede in order to protect itself from disappearance or to remedy its marginalization, this seems a reasonable complementary cause. This statement may also be justified on the assumption that nations have the right to exist.[465]

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[462] See RAWLS, J. *A Theory of Justice*, § 5.
[463] See § 1.2.4 above.
[464] See § 1.2.2 above.
[465] As Pope John Paul II recalled before the UN General Assembly on 5 October 1996, "a presupposition of a nation's rights is certainly its right to exist: therefore no one — neither a State

Through the hypothetical multinational contract, the contracting nations want to form a multinational State as well as to guarantee their prosperity, public recognition and accommodation of their distinct identity, mutual self-respect and self-protection. On deeper exploration of the argument of national self-protection based on the right to exist, Taylor argues that: (1) the conditions of our identity are indispensable to our being full human subjects; (2) for people today, a crucial pole of identification is their cultural and linguistic community; (3) the availability of such community as a viable pole of identification is indispensable to our being full human subjects; (4) there should be a right to require that others respect whatever is indispensable to our being full human subjects; (5) there should be a moral right, therefore, to demand that others respect the conditions of our cultural and linguistic community being a viable pole of identification.[466]

That most States are not nationally neuter but national or nationalizing has often involved destruction, impairment or marginalization of minority nations and nationalisms (and sometimes this has been done while abiding by the letter of liberal- democratic constitutions). From a normative point of view, this supports both the fairness and appropriateness for minority nations to hold a right to become States to protect themselves. Not only should the exercise of the right work as a shield but holding the right should help too. In Catalonia and Quebec, the argument of self-protection has been used in response to the power of the Spanish and English language, culture and economy. Nevertheless, arguments based on national self-protection and survival lead to understanding national conflicts in existentialist terms which could imply "dangerously illiberal consequences".[467] National self-protection has been, and could be, used to prevail over individual rights. Too much theoretical importance attached to arguments based on national self-protection could entail excessive *victimism* on the part of minority nations. As a result of such victim thinking, minority nations could adopt an excessively defensive position which could hinder trust, deliberation, agreement and reconciliation. What is more,

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nor another nation, nor an international organization — is ever justified in asserting that an individual nation is not worthy of existence." See https://w2.vatican.va/content/john-paul-ii/en/speeches/1995/october/documents/hf_jp-ii_spe_05101995_address-to-uno.html

[466] TAYLOR, C. *Reconciling the Solitudes*, pp. 53-4.

[467] TAMIR, Y. *Liberal Nationalism*, pp. xi-xii (*new preface*).

national self-protection and survival could legitimize and promote polarization, drama and violence excessively by claiming self-defence and necessity.

Within the broad term "self-protection", a distinction could be drawn between self-defence and self-preservation. The former is a moral right of victims to protect themselves against grave attacks by an aggressor.[468] For example, States have sometimes promoted mass migration policies deliberately to dilute the concentration of a minority nation in a given territory.[469] This would not be a mere lack of national neutrality on the part of the State, but a sort of unjust aggression that could justify secession aspirations based on national self-defence. Conversely, self-preservation is not a defence against an unjust, malicious and grave attack, but more a remedy for minority nations against an unfavourable context that cannot be directly imputed to an aggressive parent State. One example of this could be the Anglo-Saxon (Canadian and North-American) cultural context in which Quebec and French Canadians happen to live.[470]

The intuition that self-defence is a more powerful moral argument for secession than self-preservation could be explained as follows. When victims defend themselves against aggressors who are assaulting them grievously, maliciously and unjustly, aggressors have the moral duty to bear any damages caused to them by the victims assaulted, provided that those harms are necessary for self-defence and proportionate to the aggression.[471] The self-preservation argument, however, comes closer to the normative force of the self-defence argument if one believes that a *cultural nation* cannot survive indefinitely without its respective State. This would be a kind of step from the self-defence argument to a defence of necessity argument. Justice as multinational fairness is inclined to distinguish self-defence from self-

[468] BUCHANAN, A. *Secession*, pp. 64-7.
[469] Along these lines, UN General Assembly Resolution 2189 (XXI) of 1966 condemns colonial policies that promote systematic influx of foreign immigrants to the colonies while displacing, deporting and transferring the indigenous inhabitants to other areas. Again, though, international law and politics distinguish unfair treatment of overseas colonies and newly-conquered territories from similar mistreatment of peoples living on a piece of land abutting that of its oppressors.
[470] In this regard, BIRCH. A.H. "Another Liberal Theory of Secession", p. 601.
[471] However, when self-defence is launched as a secessionist argument vis-à-vis a third State which is not the aggressor, the argument of self-defence has more similar force to the argument of self-preservation.

preservation, for it generally believes that several nations can live safely within the same multinational State.

Let us take the example of immigration into Catalonia. Some have asserted that the mass waves of immigration from other parts of Spain into Catalonia were promoted by successive Spanish governments (especially in non-democratic times) to dilute national distinctiveness. If this really were so, it would be a case of cultural and political aggression that could be responded to with a secession cause based on national self-defence. By contrast, if Catalonia had both benefited and suffered from mass immigration without bad State intentions, this could be a secession argument based on self-preservation. In non-regulated conditions, immigrants from outside the State will learn the language and culture of power first (normally those of the parent State and majority group), for they believe that these will ease their integration as well as give them greater opportunities and mobility within the parent State. Since it is not disputed that States can protect themselves from migration by controlling the arrival and integration of newcomers to the State/national culture, thinking in multinational terms, why could not the minority nation control migration from other parts of the State and of the world? Therefore, in order to treat national minorities fairly, they must be given strong powers over immigration and over the terms of integration (*i.e.* education and language).[472] If minority nations lack these powers while receiving high immigration rates, this may sustain a reasonable complementary cause for secession.

From a global point of view, cultural and linguistic diversity is an intangible cultural heritage of humanity as a whole. In this regard, liberalism has defended the value of diversity from both nationalist and universalist positions. The value of cultural diversity and national protection has to be linked to the principle of democracy. From a liberal nationalist perspective, members of a national community are free to decide to abandon their national identity, culture and language. That is to say, there would be no duty to perpetuate a specific culture forever because its members have the right to abandon it and to embrace a new one. If the value of diversity required perpetuity, it would be excessively naturalistic, paternalistic and illiberal. Focus

[472] In this vein, see KYMLICKA, W. *Politics in the Vernacular*, chs. 4, 12 and 15.

should be put on the claims, actions and causes of the process leading to disappearance of a culture, rather than the disappearance as such.

To legitimize national self-protection on the basis of group rights, including a right to secede, the bonds of trust, loyalty, fraternity and solidarity generated or promoted by nationhood could be treated as public goods that deserve protection.[473] In general, members of minority nations can legitimately invoke national self-protection despite being in tension with some liberal rights.[474] However, the means of self-protection ought to depend on the type of nationalism and minority nation referred to, since illiberal nations or nationalisms deserve only to be protected by internal, rather than external, self-determination.[475] Under Justice as multinational fairness, the right of minority nations to self-protection can be a complementary cause for secession, as long as the purpose is to preserve liberal nations and nationalisms.

1.4.6. Violation or failure of internal self-determination

This complementary cause is closely related to the previous one, since both of them are related to recognition, accommodation and protection of national pluralism. Part 2 will reflect on whether a violation of the right of minority nations to internal self-determination (in particular, their right to have powers of self-rule and mechanisms of shared-rule) can lead to external self-determination.[476] In general, serious and systematic violations or failures of the former legitimize the latter. Digging deeper, a *violation* can be distinguished from a *failure* of internal self-determination. Violation of internal self-determination can take two basic forms: (1) when main political agreements or fundamental norms recognizing internal self-determination are broken; (2) in the absence of any agreement or norm recognizing a minimum level of internal self-determination in the forms just mentioned. By contrast, *failure* of internal self-determination occurs in two ways: (1) when the expectations of the minority nation fail without any violation of the agreed or minimum level of self-

[473] In this vein, MILLER, D. *On Nationality*, p. 147.
[474] See KYMLICKA, W. *Multicultural Citizenship*, ch. 3.
[475] See § 1.2.5 above.
[476] See § 2.1.5 below.

determination; (2) when, after repeated negotiations, the demands of the minority do not fit in with the project of the majority. Therefore, violations of internal self-determination would be stronger causes for secession than failures.

1.4.7. Previous statehood and historical rights

A former statehood with its own legal order and public institutions, as in the cases of Catalonia and Scotland, can help to forge, identify or recognize the nation. An earlier section underlined the importance of being a historical community, more or less institutionally complete, together with ancestral links with a given territory or homeland to define a (minority) nation.[477] In this regard, it is appropriate to connect the principle of nationality to a past as a State and to claims and recognition of historical rights as a result of this past statehood. This is not to say, however, that the mere existence of previous statehood is sufficient to back a right to secede.[478] Furthermore, critics of such complementary causes often object to the use of the terms State or statehood prior to the Peace of Westphalia of 1648 (the conventional date set for the birth of the system of sovereign States). States, however, were not created overnight (nor in thirty years of war). What is more, statehood is used here in broad terms including different kingdoms and republics with relative, limited or shared sovereignty.

The question now is whether constitutional recognition of certain historical rights can serve as a complementary cause for a right to secede. Specifically, the Spanish Constitution protects and respects the historical rights of the territories with traditional laws and jurisdiction.[479] In general, constituent processes can oppose, and sometimes have opposed, historicist traditionalism.[480] Nonetheless, constitutional

[477] See § 1.3.2 above.
[478] See § 1.4.2 above.
[479] See Additional Provision 1 of the Spanish Constitution. Although several Spanish territories such as Catalonia, Valencia and Mallorca had their own traditional laws and jurisdiction, this constitutional provision was understood to refer only to the Basque Country and Navarre. In contrast, Article 5 of Statute of Autonomy of Catalonia states that the self-government of Catalonia is based on its historical rights. However, in Judgement 31/2010, the Spanish Constitutional Court basically limited the effects of the historical rights of Catalonia to civil law.
[480] In this regard, constitutionalism and historical rights could be in tension, both for theoretical reasons (if constituent power is believed to be an unlimited power to create a new legal system) and

recognition of historical rights works as a mechanism for conciliation between constitutionalism and historicism. In this spirit of conciliation, Miguel Herrero, one of the framers of the Spanish Constitution, finds a strong link between constitutional recognition of historical rights and the principle of self-determination of peoples. Historical rights, according to him, "are used as a reference framework for democratic legitimization, since democratic options can occur within them, but not without them for the reason that, beyond them, the subject of the self-determination itself cannot be determined".[481] For Herrero, this *historical self-determination* operates as a condition and a limit for any national self-determination and opposes democratic self-determination based on a referendum.[482] Justice as multinational fairness cannot grant that much force to legal history, since the outcomes of this history may be arbitrary and since it refuses such a static conception of the nation and of the democratic will of its members. Therefore, constitutional recognition of historical rights does not work directly as a complementary cause for secession but as an implicit recognition of the minority nation, since they are historical communities that often enjoyed some form of self-determination in the past.[483]

1.4.8. Non-violent secessionist movement and excessive State coercion

The founding of a State should not be based on fratricidal crimes perpetrated with violence as the biblical story of Cain killing Abel and the Roman legend of Romulus murdering Remus. We ought to walk away from doctrines that evoke violence as the driving force for establishing sovereignty and stay in the field of politics for, as Hannah Arendt put it, violence is "antipolitical".[484] Violence must not be an intrinsic part of the creation of new States. Unfortunately, *realpolitik* shows that violence has been, and still is, a driver of the creation of new States.

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for historical reasons (liberal constitutionalism, under French influence, tended to oppose the historicist traditionalism of the *ancien régime*). See SIEYÈS, E. *Qu'est-ce que le Tiers état?*

[481] HERRERO, M. *Derechos Históricos y Constitución*, pp. 270-1. In this regard, Herrero says that a reform of the Spanish Constitution could not eliminate historical rights since, as it would involve breaking the constitutional pact, it would suppose "destruction of the Constitution" (p. 340).

[482] *Ibid.* p. 278.

[483] Arguably, the link between constitutional recognition of historical rights and internal self-determination can be more easily accepted.

[484] ARENDT, H. *On Revolution*, pp. 9-10.

Against this, however, Justice as multinational fairness defends a moralization and juridification of secession.

The absence of violence in the pro-secession movement is important to add credibility to the *principles of democracy, of agreement and negotiation, of need for liberal nationalism* and *of respect for human rights and protection of minorities*. In particular, since protection of minorities works as a legitimizer, guider and delimiter of Justice as multinational fairness, the absence of violence makes it difficult for the parent State to plead a duty and need to protect the minorities in the seceding territory. From an ideal standpoint, non-violence makes it easier for the parent State and the international society to accept and recognize a new State. In contrast to ideal liberal-democratic contexts, in manifestly nonideal settings it could be legitimate and admissible for the secessionists to use violent means.

Excessive State coercion against a peaceful and civic pro-secession movement can ease the requisites to secede, such as the *Principle of agreement and negotiation*, because compromise and consensus are harder in such a context and the resulting covenants could be vitiated. Likewise, disproportionate or abusive State coercion and punishment of institutions, leaders and participants of a non-violent secessionist movement should make it difficult for the parent State to plead legitimate reasons to impede secession. Excessive use of force may morally disempower the principle of unity, since Justice as multinational fairness does not accept unity out of brute force. Excessive State coercion could also ease international involvement in internal affairs and international recognition of nascent statehoods. In conclusion, the normative premise could be that illegitimate, unnecessary or disproportionate resort to violence by either party should make the political aim of its opponents easier.[485]

1.4.9. Normative effects of complementary causes

It is usual and intuitive to plead one or more of these causes to claim statehood, whether independent of or complementary to the principles of nationality and democracy. While for remedial theories some of these causes are essential, for

[485] See BUCHHEIT, L.C. *Secession*, pp. 236-7.

Justice as multinational fairness it is relevant but not necessary to plead these causes to vindicate a unilateral right to secede. According to the latter, the presence of complementary causes may entail several normative and political effects: (1) to identify the territory and population which have the right to secede. Although in ideal terms minority nations are the holders of the primary moral right to secede, from a nonideal point of view the grievances suffered by a territory and its population will also be strong arguments to define the group entitled to secede.[486] (2) To exclude or nuance democratic deliberation and majorities to secede. As an example, it would be nonsense to require a newly occupied people to debate and vote democratically to expel the invader and it would be even more absurd to require it to do so in a clear and qualified democratic way. (3) To deny an individual right to vote in the decision on secession to certain citizens of the parent State residing within the seceding territory or to expand the right to vote to political refugees or former residents.[487] (4) To relax the need for agreement and negotiation, while smoothing unilateral ways to secession. (5) To limit or reduce the normative force of the parent State's arguments based on the principles of sovereignty, unity, indivisibility and territorial integrity. (6) To evaporate or minimize the redistributive justice reasons to impose *secession taxation.* (7) To promote a moral, political and even legal obligation for international recognition.

In sum, these *complementary causes* could help broadly to define what a national community is (or even to grant a right to secede to groups that cannot be considered different nations from the parent State), to reduce or to extend the holders of an individual right to political participation in the decision on secession, to reduce the requisites for secession, to make it difficult for the parent State to legitimately impede secession and to promote recognition of the new State by the international society.

[486] Each kind of injustice may define the group that has the right to secede. BUCHANAN, A. *Secession*, p. 142. However, "the internal cohesiveness of the people may evaporate as soon as the external irritant is removed." BUCHHEIT, L.C. *Secession*, p. 230.
[487] See § 3.4.4 below.

2. SECESSION IN INTERNATIONAL LAW

2.1. Self-determination of peoples

2.1.1. Self-determination and democracy

The sovereignty of States means that they are subject to no other State, but only to international law. According to Hans Kelsen, it is incompatible to defend the idea of unlimited sovereignty of States and that of primacy of international law. If State sovereignty were assumed to be the supreme authority, it would be accepting the supremacy of State law over international law and, thus, it would be proclaiming the supremacy of a particular State law over the other State laws.[488] By contrast, the existence of international law, as regulator of the relations between States and of the limits of their powers, supports the principle of equality between States.[489] Hence, one specific role of international law is to establish the spheres of validity (territorial, personal, material and temporal) of the legal orders of the various States. In the final analysis, despite being a primitive and decentralized legal order, international law is responsible for establishing a framework (within which internal rules can operate) in relation to the birth of new States and the change of territorial boundaries.

Many multinational States, including some with liberal and democratic constitutions, are inflexible about territorial integrity and do not tolerate external self-determination by the minority nations located within their frontiers. Often the latter have sought, in vain, protection from international law for their secession claims. They should not forget that the international law-makers are, essentially, a heterogeneous group of sovereign States (and, with growing but still relatively limited importance, international organizations). While protecting the principles of territorial integrity and of (internal and international) stability, these international law-makers are reluctant to recognize a broad, democratic right to self-

[488] Therefore, Kelsen sustains the primacy of international (public) law and thus State sovereignty *in a relative sense.* KELSEN, H. *Principles of International Law,* § V.B.8. See also KELSEN, H. *Peace through law*, § 8. KELSEN, H. *Teoría General del Estado*, § 20.D.

[489] In this sense "the principle of the sovereign equality" is enshrined in Article 2 of the UN Charter as well as in other relevant documents.

determination. What is more, many illiberal and non-democratic States are accepted by international law and are recognized as members of the international society. It is therefore logical that recognition of self-determination of peoples by international law has been selective and limited.

The principle of self-determination can be understood in different senses: as a principle ensuring democratic forms of government; as a principle against colonial rule; as a principle prohibiting invasion and occupation of other territories by foreign powers; as a principle governing acquisition, transfers and loss of sovereignty over a territory; as a principle protecting free determination of the current sovereign States; as a principle recognizing free determination of certain groups within or between sovereign States.[490] This last meaning could cover internal self-determination (to claim representation or self-government within the parent State) or external self-determination (to claim secession or integration or association with another sovereign State). Current international law (*lex lata*) grants no general right to external self-determination to minorities. Instead, it leans more towards internal self-determination, specifically towards the protection of minorities.[491]

There seems to be an international consensus that both the principle and the right to self-determination have become *jus cogens*[492] and applicable *erga omnes*[493]. Yet, the different sides, types and forms of self-determination have different legal status, recognition and treatment. The internal side of the international principle of self-determination of peoples is closely related to the principle of democracy, considering it can be broadly defined as: "internal self-determination means the

[490] Self-determination of peoples could be handled as a *concept* and these different senses as *conceptions*. This would allow the concept to embrace many conceptions, while still being the same concept. It would also allow the conceptions to keep on changing and evolving with no need to change or abandon the concept. On the distinction between *concept* and *conception*, see § 2.1.4 below.

[491] CASSESE, A. *Self-Determination of Peoples*, chs. 2, 12.

[492] ZAYAS, A.M. "Promotion of a democratic and equitable international order" § 15. *Jus cogens* refers to peremptory norms of general international law. In other words, a norm that can be modified only by another norm of international law of the same nature, thus unalterable and inalienable by international treaty. See Article 53 of the Vienna Convention on the Law of Treaties of 1969.

[493] In the ICJ's view, the assertion that "the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an erga omnes character, is irreproachable." ICJ Opinion on East Timor of 1995 (par. 29). In legal jargon, *erga omnes* means applicable to or with effects on everyone, on everybody (in international law, applicable to all States or subjects of international law). Normally, a distinction is drawn with the phrase *inter partes*, which means between parties only.

right to authentic self-government, that is the right for a people really and freely to choose its own political and economic regime".[494] However, the principle of democracy is neither a fundamental principle nor a peremptory norm of international law, and is neither recognized nor guaranteed globally.[495] Furthermore, the existence of a democratic form of government is not a necessary condition to be a (full) member of the international society. In particular, there is no requirement to be a democratic State in order to be a member of the United Nations.[496] On the one hand, the UN General Assembly has adopted many resolutions to promote and consolidate democracy.[497] But on the other, the same Assembly has put these *pro-democracy* resolutions into perspective by reaffirming, at the same time, the principles of sovereignty and non-intervention.[498]

Even though the principle of democracy is not one of the essential principles of current international law, it can be inferred from citizens' right to take part in the conduct of public affairs and right to vote and to be elected at genuine periodic elections recognized by international declarations and treaties on human rights.[499] The practice of the UN and its Human Rights Committee, however, shows that for a long time there has been resistance to expanding the right to internal self-determination towards international acceptance of the principle of democracy. "The need to champion democratic values has all too often been subordinated to the desire to preserve intact the principle of State sovereignty".[500] International law is indeed reluctant to connect the principle of self-determination of peoples to the principle of democracy.

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[494] CASSESE, A. *Self-Determination of Peoples*, p. 101.
[495] Intervention in favour of democracy has not prevailed over the principle of non-intervention. REMIRO, A.; *et al. Derecho Internacional*, p. 213; largely based on the ICJ case concerning military and paramilitary activities in and against Nicaragua (1986).
[496] See § 2.1.4 below.
[497] *Inter alia*, General Assembly Resolutions 49/30 of 7 December 1994; 50/133 of 20 December 1995; 54/36 of 29 November 1999; 55/96 of 4 December 2000; 59/201 of 20 December 2004; 62/7 of 8 November 2007; and 64/12 of 9 November 2009.
[498] Along these lines, see REMIRO, A.; *et al. Derecho Internacional*, pp. 213, 216. Resolution A/RES/62/7 reads: "Reaffirming also that, while democracies share common features, there is no single model of democracy and that democracy does not belong to any country or region, and reaffirming further the necessity of due respect for sovereignty, the right to self-determination and territorial integrity."
[499] Article 21 of the Universal Declaration of Human Rights and Article 25 of the International Covenant on Civil and Political Rights.
[500] CASSESE, A. *Self-Determination of Peoples*, p. 103.

Some political philosophers endeavour to draw a distinction between national self-determination and the principle of democracy.[501] To a certain extent, a State can be considered democratic even if it does not respect self-determination of its minority nations. Yet, can the principle of national self-determination be respected without liberal democracy? Who would then decide the destiny of the nation at issue? And without respect for basic individual and group rights, can we talk about genuine democracy? The interconnection between national self-determination, democracy and basic individual and group rights should be emphasized under the big umbrella of the principle of self-determination of peoples.[502] Recall, however, that the principle of democracy is not one of the eight principles of Rawls's ideal international law.[503]

Democracy is, in contrast, a fundamental legal principle in Europe. Democracy is one of the founding values of the European Union (Art. 2 TEU). The EU is based on representative democracy (Art. 10.1 TEU), the citizens are directly represented in the European Parliament (Art. 10.2 TEU), only democratic States can be members of the EU (Art. 49 TEU) and there is a procedure for sanctioning serious and persistent breaches of the founding values by any Member State (Art. 7 TEU). The Council of Europe was one of the first international organizations to require democracy for admission and continued membership. The Council has mechanisms to sanction breaches of the principle of democracy, such as suspension of representation of the infringing Member State. Article 3 of the First Protocol to the European Convention on Human Rights enshrines the right to free elections and gives the European Court of Human Rights the task of protecting it. The European Commission for Democracy through Law (the Venice Commission) issues relevant opinions, reports and codes of good practice on matters related to the principle of democracy, such as on referendums.[504] The OSCE helps its participating States to build and consolidate democracy.[505]

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[501] TAMIR, Y. *Liberal Nationalism*, p. 71.
[502] In similar vein, see ZAYAS, A.M. "Promotion of a democratic and equitable international order" §§ 23, 32.
[503] RAWLS, J. *The Law of Peoples*, § 4.1. See § 1.2.2 above.
[504] See ch. 3.4 below.
[505] The Conference on Security and Cooperation in Europe, predecessor of the OSCE, was, at first, more cautious about enshrining the principle of democracy, since its purpose was to promote east-west cooperation. When the communist regimes disappeared, promotion of democracy became more clearly one of its objectives.

For the moment, let us stand by the idea that pro-secession claims based on the principle of democracy should focus on a specific portion of the international society: basically on liberal and democratic States and on international organizations formed or guided by these States.[506] In particular, focusing on the European region is interesting not only because of the importance of the principle of democracy, but also in view of the regional evolution of the principle of sovereignty.[507]

2.1.2. Self-determination as a legacy of the World Wars

In international law, the principle of and the right to self-determination of peoples were recognized and developed as a result of the two World Wars and the subsequent peace processes. Two prominent conceptions of self-determination of peoples emerged in World War I: the Leninist and the Wilsonian.[508]

Notwithstanding his internationalist ideology, Vladimir Ilyich Ulyanov, alias Lenin, was convinced that, in an initial liberating and democratizing phase of capitalism, national movements, transformed into mass movements, had contributed to overcoming feudalism and the *ancien régime*.[509] Because of equality, liberty and peace between nations, Lenin defended the idea of a multinational federation based on voluntary ties and recognition of the right to self-determination of nations. This right to national self-determination included the right to secede, since nations have an equal right to become nation-States. For Lenin, non-recognition of the right to national self-determination amounted, in practice, to supporting the oppressing nation and nationalism.[510]

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[506] See ch. 2.3 below.
[507] See BOSSACOMA, P. *Sovereignty in Europe*.
[508] CASSESE, A. *Self-Determination of Peoples*, pp. 11-33. BELSER, E.M.; FANG-BÄR, A. "Self-Determination and Secession" in BELSER, E.M.; *et al*. (ed.) *States Falling Apart?*, pp. 49-55.
[509] Despite socialism defining itself as an internationalist ideology, socialist revolutions and States often defined themselves in national terms. See § 1.2.5 above.
[510] Lenin considered that recognition of the right to self-determination of nations was also advantageous for the dominant nation, since it helped to democratize it, to make it freer and to rid it of reactionary ideas and policies. "Can a nation be free if it oppresses other nations? It cannot." LENIN, V.I. "The Right of Nations to Self-Determination", p. 413.

At the same time, recognition of the right to self-determination of nations was, according to Lenin, the approach most consistent with democracy. Taking the example of Norway's secession from Sweden, he considered the secession referendum a legitimate and practical democratic mechanism for exercising the right to self-determination of peoples (but nor did he rule out that the parliament or national assembly of the seceding nation could take the decision).[511] In the absence of democratic means, however, the use of force could be legitimate. For all these reasons, Lenin can be regarded as one of the first statesmen to uphold and proclaim the principle of and right to self-determination of peoples. In addition, Leninist rhetoric was put into action. A multinational federation of free Soviet republics was created, and its 1918 Constitution established the right to self-determination of peoples and the right to secede of the republics.[512]

Nonetheless, Lenin's conception of self-determination of peoples was subject to class interest, emancipation of the proletariat and the socialist revolution. In theory and practice, international socialism had priority over self-determination. Self-determination rhetoric was convenient first against a tsarist Russia and then against capitalist empires.[513] Despite this subjection of the right to self-determination of peoples to the socialist cause, the Leninist connection established between nationalism, federalism and internationalism can be re-read in the light of Justice as multinational fairness: plurinational federalism requires recognizing nations as free for democratic self-determination and, conversely, internationalism without either national recognition and the right to self-determination may turn into undesirable, hostile or even tyrannical cosmopolitanism.[514]

Wilson's doctrine of self-determination was anticipated in his message of 1917 to Russia explaining the war aims of the USA: "We are fighting for the liberty, the self-government, and the undictated development of all peoples. (…) No people

[511] *Ibid*. pp. 425-30, 450.
[512] See Articles 1.2, 4 and 6 of the Soviet Constitution of 1918. For more on the evolution of the Soviet constitutional right to self-determination and to secession, see § 3.1.1 below.
[513] See BUCHHEIT, L.C. *Secession*, pp. 124-6. REMIRO, A.; *et al. Derecho Internacional*, p. 165. CASSESE, A. *Self-Determination of Peoples*, pp. 16-8. CONNOR, W. "Nationalism and political illegitimacy", pp. 36-7.
[514] In other words, federal and international integration must set out from recognition of the various national identities (whether State, sub-State or supranational), from the abstract principle of equality between them and also from their right to self-determination as an expression of this recognition.

must be forced under sovereignty under which it does not wish to live."[515] Nonetheless, unlike the Leninist conception of the right to self-determination as a general right to secede for all nations, the conception and programme of the US President Thomas Woodrow Wilson were more moderate. Although none of his Fourteen Points enunciated in 1918 recognized a principle of or general right to national self-determination, Wilson stated that he aimed at securing a "just and fair peace" through the "principle of national self-determination".[516] Furthermore, there is a kind of general implicit recognition of the principle of national self-determination, since many of the 14 points are closely linked to and inspired by it: the need for listening to the claims of colonies and for giving an equal weight to the interests of the populations concerned (point 5); the readjustment of the frontiers of Italy along criteria of nationality (point 9); the freest opportunity to autonomous development of the peoples of Austria-Hungary, safeguarding their place among nations (point 10); international guarantees of the political and economic independence of the individual Balkan States based on nationality criteria (point 11); the opportunity to autonomous development of the non-Turkish nationalities of the Ottoman Empire (point 12); the independence of Poland guaranteed by international covenant (point 13); and the need for forming a general association of nations to guarantee political independence and territorial integrity to great and small States alike (point 14).[517]

Article 3 of Wilson's draft of the Covenant of the League of Nations stated that further territorial adjustments would be made "pursuant to the principle of self-determination".[518] Although it was not finally included in the Covenant, the Wilsonian principle of self-determination inspired the peace treaties ending World War I.[519] Wilson's principle of self-determination had an external purpose in three directions: (1) reorganization of Central Europe – especially of the Austro-Hungarian and Ottoman Empires – in accordance with national feelings in order to prevent a new global conflict; (2) the importance of the right to self-determination

[515] BUCHHEIT, L.C. *Secession*, p. 63.
[516] MOORE, M. *The Ethics of Nationalism*, p. 143. See MOORE, M. (ed.) *National Self-Determination and Secession*, p. 3. MEDINA, M. *El derecho de secesión…*, p. 81.
[517] In similar vein, MUSGRAVE, T.D. *Self-Determination and National Minorities*, p. 23-4.
[518] BUCHHEIT, L.C. *Secession*, p. 64.
[519] CASSESE, A. *Self-Determination of Peoples*, p. 27. MUSGRAVE, T.D. *Self-Determination and National Minorities*, pp. 26-31.

of peoples in redrawing frontiers; and (3) the principle of self-determination to reconcile the interests of the colonial State and of the colonized territory, without entailing a right to secede for the latter. Wilsonian understanding of the right to self-determination also had an internal dimension which emphasized the need for democratic government of the already sovereign States.[520] In ideal terms, Wilson's principle of self-determination of peoples sought a moderate conjunction between liberalism, democracy and nationalism. On this matter, the theoretical spirit of the Wilsonian proposal, and by extension of the Paris Peace Conference, was inspired by J.S. Mill's liberal nationalism.[521] Yet, because of the practical difficulties of recognizing national self-determination as an international right to secede, the Wilsonian ideal was realized in the form of protection of minorities under the supervision of the League of Nations.[522]

The differences between these two statesmen can be summed up as follows:[523] (1) Lenin defended a right to self-determination of nations within a framework of revolutionary socialism, whereas Wilson supported a principle of self-determination within an "ordered reformist liberalism". (2) Lenin proposed a revolutionary conception of the existing international right especially opposed to imperialism; conversely, Wilson believed that the old European State and Empire system could gradually evolve towards a society of liberal and democratic nations. (3) Lenin proclaimed general recognition of the right to self-determination of peoples and highlighted the external senses of the right – secession, non-colonization and prohibition of annexation; by contrast, Wilson emphasized the internal democratic dimension which implied that governments had to govern with the consent of the governed. (4) If it proved impossible to solve the issue in a democratic, legal and consensual way, Lenin would accept unilateral exercise of the right, if necessary using revolutionary violence; in another direction, Wilson advocated pacific exercise by way of a referendum in accordance with international law and expert

[520] MUSGRAVE, T.D. *Self-Determination and National Minorities*, p. 23-4. BUCHHEIT, L.C. *Secession*, pp. 113-6. CASSESE, A. *Self-Determination of Peoples*, pp. 20-1.
[521] TAMIR, Y. *Liberal Nationalism*, p. 142. BUCHHEIT, L.C. *Secession*, pp. 114-5.
[522] BUCHHEIT, L.C. *Secession*, pp. 64-73. MANCINI, S. "Secession and Self-Determination", p. 488.
[523] CASSESE, A. *Self-Determination of Peoples*, pp. 21-3.

opinion.[524] (5) Unlike Wilson, Lenin supported and secured constitutionalization of the right to self-determination and to secede in the internal legal order.[525]

According to Tamir, during the Wilsonian era, the theoretical principle of national self-determination retreated *de facto* before the belief that only large States could be free and progressive, whereas small States were condemned to dependence and to oppression. This contrast gave birth to a kind of principle of capacity which took precedence over the principle of national self-determination. As a result of the supremacy of this principle of viability, in conjunction with the principle of territorial integrity, unification was given priority over secession (in the cases of Germany, Italy, Bulgaria, Yugoslavia, Poland, Romania, Greece, Czechoslovakia, etc.). Only in the dissolutions of the defeated empires (Austro-Hungarian and Ottoman) did a semblance of national self-determination occur. Still following Tamir, the principle of national self-determination regressed in practice, since few of the new nation-States respected the rights of their national minorities despite the commitments given under the League of Nations. By contrast, the old European empires that had historically recognized or tolerated several forms of political, legal, cultural and religious autonomy were dismantled.[526]

On the practical consequences of World War I, of the post-war years and of Leninist and Wilsonian ideas, one may conclude that: (1) the principle of self-determination of peoples proclaimed by the allies remained subordinate to their geostrategic interests; (2) this principle often gave way to international obligations to protect certain minority rights on the part of the new States; (3) referendums to redefine territorial boundaries were the exception and not the general rule.[527] The international treaties with Germany (Versailles, 1919), Austria (Saint Germain, 1919), Bulgaria (Neuilly, 1919) and the Ottoman Empire (Lausanne, 1923, the successor to the Treaty of Sèvres of 1920) did not contemplate a referendum as an

[524] The rule of law and the doctrine of precedent are usually more present and relevant in legal and expert bodies than in political bodies.
[525] In the following decades, though, the principle of self-determination gained weight in American foreign policy with the effect of a firmer position against colonialism and a growing refusal of the more flagrant forms of imperialism. BUCHHEIT, L.C. *Secession*, p. 117.
[526] TAMIR, Y. *Liberal Nationalism*, pp. 142-5.
[527] See CASSESE, A. *Self-Determination of Peoples*, pp. 23-33, 360. BUCHHEIT, L.C. *Secession*, pp. 66-70.

ordinary mechanism to redefine territorial borders. Referendums were planned and held on small territories only.[528] It was after World War II that referendums progressively consolidated as democratic tools to exercise self-determination thanks to decolonization and the dismemberment of the socialist federations.

In the case of the Aaland Islands, two international commissions of experts considered that international law included no general right to external self-determination. Unlike external self-determination, protection of minorities was compatible with the international principle of territorial integrity of States. A right to separation would arise, however, in exceptional cases where minorities are being oppressed or the obligation to respect and protect them is being violated. Accordingly, there would be a right to external self-determination stemming from a "manifest and continued abuse of sovereign power, to the detriment of a section of the population of a State".[529] This international doctrine endorses a remedial right to external self-determination as a reaction to flagrant, systematic and selective abuses of sovereignty.

At the end of World War II a further remarkable adjustment of frontiers occurred. The Yalta and Potsdam Agreements brought stability to Europe and helped to keep peace in the world. Unfortunately, the principle of self-determination of peoples played no significant part (at first).[530] Before World War II, although self-determination of peoples emerged as a principle in international law, it was not included in the Covenant of the League of Nations. After this War, the principle of self-determination of peoples was enshrined in the 1945 Charter of the United

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[528] Upper Silesia, Allenstein, Marienwerder, Schleswig, Saarland, Klagenfurt, Teschen, Sopron. Nevertheless, obligations imposed by the international society on aggressors should not be confused with the general practice. Even to the present, "there is insufficient practice to warrant the view that a transfer is invalid simply because there is no sufficient provision for expression of opinion by the inhabitants." BROWNLIE, I.; CRAWFORD, J. *Brownlie's Principles of Public International Law*, pp. 243-4.

[529] See MARSHALL BROWN, P. *The Aaland Islands Question*, pp. 268-72. BUCHHEIT, L.C. *Secession*, pp. 70-3. MUSGRAVE, T.D. *Self-Determination and National Minorities*, pp. 32-7. CASSESE, A. *Self-Determination of Peoples*, pp. 27-31. DUGARD, J.; RAIČ, D. "The role of recognition…", p. 107. HANNIKAINEN, L. "La autonomía territorial de las Islas Åland...", p. 73. SCHARF, M.P. "Earned Sovereignty", p. 381. CONNOLLY, C. "Independence in Europe…", pp. 68-70. BELSER, E.M.; FANG-BÄR, A. "Self-Determination and Secession" in BELSER, E.M.; *et al*. (ed.) *States Falling Apart?*, pp. 54-5.

[530] MEDINA, M. *El derecho de secesión…*, p. 160.

Nations as one of the purposes of the UN but not as an obligation of the Member States.[531]

Broadly, the international positions on the significance and scope of the right to self-determination of peoples were as follows: (1) the socialist – communist – States emphasized the external dimension of the right, which, in particular, allowed colonized peoples to become free sovereign States; as for the internal dimension, they considered that the only basis for true self-determination of the people was a socialist government which could emancipate the proletariat. (2) The developing and decolonized States supported the socialist emphasis on the anti-colonial and anti-racist external dimension of the right but feared that it might give rise to secessionist demands from their national and ethnic minorities. (3) The western developed States took a different view, underlining the internal dimension of the right to self-determination of peoples as an obligation on States to respect democracy and the fundamental rights of their citizens, irrespective of whether they belonged to a national majority or minority. In respect to the external dimension, colonial States such as the UK and France were more opposed to it than non-colonial countries States such as the USA and Canada.[532] Although both old and new States feared the potential of decolonization to open up the subjective scope of the right to external self-determination to sub-State peoples and minorities, the right to self-determination of colonies advanced rapidly because the USA and the USSR wanted to *neocolonize* and because each new decolonized State added a new pro-decolonization member to the UN.[533]

The International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights of 1966 enshrined the right to self-determination of peoples as an obligation on the signatory States (and not as a mere purpose of the UN).[534]

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[531] Article 1.2 of the UN Charter: "The Purposes of the United Nations are: (...) 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."
[532] CASSESE, A. *Self-Determination of Peoples*, pp. 37-50.
[533] REMIRO, A.; *et al. Derecho Internacional*, p. 168. The UN started with 51 Member States in 1945 and it rapidly started to grow (reaching 193 Members in 2011). See http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html
[534] Article 1 of both Covenants read: "1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and

About 170 States are part of these international treaties. Nonetheless, many interpreted that the peoples referred to in these Covenants are sovereign States and, where appropriate, trust and non-self-governing territories. More specifically, the first two paragraphs seem to recognize a right to internal self-determination for sovereign peoples as a right to democratic self-government (first paragraph: western emphasis) without interference by other peoples and with the right to dispose of their natural wealth and resources (second paragraph: non-western emphasis). The third paragraph attempts to recognize a right for colonized territories to choose their international status.[535] *A contrario*, the wording may exclude external self-determination of sub-State nations beyond colonial rule.

In addition, according to Cassese, Article 1.3 should be read in conjunction with Article 27 of the International Covenant on Civil and Political Rights so that the rights of the ethnic, religious or linguistic minorities would be ascribed to their members individually, without giving rise to collective rights to self-determination.[536] Against this link, one might reply that Article 27 refers to ethnic, religious or linguistic minorities but not national minorities.[537] What is more, if one manages to question successfully the fundamental normative difference between a colonized territory and a sub-State nation with territorial continuity, an analogous argument can be defended on the basis of Article 1.3 of the 1966 New York Covenants. This will be discussed in the following sections.

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cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

[535] The trust territories referred to in chapter 12 of the UN Charter were territories under the trusteeship of the League of Nations which did not gain independence before 1945 and the colonies of the powers defeated in World War II. By contrast, the non-self-governing territories referred to in chapter 11 were the colonies not subject to the trusteeship system (the colonies of the victorious powers in World War II).

[536] CASSESE, A. *Self-Determination of Peoples*, pp. 57-61. Article 27 of the International Covenant on Civil and Political Rights reads: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

[537] For the differences between national and ethnic minorities, see § 1.3.2 above.

2.1.3. Three types of secession under customary international law

The international treaties seen in the previous sections fed the customary international law on self-determination, the external dimension of which has expanded more than the treaty law.[538] Costume becomes law (including international law) as a result of constant, lasting and uniform practice (*usus*) plus a shared consciousness of legal obligation (*opinio juris sive necessitatis*).[539] When considering the right to self-determination of peoples as customary international law, because it is of such a political nature, attention should be paid to the UN declarations on the subject and the statements made by States before, during and after adoption of them.[540] Amongst these, the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, known as the *Magna Carta of Decolonization* (UN General Assembly Resolution *1514 (XV)* of 1960) and the *Declaration on Principles of International Law* (UN General Assembly Resolution *2625 (XXV)* of 1970) are of particular importance.

In both declarations, the right to self-determination of peoples is interpreted in a way complementing and respecting the principles of territorial integrity of States and of non-intervention.[541] Accordingly, the right to external self-determination in the form of secession remains an exceptional option in international law, limited to three main types of cases: (1) colonization, (2) foreign occupation and domination, and (3) oppression of minorities or significant, systematic and selective violations of human rights. The first two seem to constitute a true right to secede under the international law in force, while the third is still in the process of formation and consolidation. Linked to the third, some have interpreted another embryonic type of secession resulting from a violation of the right to internal self-determination of sub-State nations.[542] These types of cases will now be discussed one by one.

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[538] CASSESE, A. *Self-Determination of Peoples*, ch. 7, especially pp. 159-60.
[539] See KELSEN, H. *Principles of International Law*, § IV.A.3.
[540] CASSESE, A. *Self-Determination of Peoples*, pp. 69-70.
[541] Some believe that Resolution 2625 is more contained than Resolution 1514, because the former aims to preserve the stability of the new territorial boundaries. To curb excessive fragmentation, territorial integrity occupies a preeminent position in Resolution 2625. MEDINA, M. *El derecho de secesión…*, pp. 31, 156-7.
[542] See § 2.1.5 below.

This first type of right to external self-determination appears in cases of colonization. This right could be implemented in the form of secession, of integration or association with another independent State.[543] This right applies to colonies without territorial continuity with the metropolis. Resolution *1514 (XV)* of 1960 enshrined the presumption that colonized peoples geographically separate and ethnoculturally different from the country which administers them have a right to independence. This presumption could be complemented by other criteria (political, legal, economic, historical, etc.) which prove that the territory was in a state of subordination.[544] Under the *uti possidetis* principle, the subjective scope of this right is the territory colonized, not the different communities which exist within it.[545] Once the right to self-determination has been materialized in one of these forms, it expires. Yet, if the colonized population has chosen to remain, the colonial State shall allow the colonized territory to exercise it again in the future. Colonies normally exercised the right to external self-determination by means of referendums – often organized or supervised by the UN – and, less frequently, via representatives and mechanisms for representation.[546]

The ICJ's conclusions on colonization cases are set out in its Opinions on Namibia of 1971 and on Western Sahara of 1975. The first considers that the international right to external self-determination is guaranteed to all dependent territories (colonized or under tutelage, whether international or of another State).[547] The

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[543] See UN General Assembly *Resolution 26/25 (XXV)* of 1970.
[544] REMIRO, A.; *et al. Derecho Internacional*, p. 170.
[545] The ICJ expressly recognized *uti possidetis* as a general principle of international law in the 1986 *Frontier Dispute* case (Burkina Faso/Mali): "the Chamber cannot disregard the principle of uti possidetis juris, the application of which gives rise to this respect for intangibility of frontiers. Although there is no need, for the purposes of the present case, to show that this is a firmly established principle of international law where decolonization is concerned, the Chamber nonetheless wishes to emphasize its general scope". Although case law and academia tend to link the birth of application of the *uti possidetis* principle to the decolonization of the Spanish empire in America (see *Frontier Dispute*, pars. 21-3), more detailed analysis shows that the criteria followed seemed flexible enough. The new States were not formed following the four viceroyalties (New Spain, New Granada, Peru and Río de la Plata), but following heterogeneous colonial boundaries (viceroyalties, captaincies general, *audiencias* or mere provinces). Even some provinces became part of a new State (Chiapas became part of Mexico, Jaen became part of Peru, etc.). In the Viceroyalty of Río de Plata, the constituent congress of 1825 decreed that the provinces had full liberty to place their destiny wherever they believed most convenient for their interests and their happiness. REMIRO, A.; *et al. Derecho Internacional*, p. 196. Perhaps the *uti possidetis* principle was forged latter on in Latin American diplomacy as an international law response to stop the fragmentation of these new States. See MEDINA, M. *El derecho de secesión…*, pp. 15, 23, 150-1.
[546] See CASSESE, A. *Self-Determination of Peoples*, pp. 72-9, 187.
[547] ICJ Opinion on Namibia of 1971, par. 52.

second states that application of the right to self-determination requires "a free and genuine expression of the will of the peoples concerned".[548] These opinions confirm that the right to external self-determination of colonies has managed to become international customary law. Yet, one may point out that guaranteeing the right to self-determination to overseas territories poses no excessive problems in terms of preservation of the Westphalian State system.[549]

Which are the ethical reasons for international law to grant a right to secede to *saltwater* colonies but not to sub-State nations with territorial continuity? The first argument which could be invoked is territorial discontinuity. In this context, a principle of territoriality could work as a kind of legal basis. As observed, liberal democracies are normally, and need to be, States with relative territorial continuity. Accordingly, for institutional and practical reasons, granting the right to secede to colonies could be defended on grounds of manifest territorial discontinuity. Along similar lines, a principle of need for territorial proximity could be claimed. But these territorial arguments on their own seem relatively weak. They require certain connection to the principle of nationality as a legal basis for statehood or, at least, to a value of collective self-determination going beyond institutional and practical reasons.

Second, a territory could be considered a colony if a power gains control of it by invasion or military conquest. If this were the case, only territories occupied and dominated by violence, force or intimidation would have the right to external self-determination. Although legal actions against wrongdoings tend to evaporate over time, a significant paradox has already been noticed: while actions against violent acquisitions of territories expire with the passage of time when there is territorial continuity, the saltwater that separates the metropolis from the colonized territory blocks any limitation period.[550] This therefore produces the somewhat arbitrary result that the passage of time remedies the wrong only if the victim is a contiguous or neighbouring territory or nation. To a certain extent, the two arguments

[548] ICJ Opinion on Western Sahara of 1975, par. 55.
[549] CONNOLLY, C. "Independence in Europe…", pp. 70-2.
[550] See §§ 1.4.1 and 1.4.2 above. BUCHHEIT, L.C. *Secession*, pp. 18-9.

considered so far seem to revive a doctrine of natural frontiers which had been presumed defeated.[551]

Third, it could be alleged that control of the colony was or is gained without consent. However, as already discussed, express consent is not a ground for political obligations.[552] Neither the colonizing State nor the newly decolonized State enjoys consent analogous to freedom of association. The possibility of holding a referendum at a given time in a territory normally predetermined by the internal boundaries of the colonizing State does not seem enough to satisfy, fully and consistently, a theory of secession based on consent. Moreover, basing anti-colonial self-determination on consent by referendum would signify implicitly endorsing a broad and ambitious international principle of democracy.

Fourth, the right to external self-determination could be justified if the colonized territory was subjected to serious, systematic and selective violations of human rights. Such violations seem sufficient reason to accept a right to secede, but why would they not apply more generally? These are the sort of questions asked by remedial theories of secession.[553] More specifically, it could also be argued that the colony has a right to secede if its inhabitants were denied the fundamental right to political participation in forming the general will of the colonizing State. However, an explanation of the right to secede of colonies in terms of violation of democratic rights has even more problems than one in terms of violation of human rights, since

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[551] For a defence of the natural frontiers of nations, see MAZZINI, G. *Scritti*, pp. 467-8 and MANCINI, P.S. *Della nazionalità*, pp. 31-3, 43. These Italian authors have been and can be criticized because territorial frontiers are human creations and, therefore, can also be undone by humans. Yet, Mazzini, likewise Mancini, warned that without a national or patriotic consciousness natural frontiers have no soul: "the land on which your steps tread, and the boundaries that Nature has set between your and others' lands, and the sweet language that sounds inside you are nothing but the visible form of the Homeland; but if the soul of the Homeland does not beat in this sanctuary of your life called consciousness, that form will remain like a corpse, with no movement and no breath of creation, and you are a crowd without a name, and not a Nation; individuals, not a People.". MAZZINI, G. *Scritti*, p. 462.

[552] See § 1.2.6 above.

[553] "The most obvious deficiency of existing international law regarding unilateral secession is the apparent restriction to classic decolonization. Presumably what justifies secession by overseas colonies from metropolitan power is that the colonized are subject to exploitation and unjust domination, not the fact that a body of salt water separates them and their oppressors. But if this is so, then the narrow scope of the existing legal right of self-determination is inappropriate." BUCHANAN, A. *Justice, Legitimacy and Self-Determination*, p. 339. In similar vein, BUCHHEIT, L.C. *Secession*, pp. 216-23. BEITZ, C.R. *Political Theory and International Relations*, p. 112. See §§ 1.2.6 and 1.4.3 above.

a general duty to observe human rights is more accepted than a more specific duty to grant certain democratic rights. Moreover, the argument based on lack of democratic participation could be weakened or overcome by turning overseas territories into provinces or departments, extending suffrage and establishing fair taxation and redistribution. In this regard, would extending human rights to the members of the colonies and granting them reserved seats in the parliament of the metropolis have been sufficient to stop the moral, legal and practical arguments in favour of the decolonization process? This thought makes us lean towards discarding purely individualist conceptions of justice in favour of a line of argument aware of the relevance of collective self-determination.

Fifth, it could be claimed that, given that a territory relatively distant and different from the metropolis requires a certain level of internal self-determination in the form of autonomy, a failure or violation of internal self-determination would give birth to a right to external self-determination in the form of secession.[554] This argument would lead us, once again, to understand cultural, national, ethnic and territorial differences as grounds for self-determination and secession. In the final analysis, it is morally difficult and problematic to explain that the international law should be limited to recognizing a right to secede for colonies, while rejecting, in rather absolute terms, the right to secede of sub-State nations with territorial continuity with the parent State.

The second type of case in which the right to self-determination of peoples gives birth to a right to secede concerns foreign illegal occupation and domination. This would arise, for instance, in cases of military occupation or threat and can occur both inside and outside the colonial system.[555] This type of secession seems confirmed by the 2010 ICJ Advisory Opinion on Kosovo. Unlike the other types of cases, this is identified with the international principle of non-aggression and is more compatible with the international principles of sovereign equality and territorial integrity of States. Despite that, for reasons of *realpolitik* the socialist and

[554] See § 2.1.5 below.
[555] UN General Assembly *Resolution 1514 (XV)* of 1960 "Declares that: 1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation."

developing States understood this type of self-determination in a more limited way than western States.[556] By way of example, Estonia, Latvia and Lithuania gained independence claiming that they had been illegally occupied and annexed by the USSR with undue use of force.[557] Several questions remain open such as whether there should be any explicit time limit for considering an occupation illegal according to international law on self-determination of peoples. Instead of all-or-nothing answers, Justice as multinational fairness favours a gradual decline of the normative strength of the secession cause of forceful occupation in the course of time.[558]

A third type of case in which an external right to self-determination of peoples could arise from oppression of national minorities or serious, persistent and selective violations of human rights. This is one of the readings of the opinions of the international commissions of experts on the Aaland Islands case, since the abuses of sovereignty could give rise to a right to secede.[559] Since the Aaland Islanders did not suffer oppression but instead were guaranteed internal self-determination and group protection by the parent State, they had no right to external self-determination. The case of Aaland Islands is similar to that of South Tyrol. Notice, however, that they seem cases of redemptism more than secessionism and, thereby, these national minorities were defended internationally by their adjacent States.[560] As (ir)redentist claims tend to involve more than one State, they generally come within the jurisdiction of international law.[561]

This third type of external self-determination was also dealt with in the Quebec Secession Reference. Following the Canadian Supreme Court, while there is no general international right to external self-determination for sub-State peoples, there

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[556] CASSESE, A. *Self-Determination of Peoples*, p. 92.
[557] In practice, many western States (headed by the USA) had not recognized *de jure* Soviet sovereignty over the Baltic republics. Arguably, these republics avoided to invoke the right to secede recognized by the Soviet Constitution, since the Soviet legislation implementing this constitutional right was highly restrictive. See ch. 3.1 below.
[558] See § 1.4.2 above.
[559] See § 2.1.2 above. In the *Katangese Peoples' Congress v. Zaire* case, the African Commission on Human and Peoples' Rights also links violation of human rights and rights of political participation to emergence of a right to external self-determination. DUGARD, J.; RAIČ, D. "The role of recognition…", pp. 107-8.
[560] See ch. 1.1 above. FERRERES, V.; BOSSACOMA, P. "Case Studies on Forms of Self-Determination".
[561] MUSGRAVE, T.D. *Self-Determination and National Minorities*, pp. 211, 237.

is a right to internal self-determination for minority nations (whether to respect basic civil and political rights of the members of the sub-State people or group autonomy and self-government). If this right to internal self-determination is "somehow being totally frustrated", a right to secede can arise in cases other than colonization and alien domination. The Court thus concluded that Quebec does not possess a right, under international law, to secede unilaterally. The continuing misunderstandings and failure to reach agreement on amendments to the Federal Constitution are not sufficient grounds, according to the Court, to allege violation of the right to internal self-determination of the Quebecers.[562]

Although self-governing units such as Quebec have no international right to secede, Cassese defends that self-determination of peoples acts as a principle guiding the process and solution of the conflict, namely a referendum is an appropriate instrument for consulting the sub-State population and any solution adopted should be negotiated and consented. In addition, the international principle of self-determination should operate in conjunction with active protection of minorities in a manner granting positive action, internal autonomy, regional self-government, participation in the decision-making processes of the central State, etc. In the light of this penetration of international law into the internal affairs of multinational States, the right to secede would rank as a solution *ultima ratio* for cases where a sub-State nation is denied internal self-determination.[563]

Many scholars claim that this third type of external self-determination could also be derived from the UN General Assembly *Resolution 26/25 (XXV)* of 1970.[564] The saving clause of this Resolution reads:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity

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[562] *Reference re Secession of Quebec*, par. 135: "Clearly, such a circumstance parallels the other two recognized situations in that the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated. While it remains unclear whether this third proposition actually reflects an established international law standard, it is unnecessary for present purposes to make that determination. Even assuming that the third circumstance is sufficient to create a right to unilateral secession under international law, the current Quebec context cannot be said to approach such a threshold."

[563] CASSESE, A. *Self-Determination of Peoples*, pp. 248-55, 350-3.

[564] See BUCHHEIT, L.C. *Secession*, pp. 88-97. DUGARD, J.; RAIČ, D. "The role of recognition…", pp. 102-5. SCHARF, M.P. "Earned Sovereignty", pp. 381-2. BELSER, E.M.; FANG-BÄR, A. "Self-Determination and Secession" in BELSER, E.M.; *et al.* (ed.) *States Falling Apart?*, pp. 64-5.

> or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Accordingly, if a government is representative of the whole people and does not discriminate on grounds of race, creed or colour, territorial integrity and political unity would prevail. Could race, creed or colour cover discrimination of national, cultural, political or ethnic groups? Not surprisingly, lack of practice and reason prevented the consolidation of an international right to secede of racial and religious groups. It would be rather arbitrary to establish a right to external self-determination against racist or religious tyrannies but not against States which oppress national minorities or commit selective violations of human rights. On top of that, it is unlikely for a violation of the right to internal self-determination of racial and religious groups to set in train a secession.

Why was the 1970 Resolution limited to race, creed or colour? Some feared that violations of internal self-determination could unleash an avalanche of pro-secession demands based on the Resolution (especially on the part of socialist and developing States). In the preparatory work leading up to the Resolution, the USA proposed that the existence in an independent sovereign State of a representative government which effectively represents the distinct peoples within its territory is presumed to satisfy their self-determination. For the UK, self-determination belonged to a territory which is culturally or ethnically different from the rest of the State if the central government fails to represent that diversity. These two liberal-democratic proposals filled many States with fear that their lack of internal self-determination could breed a right to secede for their under-represented peoples or groups. In response, these States followed the strategy of rejecting the liberal-democratic right to internal self-determination of minorities and of restricting the right to self-determination to racial and religious groups.[565] Still, the more interesting idea of a government representing the whole people remains.

[565] See CASSESE, A. *Self-Determination of Peoples*, pp. 108-33.

Overall, the deficiencies and ambiguities of international law on remedial secession (especially beyond saltwater colonization and military occupations) are salient and deserve to be criticized.[566]

2.1.4. A utopian type of secession to foster perpetual and just peace

This section will evoke a new type of secession based on national self-determination with no need to prove any previous injustice. Three preliminary issues deserve a brief comment. First, current international law applies to an international *society* of States that, despite apparently overcoming the international *system* of States, has not yet managed to become an international *community.*[567] Second, this society still has many non-liberal and non-democratic States. Third, the UN is not inclined to recognize the right to secede, since it tends to consider the successor States that result from secession as automatically outside the organization.[568] They have to apply to join it, and the procedure is not straightforward: the Security Council shall recommend admission and a two-thirds majority of the General Assembly must

[566] BUCHANAN, A. *Justice, Legitimacy and Self-Determination*, pp. 339-40.

[567] Hedley Bull defines society of States or international society as a group of States with certain common interests, values, rules and institutions. According to him, States not only follow the rules of prudence and expediency, but also pay attention to the imperatives of morality and of law. However, following these imperatives does not automatically mean the end of the *system* of States and its replacement by the universal *community* of mankind, but, instead, acceptance of the demands of coexistence and cooperation within a *society* of States. BULL, H. *The Anarchical Society*, pp. 23-50. Rawls refers to an international society of States: "The Law of Peoples hopes to say how a world Society of liberal and decent Peoples might be possible." RAWLS, J. *The Law of Peoples*, Introduction, p. 6. The legal order is decentralized, but with a considerable level of voluntary compliance with international law as well as a long list of ways to promote compliance and penalize non-compliance. BEITZ, C.R. *Political Theory and International Relations*, Part 1.

[568] In 1947, the Sixth Committee of the UN General Assembly issued some principles on continuity and succession of States in relation to membership of the UN: "1. That, as a general rule, it is in conformity with legal principles to presume that a State which is a Member of the Organization of the United Nations does not cease to be a Member simply because its Constitution or its frontier have been subjected to changes, and that the extinction of the State as a legal personality recognized in the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist. 2. That when a new State is created, whatever may be the territory and populations which it comprises and whether or not they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim that status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter. 3. Beyond that, each case must be judged according to its merits."
Almost all the States emerging from a secession of a UN Member States have had to apply to (re)join, except Syria when it seceded from the United Arab Republic (union with Egypt). In this case, both Egypt and Syria were automatically counted as members of the UN. Although the initial reaction of President Nasser was to oppose militarily Syrian separation, it ended up being accepted by acquiescence. BUCHHEIT, L.C. *Secession*, p. 99.

approve it.[569] Although both the Council and the Assembly ought to act in accordance with self-determination of peoples as a main purpose and principle of the United Nations, such applications seem doomed to be rejected until the parent or continuator State recognizes the newborn State.[570]

An explanation for this may be that admission as a Member State of the UN generally implies recognition of statehood by the other Members.[571] According to Kelsen, entry of a State into the UN entails a transfer of the competence to recognize new States to the Council and the Assembly by admitting them as members of the organization.[572] In 1970, the Secretary-General U Thant declared that the UN had not accepted, and would never accept, the principle of secession of a part of its Member State.[573] In addition, the democratic functioning of the General Assembly based on the rule "one State, one vote" can be used as an objection to secession and admission of new States because of the loss of decision-making power both for Member States that remain united and for those that decide to merge.[574] In this context, a type of secession based on a primary right to national self-determination is far from minimal realism and could go beyond realistic utopia.

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[569] The procedure for becoming a new member of the UN is based on Article 4.2 of the UN Charter: "The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council." See http://www.un.org/en/sections/member-states/about-un-membership/index.html

[570] "Since 1945 no State which has been created by unilateral secession has been admitted to the United Nations against the declared wishes of the government of the predecessor State". CRAWFORD, J. *The Creation of States…*, p. 390. See ch. 3.5 below.

[571] Member States of the UN are generally considered States even if they do not enjoy broad recognition as individual States. DUGARD, J.; RAIČ, D. "The role of recognition…", pp. 99-101. See ch. 2.3 below.

[572] See KELSEN, H. *Principles of International Law*, § III.D.4.h. The same interpretation applied regarding the League of Nations. Note that, under Article 4.1 of the Charter, the first substantive requirement in order to be a member of the UN is to be a State. In contrast, see RAIČ, D. *Statehood and the Law of Self-Determination*, pp. 39-48. CRAWFORD, J. *The Creation of States…*, pp. 544-5.

[573] Press Conference of 4 January 1970 held in Dakar, Senegal.

[574] Remember that the League of Nations and, in particular, the USSR opposed admission of micro-States as members of the UN. BUCHHEIT, L.C. *Secession*, p. 233. RAIČ, D. *Statehood and the Law of Self-Determination*, p. 44. The formal reason seemed to be their lack of independence – an essential requirement for statehood. Socialism largely considered the independence of micro-States (and of small States in general) somewhat fictitious, since they were subject to other States, imperial powers or the forces of capitalism. See § 1.2.7 above. Another reason would be that it implied an additional vote for the western bloc. When the Venice Commission had the opportunity to rule on constitutionalization of the right to secede of the municipalities of Liechtenstein, it concluded that, although it is undesirable to split a micro-State even further, such a constitutional right to secede is not in violation of international law. *Opinion on the amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein*, 2002, par. 39.

To defend an international law right to secede based on national self-determination, the term *people* should be able to embrace the concepts of both *nation* and *nationality* (even if they are not organized in States). The terms nation and nationality come from the Latin word *natio*. For the Romans, *Natio* was the goddess of birth and origin.[575] Following Habermas, *natio*, *gens* and *populus* refer, unlike *civitas*, to tribes and peoples not organized in political associations.[576] In the works of Cicero, however, the word *populus* is used in a more legal and political sense meaning a group of people associated by law and common utility.[577] In the early modern period, *populus* seems to be used in a sense similar to *gens* and *natio* by authors such as Hugo Grotius. Nonetheless, a divergence appeared in Europe between the French and the Germans. For the French Montesquieu, Sieyès and Rousseau, among others, people, nation, State and government were equivalent, analogous or closely connected.[578] For the Germans, nation and people will usually be equivalent, but not to State or political association (during a long period of modern times, the German nation was not united in a single State). According to Hegel or Kant, a nation or people is or can be different from a State. This German conception of nation and people is bound up with a community based on common or shared descent, history, traditions, culture or language (but not necessarily organized as a political association).[579] By contrast, Renan defined the nation,

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[575] The goddess "derives her name Natio a *nas-centibus*, from those being born, because she protects married women who are in labour." CICERO, *The Nature of the Gods*, book 3, § 47.

[576] HABERMAS, J. "Citizenship and National Identity" (1990), Appendix II to *Between Facts and Norms*, p. 494. In similar vein, see CALHOUN, C. *Nations Matter*, pp. 1-2, 28.

[577] *De Re Publica* reads: "*populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis juris consensu et utilitatis comunione sociatus*" (Book 1, XXV). According to Mira, the Romans seemed to draw a distinction between: (1) *populus*, (2) *civitas* and *res publica*, (3) *gens* and *natio*. While *civitas* and *res publica* referred more to the State or Commonwealth, *gens* referred directly to generation, origin and descent, and *natio* is formed from the root of *nascor-natus sum* (*i.e.* the idea of birth). Both *gens* and *nation* could apply to a tribe, lineage or race of people. *Gens* could be applied to an aristocratic lineage (the *gens Julia*) or to a whole "people" ('*in illa ... gente Aegyptiorum*', as Cicero wrote in *De Re Publica*), whereas *gentes*, in the plural, was used more or less generally for all non-Roman peoples (all the foreign peoples and tribes the Romans found as the Empire expanded were '*exterae nationes et gentes*'). *Ad Nationes* was the name of a gate built by Augustus and dedicated to all the known peoples. *Natio* referred also to a tribe or a foreign country, especially if it was barbarian, but could also occasionally apply to 'civilized' peoples ('*eruditissima Graecorum natio*', as Cicero expressed in *De Oratore*). Later, when the Empire gained strength and Roman citizenship was progressively extended to all its provinces, the ablative *natione* started also to mean place of origin or of birth. '*Natione Afer*' or '*natione Hispanus*' did not mean African or Spanish national, but simply born in Africa or in Spain. MIRA, J.F. *Crítica de la nació pura*, pp. 83-6.

[578] In particular, Article 3 of the 1789 French *Déclaration des Droits de l'Homme et du Citoyen* proclaimed that "the principle of all sovereignty resides essentially in the Nation".

[579] See KANT, "The Metaphysics of Morals", in *Political Writings*, pp. 164-5. HEGEL *The Philosophy of History*, p. 419.

politically, as "a daily plebiscite". In his words, "Man is a slave neither of his race nor his language, nor of his religion". A nation is a group of people who, exalting a rather mythical past, desire to live and share a common destiny.[580] For Mill, a nationality is a group of people with common sympathies that facilitate cooperation and create a will for self-government. Therefore, organization of the nationality as a State is a desire, not necessarily a reality.[581] This polysemy persists and is likely to persist in the near future.

The term *people* in the international principle of self-determination of peoples is, then, broad enough to include State and stateless nations.[582] The term *people* could perhaps be held as a *concept* and the groups mentioned as *conceptions* of what a people is or might be. This would allow the concept to embrace many conceptions. It would also allow the conceptions to keep on changing and evolving with no need to change or abandon the concept.[583] According to the Supreme Court of Canada, the term *people* in international law of self-determination "may include only a portion of the population of an existing State".[584] The UN Declaration on the Rights of Indigenous Peoples considers indigenous peoples as right holders of self-determination.[585] The breadth of the term *people* is also proved by including colonized peoples who were not previously a State, nor even a nation or nationality. In remedial theories of secession, this makes sense because the geographical area affected by the injustice plays a special role in defining the seceding territory. In this regard, the decolonization process preferred to start from the injustices and errors of the colonial map, hoping that the nation would emerge after the State.[586] Some

[580] RENAN, E. *Qu'est-ce qu'une nation*?, pp. 28-31.
[581] MILL, J.S. *Considerations on Representative Government*, ch. XVI.
[582] See MUSGRAVE, T.D. *Self-Determination and National Minorities*, ch. 7.
[583] To draw a distinction between *concept* and *conception* in philosophy and law, see RAWLS, J. *A Theory of Justice*, p. 5. DWORKIN, R. *Law's Empire*, pp. 90-6. MACCORMICK, N. *Questioning Sovereignty*, p. 32.
[584] *Reference re Secession of Quebec*, par. 124. The Court argues: "The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to 'nation' and 'State'. The juxtaposition of these terms is indicative that the reference to 'people' does not necessarily mean the entirety of a State's population. To restrict the definition of the term to the population of existing States would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing States, and would frustrate its remedial purpose."
[585] Article 3 of the Declaration stipulates: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."
[586] REMIRO, A.; *et al. Derecho Internacional*, p. 172.

colonized peoples became nations, while others remained multinational and multi-ethnic peoples.[587] Since the colonial map could identify a people, its existence may be independent from its members' consciousness. In contrast, a nation is a people conscious of its existence.

This new type of secession based on national self-determination could be accused of being Eurocentric, in other words as showing a bias shaped by the European and Western vision of nation. This objection would call into question nation – when it does not correspond to the term State – as a universal idea or phenomenon. Both nations and States have spread around the world.[588] In this respect, Part 1 attempted to define the concept of nation in rather universal terms.[589] Notwithstanding the efforts, the proposal made in this section and of Justice as multinational fairness in general may still be too Eurocentric. This could be another reason why Justice as multinational fairness especially aims to (re)interpret and (re)define the constitutional law of European and western liberal democracies. Eurocentric bias is not something unique to this book, however. International law, first regarding the Westphalian system and then the gradual evolution towards liberalism, has both suffered and benefited from a European and Western influence.

Having clarified the terminology and tried to answer the objection concerning the Eurocentric bias of this proposal, more specific and practical reasons can now be given (added to the more general reasons set out in Part 1) to defend this proposal. Michael Keating criticizes the traditional conception of the right to self-determination of peoples as a right to secede in reaction to oppression or colonialism. First, he underlines the unfortunate consequences of this approach: (1) it might encourage minority nations to contemplate violent confrontation or to provoke a repressive reaction from the State; (2) it might encourage sub-State Western nations to depict themselves as colonized territories. Second, he criticizes that the right to national self-determination necessarily entails a right to secede; for him, it should imply a right for a minority nation to negotiate its own position within the State. Finally, according to Keating, self-determination of peoples should

[587] See ANDERSON, B. *Imagined Communities.*
[588] See ANDERSON, B. *Imagined Communities.*
[589] See ch. 1.3 above.

be seen as matters of democracy, instead of matters of nationality, "when democracy concerns not just politics within a given polity but the shape of the polity itself".[590]

Let us make pause here to discuss whether the current right to external self-determination encourages stateless nations to contemplate violent confrontation or provoke a repressive reaction from the parent State. There are many interrelated reasons why the current rules can be considered an incentive to violence: (1) non-recognition of the right to secede by democratic, rational and peaceful means creates pressure to seek other means to exercise secession; (2) in similar vein, upholding the doctrine of consummated facts to obtain statehood at the expense of legal, democratic and peaceful ways can also encourage violence, force or intimidation; (3) finally, as domination and violations of human rights are more accepted causes to invoke and activate the right to external self-determination, sub-State peoples could go for all-or-nothing, by making a unilateral declaration of independence, in the hope that if they cannot obtain independence in fact, they could claim it by law when the parent State excessively or disproportionately represses this attempt at secession.[591]

It should not be forgotten that Article 1.2 of the UN Charter understands self-determination as a measure to strengthen universal peace. Self-determination as "a cornerstone of peace" and as "a vector of peace" is claimed by the UN independent expert Alfred-Maurice de Zayas. His report submitted to the General Assembly reads: "it is clear that decolonization did not pronounce the last word on self-determination. To avert future armed conflict, timely adjustment of frontiers is a peace-promoting policy that should be applied with international solidarity. There is no reason to insist on the "sanctity" of national borders, which sometimes owe their existence to very unsaintly means." The UN independent expert concludes: "Self-determination is a work in progress, a process of adapting and readapting to tensions between power and freedom. Rather than perceiving self-determination as a source

[590] KEATING, M. "Rethinking sovereignty", pp. 14-5.
[591] See chs. 2.2 and 2.3 below. Some may point out that something of this style happened in Catalonia in the fall of 2017, with the unilateral referendum and the unilateral declaration of independence.

of conflict, a better approach is to see armed conflict as a consequence of the violation of self-determination."[592]

As can be deduced from the previous paragraphs, a current narrow interpretation of self-determination may be a risk to international peace and stability. Even if peace and stability of borders were guaranteed by the current norms, it would not be *just peace*, since this would not be "peace by satisfaction", but "peace by power" or, more precisely, "peace by impotence".[593] President Wilson believed that the prevention of future wars was linked to the establishment of a just peace, a peace founded on respect for the principle of self-determination. An "imperative principle of action, which statesmen will henceforth ignore at their peril", he warned.[594] Kant advised that if "perpetual peace" is to be reached, States ought to be governed by republican constitutions based on representative systems (which, in contemporary terms more suitable for this work, could be called liberal-democratic constitutions). This prescription was due to the Kantian prediction that such States would be less inclined to wage war.[595] According to Rawls, liberal democracies do not engage in war between themselves (at least liberal-democratic States do not tend to fight directly against each other).[596] However, wars sparked by secessionist claims and exercise of self-determination could, to some extent, call into question the Kantian prediction or force us to exclude wars within States.[597] Such wars and, more generally, national conflicts within States could endanger international peace. Hence, it is not only fair but also rational to move towards an understanding of the right to self-determination of peoples along the lines of the philosophy proposed in Part 1.

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[592] ZAYAS, A.M. "Promotion of a democratic and equitable international order" §§ 6, 17, 51, 78.
[593] Based on RAWLS, J. *The Law of Peoples*, § 5.2. See also BUCHANAN, A. *Justice, Legitimacy, and Self-Determination*, pp. 76-82.
[594] BUCHHEIT, L.C. *Secession*, pp. 114.
[595] "Perpetual Peace", pp. 99-102. "The Metaphysics of Morals", p. 174. Both texts in: KANT, *Political Writings.* This Kantian prediction could be inspired by Cicero, when in *De Re Publica* (note 46 to Book 3) he claimed that well-regulated States (*civitate optima*) engage in war only for faith or for safety (*pro fide aut pro salute*).
[596] RAWLS, J. *The Law of Peoples*, Introduction and § 5.4. Some liberal democracies have promoted, cooperated with or collaborated in some internal military uprisings.
[597] Ireland seceded through war from one of the most advanced States of the time in terms of liberalism, representation and rule of law. Other secession wars to take into consideration could be the Belgian Revolution of 1830, the American Civil War, the Algerian War of Independence and other decolonization wars. In 1934, under the republican Constitution of 1931, the Spanish democratically elected government prevented through military intervention the implementation of the Catalan State proclamation by a democratically-elected Catalan government.

Nevertheless, since States are the principal subjects and creators of international law and since many of them are neither liberal nor democratic, recognition of a primary right to secede under general international law is a non-realistic utopia. Thus, the next section will discuss more realistic types of secession based on violation and failure of internal self-determination. Still, all these types of secession may be less utopian if they are regarded as proposals to be implemented through international treaties between liberal-democratic States, rather than through general, customary international law.

2.1.5. Violation or failure of internal self-determination as more realistic types of secession

Under Justice as multinational fairness, the *Principle of internal national self-determination* consists not merely of respecting the civil and political rights typical of a liberal democracy of the members of sub-State nations, but also of allowing the sub-State nation to have institutional mechanisms guaranteeing a reasonable minimum of autonomy, self-organization, self-government and representation within the multinational State.[598] In Part 1, *violation* was distinguished from *failure* of internal self-determination.[599] A violation of internal self-determination occurs in the event of breaking main political agreements or basic norms recognizing internal self-determination.[600] A violation should arise also in the absence of such an agreement or norm that would recognize a minimum level of internal self-determination (thus not allowing minority nations to have representative

[598] See § 1.2.3 above.
[599] See § 1.4.6 above.
[600] In relation to breaking the constitutional pact, the analogy with termination of a contract due to non-compliance by one of the parties points to the following: when one party breaches a relevant clause of a contract, the other normally has the right to rescind it. The problem with this analogy is that in private law issues the parties usually do not have self-jurisdiction and have to turn to courts or to arbitration to solve their disputes. But neither the internal nor international courts seem adequate to perform this function regarding secession. In relation to both internal and international courts the central State has much more power and influence than minority nations. In particular, the regulations and composition of international courts are decided directly or indirectly by States (with no participation of minority nations), which calls into question their objectivity and impartiality regarding issues of secession. The international legal order is still a primitive and decentralized legal system, in which self-jurisdiction and effectiveness prevail in many cases. International arbitration and blue-ribbon panels could be a better option if minority nations are allowed a similar role to States (for instance, in the appointment).

institutions, powers of self-rule nor mechanisms of shared-rule and veto). Under international law, a breach of internal self-determination may occur when the rights to similar participation and democratic representation between members of a minority and of the majority nation are not respected. Conversely, failure of national self-determination happens when the expectations or demands of the minority nation are not satisfied or do not fit in with the project of the central majority. Therefore, it was argued that *violations* of internal self-determination would be stronger causes for secession than *failures*.

Some theories of secession are halfway between remedial and ascriptive approaches. They defend a moral right to secede on the part of the minority nations as a reparation for multicultural injustice (caused, in particular, by the failure to adopt a *de jure* multinational State or to respect multinational federalism). Rainer Bauböck, after advocating for a general right to federal autonomy, defends a right to secede when such autonomy rights are "persistently violated". In a remedial logic, he endorses the right to unity of multinational States that duly recognize and respect their minority nations.[601] Josep Costa, upholding a moral right to national self-determination, conceives the right to secede as a reaction against a failure to adopt or respect agreements on territorial self-government and power-sharing between the various nations within the State.[602]

These proposals entail, at least, three benefits. First, they tend to produce right incentives by penalizing multinational States that do not legally recognize and accommodate multinationalism while rewarding with the guarantee of unity *de jure* multinational States. Second, these proposals could balance the traditional protection of sovereign States under international law with a renewed protection of minority nations. Third, these suggestions have an interesting component of realism that could make them institutionally attractive for international law. However, if international law adopted such a doctrine, it could end up protecting even more the multinational unity of States such as Canada, the UK and Spain while making unilateral secession of minority nations such as Quebec, Scotland or Catalonia close to illegal. In contrast, Justice as multinational fairness sustains that secession from a

[601] BAUBÖCK, R. "Why Stay Together?".
[602] COSTA, J. "On Theories of Secession".

just State can be morally and legally acceptable provided that the more just the State treatment of the minority nation is, the greater the requisites to secede ought to be, like for instance requiring higher pro-secession majorities.

Buchanan added a new cause for secession to his remedial theory: "serious and persistent violations of intra-State autonomy agreements by the State". Buchanan did so defending an institutional and consequentialist theory of the international principle of self-determination of peoples which would force the international society to: (1) encourage – politically – agreements on intra-State autonomy instead of secession, (2) monitor compliance of such agreements, (3) help to make such agreements viable by forcing both parties to account for compliance with their duties and (4) establish an impartial international court to resolve conflicts and decide whether or not there is a persistent breach that would justify unilateral secession.[603] In particular, Buchanan pointed out that a strong argument Catalonia can plead for secession is that Spain has continuously rejected to negotiate suitable or adequate autonomy.[604] As regards future mediation on this case, he suggested a blue-ribbon *ad hoc* group of respected statesmen and jurists (since the EU might fear the precedent it could create).[605] In general, according to Buchanan, international law should be a true protector – and political promoter – of inter-State agreements on autonomy. This position is consistent with Buchanan's respect for the territorial integrity of States (to encourage democratic deliberation and commitment while preventing secession threats from working as a right of veto) and preference for decentralization instead of secession (to impede recentralization and to protect federalization from secession threats).[606]

In line with Buchanan, Seymour rejects the existence of a primary right to secede in the form of external self-determination, but defends a primary right of nations to internal self-determination. Therefore, according to him, minority nations should

[603] BUCHANAN, A. *Justice, Legitimacy and Self-Determination*, chs. 8-9, particularly pp. 357-9.
[604] VILAWEB, "Buchanan: 'Si l'estat no vol negociar més autonomia, la independència unilateral és una causa justa'". 3 October 2018. See SANJAUME-CALVET, M. "The Morality of Secession" in CUADRAS-MORATÓ, X. (ed.) *Catalonia*, pp. 82-106.
[605] VILAWEB. "Allen Buchanan: Catalonia should ask the UN to mediate if Spain shows disdain for the referendum". 2 July 2013. This blue-ribbon *ad hoc* group of respected statesmen and jurists is one proposal to tackle the abovementioned problem of the absence of an impartial referee.
[606] BUCHANAN, A. *Justice, Legitimacy and Self-Determination*, chs. 8-9, particularly pp. 349-50.

have a remedial right to external self-determination only in response to a prior breach of their primary right to internal self-determination. While Buchanan makes the right to secede conditional on a prior violation of inter-State autonomy agreements, Seymour sees no need for such violations, but puts the emphasis on non-recognition or misrecognition of the primary right of sub-State nations to internal self-determination.[607] Buchanan objects nations as groups that deserve special treatment, whereas Seymour emphasizes the distinctiveness of national communities, which makes them institutionally eligible for a primary right to internal self-determination and, if not recognized or respected, a remedial right to external self-determination.[608] In Part 1, this book has offered many arguments to refuse that national self-determination is an undue form of discrimination.[609]

Both Buchanan's and Seymour's theories focus on how international law should be. Buchanan argues that a theory on international institutionalization of the right to secede should: (1) be consistent with the *progressive moral principles* of current international law, (2) comply with the *minimal realism* based on the feasibility and accessibility in the near future, (3) produce no perverse incentives and (4) be morally acceptable for various societal cultures. Seymour takes up these four arguments to back up his theory: (1) Buchanan can be more conservative than current international law since this law does not consider unilateral secession automatically illegal, but leaves it to the realm of politics.[610] (2) Buchanan is not realistic enough when he objects that nations are more relevant groups with regard to self-determination than religious, ideological, immigrant and other groups. (3) Buchanan's proposal might contain perverse incentives, as it leads to unrest and violence when there is no intra-State autonomy agreement. (4) Buchanan's ethical individualism may not be exportable to a wider range of societies, since it defends

[607] For Seymour, the principle of territorial integrity could be legitimately pleaded only when the right to internal self-determination of minority nations is recognized and the spirit of the constitutional pact is satisfied. SEYMOUR, M. "Les peuples et le droit à l'autodétermination" in GAGNON, A.; REQUEJO, F. (ed.) *Nations en quête de reconnaissance*, pp. 51-68.
[608] SEYMOUR, M. "Secession as a Remedial Right", pp. 395-423. In this regard, see COUTURE, J.; NIELSEN, K.; SEYMOUR, M. (ed.) *Rethinking Nationalism*, pp. 45, 646-53. In contrast, see in this volume BUCHANAN, A. "What's So Special About Nations?", pp. 283-309.
[609] See, in particular, §§ 1.2.2, 1.3.2 and 1.3.3 above.
[610] Furthermore, Seymour considers that Resolution *26/25 (XXV)* of 1970 accepts secession in response to systematic violations of human rights, political under-representation or breaches of internal self-determination. See, however, § 2.1.3 above.

individuals as the only source of moral worth and claims the priority of individual rights.[611]

If only the violation of an existing intra-State autonomy agreement gives birth to a right to secede, it could incentivize sovereign States not to adopt any agreement of this kind. In order to avoid this perverse incentive, Patten proposes an additional cause, namely *failure of recognition*. Following this proposal, a right to secede would emerge when "the State has failed to establish arrangements that extended recognition to a national minority". A national identity is recognized, says Patten, "to the extent that bearers of that identity enjoy self-government"; and this in turn requires that the constitutional framework of the State provides a democratic forum in which those members form a majority and take decisions together as a group (*e.g.* by means of multinational federalism).[612]

Beyond academic theories, the Supreme Court of Canada considers that a case for external self-determination emerges in international law when the right to internal self-determination is *totally frustrated*. For the Court, although continuous failure to reach agreement on amending the Constitution does not equal denial of (internal) self-determination, failure to negotiate in good faith may undermine Canada's claim to legitimacy and promote international recognition of an independent Quebec.[613] The ICJ emphasized the failed attempts to negotiate the constitutional ties between Kosovo and Serbia. These failed negotiations had been mediated by Martti Ahtisaari (Special Envoy appointed by the Secretary-General of the UN and former president of Finland) who, after seeing that no agreement was possible, concluded that the only viable option for Kosovo was independence.[614]

2.2. Unilateral declarations of independence under international law

[611] See BUCHANAN, A. "Theories of Secession", § III. BUCHANAN, A. *Justice, Legitimacy and Self-Determination*, § 8.III. SEYMOUR, M. "Secession as a Remedial Right", pp. 395-423.
[612] PATTEN, A. *Equal Recognition*, pp. 235-40, 268.
[613] *Reference re Secession of Quebec*, pars. 103, 134-7.
[614] See ICJ Advisory Opinion on Kosovo, par. 69.

A UDI can be defined as a public declaration by the representatives or rulers of the population of a specific territory that proclaims political and legal independence without consent of the parent State and without following the internal legal order in force. Still, the absence of either international or internal right to secede does not imply that unilateral secession is forbidden under international law. This was the view taken by the ICJ Advisory Opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, which will now be examined.

At the initiative of the Serbian representation, the UN General Assembly asked the ICJ whether or not the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo was in conformity with international law. In July 2010, the ICJ answered that, in general, UDIs are not against international law:

> During the eighteenth, nineteenth and early twentieth centuries, there were numerous instances of declarations of independence, often strenuously opposed by the State from which independence was being declared. Sometimes a declaration resulted in the creation of a new State, at others it did not. In no case, however, does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law. On the contrary, State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence. During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation (…). A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases.[615]

Beyond this general consideration, the Opinion seems to signal some requirements for UDIs to be compatible with international law: (1) peaceful means – understood as lack of "unlawful use of force or other egregious violations of norms of general international law", (2) democratic process and (3) previous unsuccessful attempts at negotiation and agreement. These are implicit requirements which unilateral secessions should satisfy to avoid being contrary to international law. The international principle of self-determination of peoples could be acting as a guiding

[615] ICJ Opinion on Kosovo, par. 79.

principle in unilateral secession processes, since UDIs ought to be based on the consent of the seceding people, without undue use of force and following previous unsuccessful negotiation attempts.

In this way, the ICJ confirmed a traditional neutrality of international law towards UDIs (at least towards those meeting the requirements mentioned). The ICJ reaffirmed the view according to which the international principle of territorial integrity does not forbid the issuing of a UDI (nor secession in general), understanding that this principle applies only to relations between States.[616] By contrast, the international law principle of non-use of force does seem to apply within States.[617] Interestingly, the ICJ issued a sort of restrained and prudent opinion which maintains that UDIs are not contrary to international law but remains silent about the right to secede (and to external self-determination) and the legal effects and implications of such declarations.[618] The Opinion reads (par. 56): "Indeed, it is entirely possible for a particular act − such as a unilateral declaration of independence − not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second."

Years before the ICJ Opinion was issued, prominent international law scholars had already taken a position along similar lines.[619] For Hersch Lauterpacht, "international law does not condemn rebellion or secession aiming at acquisition of independence".[620] According to Cassese, international law neither authorizes nor forbids secession of a national or ethnic group. The issue lies beyond the realm of law.[621] According to Crawford, international law does not prohibit secession because the seceding entity is not a subject of international law and because the debates on the international resolutions on the issue make no reference to any

[616] "Thus, the scope of the principle of territorial integrity is confined to the sphere of relations between States." ICJ Opinion on Kosovo, par. 80.
[617] This does not mean, however, that the State cannot use force to guarantee the sovereignty, unity and integrity of the State as internal constitutional principles.
[618] Some have criticized these silences (e.g. CARRILLO SALCEDO, J.A. "Sobre el pretendido 'derecho a decidir'…"). Others pointed out that they were needed to achieve consensus among the ICJ's judges (MEDINA, M. *El derecho de secesión…*, p. 166).
[619] The Supreme Court of Canada also concluded that international law does not prohibit unilateral secession. *Reference re Secession of Quebec*, par. 140.
[620] LAUTERPACHT, H. "Recognition of States in International Law", p. 392.
[621] CASSESE, A. *Self-Determination of Peoples*, p. 340.

international rule that prohibits secession. Hence, in his words, "the position is that secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally."[622] For Thomas Musgrave, "secession within a State does not generally fall within the jurisdiction of international law". While (ir)rendentist claims typically involve more than one State and are therefore governed by international law, a group in one State is at liberty to secede and form its own State.[623]

The analogy with revolution could favour the interpretation that, in general, international law neither authorizes nor forbids secession. International law is, *prima facie*, neutral towards internal revolutions, even though they imply a constitutional break or illegal reform under municipal law.[624] Since revolutions in violation of the internal constitution are not contrary to international law, a similar interpretation ought to apply to unilateral declarations of independence. Indeed, unilateral secession can be considered a *demotic* revolution. Yet, as not all revolutions are compatible with international law, not all UDIs are in accordance with that law. "Unlawful use of force or other egregious violations of norms of general international law" are undue means to pursue both revolution and secession. Generally, though, revolution and secession are just sorts of legal modification under international law.[625]

Many questions remain unanswered or unclear after the ICJ Opinion on Kosovo. The first is whether the particularities of the Kosovo case make it unsuitable as a general precedent or analogy with other UDIs. Some consider that the exceptional nature of the case precludes it as a general precedent because of the following features: (1) the violence and serious violations of human rights suffered in Kosovo had led to international military and administrative intervention, (2) Kosovars had been deprived of internal self-determination, (3) the Serbian constitutional order no longer applied effectively to Kosovo, (4) the Resolutions of the Security Council

[622] CRAWFORD, J. *The Creation of States…*, pp. 389-90.
[623] MUSGRAVE, T.D. *Self-Determination and National Minorities*, pp. 211, 237.
[624] See KELSEN, H. *Principles of International Law*, § III.D.3. KELSEN, H. *Teoría General del Estado*, § 36.A.
[625] See ch. 3.7 below.

were the effective and overriding norms on the territory of Kosovo.[626] Despite these peculiarities, the ICJ Opinion shows no will to resolve the case only for Kosovo or territories that suffered injustices, but opts for a more general approach. Although the Court could have taken a remedial (right) approach to Kosovo's secession, it chose to give a broad but contained answer. Broad regarding the subjective scope and contained regarding the matter.[627]

Has the ICJ slightly opened the door to peaceful, democratic secession while closing it to violent, non-democratic secession? Regarding the former, the Court recalls that the declaration of independence was adopted by 109 out of the 120 members of the Assembly of Kosovo (including the Prime Minister of Kosovo) and by the President of Kosovo. Regarding the latter, the Court notes that the illegality attached to several declarations of independence by the Security Council stemmed not from the unilateral character of these declarations as such, but from the connection with the unlawful use of force or other egregious violations of norms of general international law.[628] In the light of the ICJ Opinion, democratic legitimacy seems to gain importance to attain the status of State to the detriment of effectivity obtained through illegitimate violence.[629]

Another question left open is whether the international principle of non-use of force limits the conduct of the parent State towards the promoters of the UDI. Since according to the ICJ Opinion the international principle of non-use of force applies within States (unlike that of territorial integrity), it seems consistent to answer affirmatively. If the principle of non-use of force applies to sub-State territories or entities that seek secession, it could similarly act against illegitimate or excessive use of force by the parent State against UDIs issued with no unlawful use of force nor other egregious violations of international law, via democratic process and after unsuccessful attempts at negotiation and agreement. Yet, the use of force to combat separatist movements (including non-violent ones) is not illegal as such, but only if

[626] When the USA recognized the statehood of Kosovo, it was said that: "Kosovo cannot be seen as a precedent for any other situation in the world today".
[627] See ICJ Opinion on Kosovo, pars. 82-4.
[628] *Ibid*. pars. 76, 81.
[629] LÓPEZ BOFILL, H. "L'evolució jurídica cap a un Estat Propi", pp. 485-93. URRUTIA, I. "Territorial Integrity and Self-Determination", p. 137.

it is excessive or disproportionate.[630] On the other side, the separatists may legitimately use force to defend themselves, especially from excessive or disproportionate use of force by the parent State. What can be even more problematic is that, under the principle of effectiveness, a nascent State needs to get in control of the territory and its population, which implies not only claiming but also exercising the monopoly of force.

If a UDI does not violate general international law, does that mean it is allowed? In order to give a proper response it may be pertinent to ask whether the issuer of the UDI is (already) a subject of international law or, more precisely, a holder of rights and obligations under international law. Some rights and obligations, such as the ones related to the use of force, seem to apply beyond and within States. If the subject is eligible to hold some international rights and obligations, the next question to answer is whether it has permission to issue a UDI. The answer could be affirmative under a highly controversial understanding of the legal principle of residual freedom, according to which what is not forbidden is permitted.[631] Whilst in internal law this liberal principle applies normally to citizens and other private persons, in international law this principle has been said to apply to States.[632] Nonetheless, some have pointed out that, by virtue of the Opinion on Kosovo, this controversial principle could be penetrating the borders of States to apply to sub-State units.[633] Anyway, a distinction could be drawn between the international right to secede (subjective right to self-determination) and the international liberty for secession (based on the principle of self-determination of peoples). This international liberty would imply weak permission in the sense that international law would not consider UDIs illegal *per se.* The success of the latter would depend much more on the principle of effectiveness and on international recognition.

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[630] REMIRO, A.; *et al. Derecho Internacional*, p. 194. MONAHAN, P.J.; BRYANT, M.J. *Coming to Terms…*, p. 7. BUCHHEIT, L.C. *Secession*, pp. 236-7.
[631] See KOLB, R. *Theory of International Law*, p. 218 *et seq*.
[632] To bridge the gaps in international law, the *Lotus case* seems to indicate there is a residual freedom for States. In an extract from the case of 1927 (p. 18), the Permanent Court of International Justice, the predecessor of the ICJ, stated that: "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."
[633] URRUTIA, I. "Territorial Integrity and Self-Determination", pp. 118-22.

Therefore, the importance of this international liberty lies in the capacity of third States to start granting recognition and dealing with this emerging subject, even if the parent State objects to the UDI.

If the principle of territorial integrity is no limit to a UDI, could it be a limit to the power of other States to recognize the territory declaring itself independent? In the light of the ICJ Opinion, one answer could be that recognition by other States is against the principle of territorial integrity if the sub-State entity makes illegitimate use of force, fails to follow a democratic process and has not previously exhausted the possibilities of reaching a pact through deliberation. This interpretation would be supported by the fact that more than a hundred UN Member States have already recognized the State of Kosovo without any previous explicit recognition by Serbia.[634] The building-blocks for an incipient customary norm would seem to be emerging: the *usus* of States recognizing the new State of Kosovo and the *opinio juris* in the ICJ Opinion. Nonetheless, the Kelsenian answer is that *de jure* recognizing an entity as a State violates international law if this entity does not meet the essential elements of statehood.[635] Dugard's and Raič's answer would be more sophisticated: a unilateral secession which does not meet the requirements of a remedial secession (which they call "qualified secession doctrine") would be an abuse of law and, as such, a violation of the rules governing the right to self-determination. Outside remedial secession, recognition by other States would be against the prohibition of early recognition and the principles of non-intervention and of territorial integrity.[636] However, the ICJ Opinion seems, implicitly, to

[634] Interestingly, 69 of the then 192 members of the UN had already recognized Kosovo before the ICJ Opinion was issued. URRUTIA, I. "Territorial Integrity and Self-Determination", p. 107. For more on the progress towards international recognition of Kosovo, see http://www.kosovothanksyou.com/ or WIKIPEDIA "International recognition of Kosovo".

[635] KELSEN, H. *Principles of International Law*, § III.D.4.c.

[636] DUGARD, J.; RAIČ, D. "The role of recognition…", pp. 104-9. David Raič developed a kind of legal *test* to check whether a secession is remedial: "(a) there must be a people which, though forming a numerical minority in relation to the rest of the population of the parent State, forms a majority within an identifiable part of the territory of that State; (b) the people in question must have suffered grievous wrongs at the hand of the parent State from which it wishes to secede (…), consisting of either (i) a serious violation or denial of the right of internal self-determination of the people concerned (through, for instance, a pattern of discrimination), and/or (ii) serious and widespread violations of the fundamental human rights of the members of that people; and (c) there must be no (further) realistic and effective remedies for the peaceful settlement of the conflict." RAIČ, D. *Statehood and the Law of Self-Determination*, p. 332. In similar vein, BUCHANAN, A. *Justice, Legitimacy and Self-Determination*, pp. 394-6. These are basically proposals on how international law should be, which do not deny that recognition is a highly discretionary power of States.

question this answer, since it confirms that there is no general prohibition of unilateral secessions (not even in contexts outside colonization, alien subjugation, domination and exploitation), refuses to consider whether the Kosovo's case falls under remedial secession and reduces the scope of the principle of territorial integrity. Accordingly, "it seems that recognition of statehood in cases of contested secession is largely a matter of States' political judgement".[637]

State sovereignty under international law can be divided into two aspects: non-intervention as the negative aspect and State people self-determination as the positive aspect.[638] Would recognition of a unilateral secession by third States be contrary to the international principles of sovereignty, of non-intervention and of self-determination? For Lauterpacht, "premature recognition is a wrong not only because, in denying the sovereignty of the parent State actively engaged in asserting its authority, it amounts to unlawful intervention".[639] Still, in the light of the ICJ Opinion, it may not be against these principles to recognize a peaceful and democratic unilateral secession, following previous failed attempts at agreement through negotiation. The principles of sovereignty and of non-intervention have been nuanced in the course of the 20th century and balanced with the principles of self-determination of peoples, of respect for human rights and of protection of minorities. Nevertheless, if an international right to secede of sub-State nations is not recognized, such a UDI may rely on exercise of an international liberty and on the international principle of self-determination of peoples, whereas the people of the parent State may hold an international right to self-determination.[640] This dilemma fades if the latter is interpreted as applying only in relation to other States and international organizations, in similar fashion to territorial integrity.

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[637] CAPLAN, R.; VERMEER, Z. "The European Union and Unilateral Secession", p. 760.
[638] See BEITZ, C.R. *Political Theory and International Relations*, pp. 92-3.
[639] LAUTERPACHT, H. "Recognition of States in International Law", p. 392.
[640] See General Comment 12, adopted in 1984 by the Human Rights Committee, on the right to self-determination, par. 6. Although this Comment considers that all States shall take positive action to promote the realization of the right of self-determination, "such positive action must be consistent with the States' obligations under the Charter of the United Nations and under international law: in particular, States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination." In general, as Musgrave wrote, "international instruments and United Nations practice both clearly indicate that self-determination also applies to the populations of independent states". MUSGRAVE, T.D. *Self-Determination and National Minorities*, p. 178.

The principle of effectiveness and international recognition of new States could fill the gap between the absence of a right to secede on the one hand and considering that a UDI is not contrary to international law on the other.

2.3. Effectiveness and international recognition

In the Quebec Secession Reference, the Supreme Court of Canada considered that Quebec had no right to secede under the international right to self-determination of peoples. The Court, however, pointed to the principle of effectivity and international recognition as alternative routes in the absence of a unilateral right to secede or if attempts to agree a negotiated secession fail. The ultimate success of unilateral secession would be dependent on effective control of a territory and recognition by the international society community, "which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition".[641]

According to the principle of effectiveness, the existence of a State as a paramount subject of international law depends on facts showing that some essential elements of statehood are met, namely permanent population, defined territory and independent effective government. "A state comes into existence when a group of individuals living on a definite territory are organized under an effective and independent government; and a state ceases to exist when it loses one of its essential elements (…). A government is independent if it is not legally under the influence of the government of another state; and it is effective if it is able to obtain permanent obedience to the coercive order issued by it".[642] Article 1 of the Montevideo Convention of 1933 on the Rights and Duties of States, albeit only an international treaty between American States, attempts to capture these basic criteria for statehood:

> The State as a person of international law should possess the following qualifications:
> I. A permanent population.
> II. A defined territory.
> III. Government.
> IV. Capacity to enter into relations with other States.

[641] *Reference re Secession of Quebec*, pars. 106, 155.
[642] KELSEN, H. *Principles of International Law*, pp. 258-9.

After acknowledging the merits of this Article and explaining its four requirements, Crawford explores other criteria:[643] (1) "Independence" – independence as subjection to no other State, but only to international law, is a crucial criterion for statehood. (2) "Sovereignty" – if sovereignty is defined as the plenary legal competence that States *prima facie* possess, it is more a legal consequence of statehood than a requirement for it. Nevertheless, sovereignty can be a significant criterion if it designates that a government of a State exercises, imposes and vindicates its sovereign powers effectively. Sovereignty in this sense is related to the possession of the monopoly of force. (3) "Permanence" – when some criteria are deprived or disputed for the time being, it is important to show that these and other criteria for statehood have been satisfied for long. (4) "Willingness and ability to observe international law" – while *ability* is more linked to factual existence as a State, *willingness* is more related to normative judgement according to which recognition may be denied. (5) "A certain degree of civilization" – the historical and dangerously ethnocentric criterion that only civilized peoples could be part of the international system of States might not be entirely superseded. Indeed, statehood presupposes certain degree of social and political organization. Other criterion for statehood may lead to similar conclusions nonetheless. (6) "Legal order" – insofar as the State is of paramount importance for the existence of a legal order, the other way round the latter can work as a criterion to identify the former. In particular, the existence of a *basic norm* that identifies and validates one State and its legal order seems relevant as well.[644] In cases of revolution, however, the State may remain even if the legal order and the basic norm change. (7) "International recognition" – if international recognition is understood as having more constitutive than merely declarative effects, it intensifies its status as a criterion for statehood.

These criteria should work more as principles than rules, allowing them to be interpreted contextually, systematically and flexibly.[645] In this regard, effectiveness is and should be supplemented by international recognition. Although the doctrine of *faits accomplis* may lead to considering certain factual situations as States, non-

[643] CRAWFORD, J. *The Creation of States…*, pp. 45-95.
[644] On the concept of *basic norm*, see § 3.7.2 below.
[645] For example, the essential criterion of territory requires neither precise borders (*e.g.* Israel) nor large areas (*e.g.* the Vatican).

compliance with certain general and peremptory norms of international law (such as the prohibition of unlawful use of force) can and should lead States and international organizations to deny recognition of statehood. Conversely, some other norms and principles (such as self-determination of peoples) can or should lead to recognition of emerging States that might not fully meet the factual requirements. Consequently, a tension can be observed between the doctrine of *faits accomplis* and a doctrine of recognition aiming to promote certain legal and political positions and conditions.

International recognition is a legal and political institution to confirm, determine or clarify the birth and existence of new States within international law. Over the years, two theories of the legal effects of international recognition have developed: one predicates the merely declarative effects, the other the constitutive effects. The declarative view considers international recognition as a mere act of confirmation that emerging States fulfil the requirements of the principle of effectiveness. Taking a different line, the constitutive view allows dialogue between international recognition and the principle of effectiveness. While declarative theory plays down the relevance of international recognition, constitutive theory adds to its importance, claiming that *faits accomplis* are not always sufficient to become a fully-fledged State.

According to constitutive theory, recognition by other States (or international organizations) is necessary to become a full member of international society. Thus, international subjectivity could be conditional on the legal or political criteria of the other international subjects. Conversely, the declarative theory considers that if a State exists *de facto* (in fact), it must also exist *de jure* (in law).[646] The constitutive

[646] In Opinion No. 1, the Badinter Commission stated that: "the existence or disappearance of the State is a question of fact; that the effects of recognition by other States are purely declaratory". Nonetheless, in Opinion No. 3, it qualified this: "According to a well-established principle of international law the alteration of existing frontiers or boundaries by force is not capable of producing any legal effect. This principle is to be found, for instance, in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly Resolution 2625 (XXV))". In Opinion No. 10, it concluded that: "As, however, the Arbitration Commission pointed out in Opinion No. 1, while recognition is not a requisite for the foundation of a State and is purely declaratory in its impact, it is nonetheless a discretionary act that other States may perform when they choose and in a manner of their own choosing, subject only to compliance with the imperatives of general

conception defended here, however, has no intention of denying the importance of facts, but emphasizes that the international legal personality of the State is a legal and political, not natural, creation. Therefore, while the declarative view considers that the existence of a State is a matter of fact, the constitutive view – as here conceived – claims it also depends on law, politics and, ultimately, morals.

Interestingly, according to the constitutive approach, States and international organizations (which are, of course, formed by States) identify which are States. This is a circular course. International subjectivity is, in this respect, a product of an inter-subjective belief, inclination or judgement on the part of the international society of States. This inter-subjective reality is, partly, a product of the broad decentralization of international law. The constitutive view is thus sometimes criticized for giving States excessive discretionary power when it comes to deciding the other subjects of international law. This objection can be tackled from two angles. From a more descriptive angle, it can hardly be denied that political considerations have an influence on the processes of recognition and non-recognition of incipient statehoods.[647] States do not feel legally bound to recognize other States even if they meet the criteria for statehood.[648] Moreover, most supporters of the declarative view admit the need for some international recognition as a precondition of statehood since, among other reasons, a general lack of recognition could create difficulties when it comes to showing "the capacity to enter into relations with other States" – the fourth criterion for statehood in the Montevideo Convention.[649] From a more normative angle, political and legal discretion can be preferable to the arbitrariness of *faits accomplis*. The doctrines of *faits accomplis* and of recognition with mere declarative effects lack normativity

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international law, and particularly those prohibiting the use of force in dealings with other States or guaranteeing the rights of ethnic, religious or linguistic minorities."

[647] When admitting the importance of recognition, we should not forget, however, the importance of power politics of recognition, political expediency and political interests as opposed to international ethics and law. See COGGINS, B. *Power Politics and the State Formation in the Twentieth Century.*

[648] When the International Law Commission of the UN drafted a Declaration on Rights and Duties of States, it decided not to include "Each State has the right to have its existence recognized by other States". One of the reasons given by the Draft of the Commission not to include this right was that it would go beyond the general principles of international law regarding recognition of new States. See *Draft Declaration on Rights and Duties of States with commentaries 1949*.

[649] DUGARD, J.; RAIČ, D. "The role of recognition…", pp. 98-9. RAIČ, D. *Statehood and the Law of Self-Determination*, pp. 31-48.

and idealism.[650] A constitutive view of international recognition could help to steer the normative course of international relations towards the principles of self-determination, agreement and non-use of force.[651]

Constitutive theory raises several questions and objections. If States X, but not States Y, recognize State Z, which prevails? Which is the minimum number of States required to recognize Z? Should a purely quantitative or a more qualitative criterion be used? Or will State Z exist solely in relation to States X? If this were the case, statehood would turn out to be rather relative and subjective. Eminent constitutivist authors admit that States exist legally only in their relations with other States. In this regard, they deny the existence of States in absolute terms.[652] Others tried to mitigate these problems with the constitutive view by showing and claiming collective recognition at the expense of unilateral and random recognition.[653] In other words, both international recognition and non-recognition (should) depend less and less on the sum of individual State recognitions, but more on the deliberations and agreements between States generated within international organizations such as the UN and the EU. Increasingly collective dynamics of recognition may tend to overcome the objections set out above.[654]

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[650] See BUCHANAN, A. *Justice, Legitimacy and Self-Determination*, ch. 6.

[651] The distinction made in this section may not be between declarative and constitutive recognition, but between legal and political recognition. According to Kelsen, legal recognition is the act by which a State confirms that a community fulfils the principle of effectiveness. By contrast, political recognition is the act by which a State recognizes that it wishes to enter into political and other kinds of relations with the State recognized. Although for Kelsen the State starts to exist for another State from the moment of recognition, this recognition can be given only when the State recognized meets the factual criteria for statehood. See KELSEN, H. *Principles of International Law*, § III.D.4.b.

[652] KELSEN, H. *Principles of International Law*, § III.D.4.c.

[653] LAUTERPACHT, H. "Recognition of States in International Law", pp. 447-9.

[654] Dugard and Raič also highlight the importance of the decisions by the Security Council and the General Assembly of the UN, which expressly urge States to deny recognition of certain secessions resulting from occupation, aggression, breach of human rights or breach of self-determination of peoples (for example, the Bantustan territories in South Africa, Rhodesia, Katanga, the Republic of Northern Cyprus, Republika Srpska and Abkhazia). DUGARD, J.; RAIČ, D. "The role of recognition…", pp. 97-137. By way of example, UN Security Council Resolutions 541 (1983) and 550 (1984) considered the declaration of independence by the Republic of Northern Cyprus legally invalid and politically regrettable and asked third States not to recognize any Cypriot State other than the Republic of Cyprus. According to Crawford, there is a presumption that would deny the status of State under international law to any entity that formally displays all the elements of statehood but has been established by a belligerent occupying power. In these cases, the criteria of independence for statehood would be missing. See CRAWFORD, J. *The Creation of States…*, pp. 78-83, 156-82. Crawford does not expect, however, "that collective recognition will play a major or predominant role in matters of territorial status", despite the fact that "in a number of cases it has been of considerable importance" (p. 540).

From a practical and eclectic point of view, international recognition can help to clarify, identify, boost, consolidate or unblock incipient statehoods. Recognition may work as a driving force of effectiveness, in that the principle of self-determination of peoples (including respect for human rights and protection of minorities) would take on key relevance in dialogue with the doctrine of *faits accomplis.* This is not particularly innovative: self-determination of colonized peoples pushed for recognition of emerging States, even though they failed the effectiveness requirements. At the same time, a practical and eclectic view of recognition should provide a means of penalizing *faits accomplis* that breach peremptory norms and fundamental principles of international law.[655]

The combination of the principle of effectiveness and international recognition raises many questions that cannot be answered in this book.[656] Despite them, effectivity and recognition are undeniably significant routes to secession when there is no internal or international right to secede. They are no easy goals and cannot be taken lightly, however. Since effectiveness is so closely linked to the factual control and to the monopoly of force over people and territory, considering international recognition dispensable to obtain unilaterally the independence of sub-State units may entail tragic consequences. Still, invoking Article 3 of the Montevideo Convention, some have held that international recognition is not necessary to become a State:

> The political existence of the State is independent of recognition by the other States. Even before recognition the State has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The exercise of these rights has no

[655] In order to place international sanctions on non-legitimately newborn States, the UN could deny them entry to the Organization because of non-fulfilment of the substantive requirements for admission set out in Article 4.1 of the United Nations Charter, which are: (1) to be a State, (2) to be a peace-loving State, (3) to accept the obligations contained in the Charter, (4) to be able to carry out these obligations and (5) to be willing to carry out these obligations. According to the 1948 ICJ Advisory Opinion on the conditions for admission of a State as a member of the UN, these requirements are all necessary and no further requirements may be added.

[656] Among other questions: Which definition of State is the most accurate or appropriate, bearing in mind the relevance of international recognition? Can legal recognition be distinguished from political recognition? Would early recognition be against general international law? To what extent could international recognition be advanced to strengthen or promote statehood? Does a *de facto* State situation which has not yet been recognized create rights and duties? Is there any difference between *de facto* and *de jure* recognition? Can the acts of recognition be implicit or tacit? Would the retroactive effects of recognition depend on whether the view is constitutive or declarative? Although some of these questions are partially addressed in this book, they will remain open.

> other limitation than the exercise of the rights of other States according to international law.

Articles 6 and 7 of the Convention add that:

> The recognition of a State merely signifies that the State which recognizes it accepts the personality of the other with all the rights and duties determined by international law. Recognition is unconditional and irrevocable.
> The recognition of a State may be express or tacit. The latter results from any act which implies the intention of recognizing the new State.

Even if recognition is defended as a non-essential requirement for statehood, the mere approval of a UDI is clearly not enough to achieve an independent State.[657] On the factual ground, how would the seceding government impose its internal and external sovereignty if the parent State refused to negotiate and agree the independence and the other States and international organizations did not recognize the new statehood or intervene in the process? A scenario involving a unilateral constitutional break without significant internal majorities and external recognitions is tremendously complicated both legally and politically.[658] If a UDI were to be issued, international recognition would need to be obtained subsequently, whether express or tacit, individual or collective, definitive or provisional or incipient, especially from neighbouring and influential States and the relevant international organizations in the region. Although in strict juridical terms international recognition has been considered a definitive act, in broader terms it should be regarded as a staged, provisional and conditional practice.[659] In fact, international recognition may have different phases: international concern and intervention; international conciliation, mediation and arbitration; international recommendation and observation of elections and referendums; international conditions and controls of the basic norms and institutions of the emerging State; association with and integration in international organizations.

Under current international law, States imposing conditions beyond the principle of effectiveness before recognizing new subjects of international law seem neither

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[657] "Recognition occurs only after a territorial unit has been successful, as a political fact, in achieving secession." *Reference re Secession of Quebec*, par. 142.
[658] See ch. 3.7 below. BOSSACOMA, P. "Secession in Liberal-Democratic Contexts".
[659] Inspired by BUCHANAN, A. *Justice, Legitimacy and Self-Determination*, pp. 56-7, 280-1. See also CAPLAN, R.; VERMEER, Z. "The European Union and Unilateral Secession", pp. 765-7. SCHARF, M.P. "Earned Sovereignty", pp. 373-85.

illegal nor unusual.[660] In this regard, there is a tendency in Europe towards moralization and juridification of recognition by making it conditional on a number of requirements independent of effectiveness:[661] (1) respect for the provisions of the UN Charter as well as other international charters and conventions; (2) honour the rule of law, democracy and human rights; (3) guarantees for protection of minorities;[662] (4) respect for the inviolability of other States' frontiers; (5) acceptance of commitments regarding security and regional stability; (6) obligation to settle by agreement and arbitration all issues concerning State succession and regional disputes.[663] This trend towards moralization and juridification of international recognition are in tune with Justice as multinational fairness and with an evolution of self-determination of peoples along the peaceful, democratic and negotiated lines advocated in this book.

The disintegration of the USSR and of Yugoslavia generated interesting practices and doctrines regarding international recognition and self-determination. In both disintegration processes, acting on the recognition guidelines written by *the Twelve* Ministers of Foreign Affairs of the Member States, the European Community started a path of detaching recognition from facticity towards normativity, idealism and politics and an indirect expansion of the principle of self-determination of peoples. There are some distinctions between these disintegration processes which need preliminary attention. While the Russian Federation was recognized as the

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[660] See CAPLAN, R. *Europe and the Recognition…*, p. 61. SCHARF, M.P. "Earned Sovereignty", pp. 374-5, 384-5. For Kelsen, however, legal recognition of a State can only be unconditional. Conditional recognition makes sense only when referring to political recognition understood as willingness to enter into political, economic, diplomatic or other kinds of relationships with the politically recognized State. KELSEN, H. *Principles of International Law*, § III.D.4.e. According to Crawford, breach of a condition attached to a grant of recognition may undermine friendly relations between States or may be treated as a violation of an international obligation, but rarely lead to suspension of recognition and relations. CRAWFORD, J. *The Creation of States…*, p. 546.

[661] RIBBELINK, O. *State Practice Regarding Succession and Issues of Recognition*, pp. 75-9. CASSESE, A. *Self-Determination of Peoples*, pp. 266-7. CAPLAN, R. *Europe and the Recognition…*, p. 2.

[662] There are many precedents for making recognition of new States conditional on respect or protection of minorities. In the Treaty of Berlin of 1878, the signatory States made recognition of Bulgaria, Montenegro, Serbia and Romania conditional on respect for religious minorities. After World War I, the allies made recognition of Poland, Czechoslovakia and the Kingdom of Serbs, Croats and Slovenes conditional on protection of national and ethnic minorities, guarantees of freedom of thought and belief, prohibition of discrimination on the basis of race, language or religion. See CAPLAN, R. *Europe and the Recognition…*, pp. 61-2. CRAWFORD, J. *The Creation of States…*, p. 545.

[663] See Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union, of 16 December 1991. The penultimate paragraph of the Declaration reads: "The Community and its Member States will not recognize entities which are the result of aggression."

continuator State, the Federal Republic of Yugoslavia (formed by the currently independent States of Serbia, Montenegro and Kosovo) was not generally recognized as the continuator State.[664] Unlike the disintegration of the Soviet Union, the Socialist Federal Republic of Yugoslavia was dismantled under the supervision of the European Community within the framework of the Conference on Yugoslavia (established on 27 August 1991).[665]

The Conference on Yugoslavia created an Arbitration Commission to rule on the disintegration process. This was an *ad hoc* body, formed by the presidents of the constitutional courts of France, Italy, the Federal Republic of Germany, Belgium and Spain. Since the French justice Robert Badinter was appointed president, it came to be called the Badinter Commission. The Commission produced a series of advisory opinions on general issues concerning the process and on specific issues relevant to each seceding territory, which deepened the juridification of recognition.[666] These Opinions put particular emphasis on referendums as an instrument to generate new sovereign peoples.[667] Specifically, in the case of Bosnia and Herzegovina, they ruled that a duly supervised referendum of the entire population was indispensable to recognize the new State internationally. Consequently, on 29 February 1992, a new referendum was held in line with the Opinion of the Badinter Commission and, on 6 April of the same year, the twelve Member States of the European Community recognized Bosnia and Herzegovina. Recognition by the USA came the following day.[668]

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[664] See CRAWFORD, J. *The Creation of States…*, pp. 393-401, 669-70. CRAWFORD, J.; BOYLE, A. *Referendum on the Independence…*, Part IV, pars. 57-92. The Russian Federation recognized the Baltic Republics and other former republics as new States in exchange for them recognizing it as the continuator State to the USSR. In this way, Russia, as continuator State, could retain the privileged position of the USSR in the UN (*i.e*. the status of permanent member of the Security Council and its concomitant right of veto) and supported the applications from the former republics, as successor States, to become members of the Organization. By contrast, the other former Yugoslav republics and international society did not accept (despite initial uncertainty) the status of continuator State for the Federal Republic of Yugoslavia.

[665] See Declaration on Yugoslavia of 16 December 1991.

[666] Not all the Opinions were followed by the Member States. For example, the recognition of Macedonia was delayed despite the favourable Opinion from the Commission and the recognition of Croatia went ahead despite the reservations expressed by the Commission. CAPLAN, R. *Europe and the Recognition…*, p. 50.

[667] TIERNEY, S. *Constitutional Referendums*, p. 167 *et seq*.

[668] CASSESE, A. *Self-Determination of Peoples*, pp. 271-2.

The Badinter Commission made efforts not to broaden international law on self-determination of peoples. From the very beginning the Commission treated the disintegration of Yugoslavia as a "process of dissolution" of a Federation.[669] In this way, the Commission managed to avoid the risk that the Yugoslav process could be considered a widening of the international right and principle of self-determination of peoples that would set a precedent for other secession processes.[670] Another important reason for treating the disintegration of Yugoslavia as a dissolution was to move away from the idea of civil war and turn the Balkan confrontations into international wars. While in a secession there is a continuator State, in a dissolution all the parties become successor States. This difference is of paramount importance. Among other consequences, in the latter "no one party is allowed to veto the process. By contrast where the government of the predecessor State maintains its status as such, its assent to secession is necessary, at least until the seceding entity has firmly established control beyond hope of recall."[671] In the case analysed here, even though the Yugoslav Federal Republic initially considered itself the continuator State of the Socialist Federal Republic of Yugoslavia and was recognized some continuity, it was generally recognized by international society as a successor State (in line with the thesis of dissolution). The issue was not finally solved until a decade later the Federal Yugoslav Republic accepted the status of successor State and, in 2003, changed its name to the State Union of Serbia and Montenegro.[672]

Objections can be raised to the Badinter Commission's interpretation that this was a case of dissolution.[673] The federal government did not decide to dissolve the Federation. Slovenia and Croatia were using secessionist terms, arguments and strategies such as declarations and referendums of independence and sovereignty.[674] The secession outbreaks in Slovenia and Croatia led the rest of the republics to fear a collapse of the multinational balance in Yugoslavia because of the over-

[669] See Opinion No. 1 of the Badinter Commission.
[670] CAPLAN, R. *Europe and the Recognition…*, p. 66.
[671] CRAWFORD, J. *The Creation of States…*, p. 391. For Crawford, continuity is, at least in practice, closely linked to the claims of the State or States concerned and to recognition by other States or international organizations (pp. 670-1).
[672] See CRAWFORD, J.; BOYLE, A. *Referendum on the Independence…*, pars. 79-92.
[673] See MUSGRAVE, T.D. *Self-Determination and National Minorities*, pp. 200-7.
[674] See § 3.3.2 below.

dominance of the Serb majority. Unlike other republics, Slovenia had no large Serb minority within its borders and achieved *de facto* independence with low conflict and violence. This secession generated a contagious bandwagon effect. In fact, the general historical pattern was followed, in which secessions occur in bursts, and not in a uniform, ongoing way.[675] The principle of effectiveness drives seceding territories to take advantage of moments of weakness on the part of the parent State to create new States, at the expense of democratic, deliberative and measured processes. In the final analysis, we may call it disintegration as a result of a series of cascading secession processes.

By the end of November 1991, Opinion No. 1 of the Badinter Commission already expressed that "the Socialist Federal Republic of Yugoslavia is in the process of dissolution". This Opinion, however, seemed to run counter to the historical presumption of the continuity of the existing State subjected to disintegrating pressures.[676] In international law, there is a strong presumption in favour of the continuity of the existing State, even if it suffers great losses of effective authority.[677] Moreover, in cases of State disintegration, there is usually a continuator State, since continuity generally precedes succession.[678] This presumption was possibly neglected with the aim of avoiding a greater risk for existing States: the expansion of the principle of and right to self-determination (which were, by the way, recognized by the 1974 Constitution then in force).[679]

Despite the efforts of the Badinter Commission to avoid creating precedents for secession, it may have opened up new opportunities for external self-determination based on a previous violation or failure of internal self-determination.[680] In Opinion No. 1, the Commission considered "that in the case of a federal-type State, which embraces communities that possess a degree of autonomy and, moreover,

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[675] See § 1.2.7 above.
[676] CAPLAN, R. *Europe and the Recognition…*, pp. 66-7.
[677] CRAWFORD, J. *The Creation of States…*, p. 89.
[678] Among other reasons, continuity precedes succession because the former presupposes more stability in legal relations (rights and duties) than the latter, thus increasing the legal security. BROWNLIE, I.; CRAWFORD, J. *Brownlie's Principles of Public International Law*, p. 427. CRAWFORD, J. *The Creation of States…*, pp. 667-8. CRAWFORD, J.; BOYLE, A. *Referendum on the Independence…*, par. 24.
[679] See § 3.1.1 below.
[680] For Cassese, the Twelve also stressed "the close link between external and internal self-determination". CASSESE, A. *Self-Determination of Peoples*, p. 268.

participate in the exercise of political power within the framework of institutions common to the Federation, the existence of the State implies that the federal organs represent the components of the Federation and wield effective power". That is to say, in a federal State the self-governing units ought to participate in the federal institutions and the latter should be representative of the former.[681] The Commission found, however, that "the composition and workings of the essential organs of the Federation, be they the Federal Presidency, the Federal Council, the Council of the Republics and the Provinces, the Federal Executive Council, the Constitutional Court or the Federal Army, no longer meet the criteria of participation and representatives inherent in a federal State". Could this imply that when a federal State is no longer representative of the federated units, a right to external self-determination arises? Indeed, the lack of participation, representativeness and effectiveness was followed by turning the internal federal borders into international frontiers.

Approximately six months elapsed between the declarations of independence of Slovenia and of Croatia, on 25 June 1991, and the decision of the Council of Ministers of the European Community, on 16 December 1991, to open the process of recognition of the new States.[682] Internal and external factors promoted recognition. Internally, Belgrade was increasing the use of force whilst creating obstacles to negotiation and compromise. Externally, the disintegration of the USSR was advancing and most Opinions of the Badinter Commission ran in favour of the former republics. The strategic functions of conditional recognition of the former Yugoslav republics by the European Community Member States were: (1) to avoid excessive use of force by offering the republics the rights provided by international subjectivity; (2) to turn an internal affair into an international conflict and, thus, allow more intensive intervention by third States and international organizations; (3) to guarantee protection of minorities, which was pleaded as one of the main causes

[681] Some criticized the Commission for not giving details of the causes of the lack of representativeness and effectiveness of the federal institutions, when it could have been the result of previous disloyalty to the constitution by federated units. See REMIRO, A.; *et al. Derecho Internacional*, pp. 195-6.

[682] The Declaration on Yugoslavia, of 16 December 1991, stated that the Republics that so wished could send their applications for recognition to the Badinter Commission so that it could give its Opinion before the implementation date. The first seven Opinions were given in January 1992, and the other three followed in July of the same year.

of the armed conflict; (4) to use the threat and expectation of recognition as a negotiating tool in the hands of the European Community for cooling and directing the Balkan conflict. Nevertheless, this policy of recognition worked more intensely on the new independent republics than on Belgrade.[683]

While some blame the European policy of recognition for the outbreak of violence in the Balkans, others have tried to dismiss this accusation or play it down. Richard Caplan sustains that the violence operated independent of international recognition. The violence in Croatia erupted before recognition. The violence in Bosnia and Herzegovina broke out immediately after recognition, but had been prepared in advance by the Serbs – with Belgrade arming the Bosnian Serbs to allow them to constitute Republika Srpska. What is more, the delay in international recognition of the Former Republic of Macedonia (1991-1993) and of the former province of Kosovo (1991-2010) neither increased stability nor avoided Serb violence in those pre-statehoods. Once violence starts or becomes unavoidable, international recognition can be a way of stopping it since it makes international law fully applicable and allows much more intervention by third States and international organizations. Even if some might say that international recognition impeded an agreed solution to the conflict (because Serbia rushed to expand its territorial domination), recognition pushed Serbia to negotiate more constructively from 1992 on. In sum, according to Caplan, EC recognition created opportunities for conflict prevention, attenuation and resolution that the international society did not exploit.[684] While agreeing with early international recognition, David Owen takes a more critical view of the European intervention:

> There are many 'ifs' surrounding the former Yugoslavia, and many lessons to be learnt in the conduct of foreign policy of the EU and the UN Security Council. In retrospect, the biggest mistake, and the one that made the war inevitable, was not the premature recognition but (...) the rejection by EC Foreign Ministers on 29 July 1991 of the suggestion made by the Dutch Presidency in a COREU telegram sent out on 13 July. If the EC had launched a political initiative in August 1991 to address the key problem facing the parties in the dispute, namely the republics' borders, and had openly been ready to see an orderly agreed secession of separate States in revised borders, then in conjunction with NATO a credible call could have been made for an immediate ceasefire. (...). In July 1991 there was such an opportunity; once missed, it took until 1995 for war exhaustion to become the determining factor. (...) The unwarranted

[683] See CAPLAN, R. *Europe and the Recognition…*, pp. 22-40, 185.
[684] *Ibid.* ch. 4, pp. 95-145.

> insistence on ruling out changes to what had been internal boundaries within a sovereign State was a fatal flaw in the attempted peacemaking in Yugoslavia. (...) Of course the world has to be aware of the dangers of drawing State borders along ethnic lines; but the world also has to recognize the dangers of ignoring ethnic and national voices.[685]

The Badinter Commission recommended exclusive recognition of the former republics of the Yugoslav Federation as new States and ruled, based on the *uti possidetis* principle, that the internal federal borders had to be understood as the new international borders ("except where the States concerned agree otherwise").[686] As already discussed, if the *uti possidetis juris* principle is understood as a conclusive presumption that the internal borders of States are rational and fair, it can unduly favour or harm secessionists and unionists – for having too much or too little territory and population.[687] For instance, the *uti possidetis* principle allowed the Republic of Croatia questionably to retain the region of Krajina (inhabited mainly by Serbs who were against secession), but harmed the Croats of Bosnia who were claiming inclusion in Greater Croatia.[688] The same principle allowed Serbia unduly to retain the former autonomous province of Kosovo, but harmed the Serbs of Bosnia and Herzegovina by impeding recognition of Republika Srpska.[689]

The denial of international recognition of Kosovo, despite the pacific strategy followed by the pro-secession movement in the early years (1991-7), raises the question whether it is the actual or potential violence that causes European

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[685] OWEN, D. *Balkan Odyssey*, pp. 342-3.

[686] In its Opinion No. 2, the Badinter Commission said that: "whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise. Where there are one or more groups within a State constituting one or more ethnic, religious or language communities, they have the right to recognition of their identity under international law." In Opinion No. 3, it went on to add that: "The boundaries between Croatia and Serbia, between Bosnia-Herzegovina and Serbia, and possibly other adjacent independent States may not be altered except by agreement freely arrived at. (…) Except where otherwise agreed, the former boundaries become frontiers protected by international law. (…) Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles (…)". The ICJ expressly recognized *uti possidetis* as a general principle of international law in the *Frontier Dispute* case of 1986, but in a less categorical manner than the Badinter Commission.

[687] See § 1.3.3 above.

[688] See MOORE, M. *The Ethics of Nationalism*, pp. 144, 161. BERAN, H. "A democratic theory of political self-determination…", in LEHNING, P.B. (ed.) *Theories of Secession*, p. 38.

[689] The Serb people in Bosnia and Herzegovina proclaimed the Republika Srpska on 9 January 1992 (with its own parliament, after a referendum and with relatively effective control over its territory thanks to the support of the Serbian authorities in Belgrade). CRAWFORD, J. *The Creation of States…*, pp. 406-7.

recognition, and not the other way round.[690] According to the ICJ, the UDI issued by Kosovo, unlike Republika Srpska, was in accordance with international law since there was no "unlawful use of force (n)or other egregious violations of norms of general international law".[691] This may help to constrain violence as a driver of effectiveness. In addition, moralizing and juridifying recognition in the sense suggested in this chapter gained plausibility after the ICJ confirmed that a UDI is not contrary to international public law. It seems to imply that Kosovo could aspire to become a new State appealing for international recognition. As long as UDIs make no undue use of force, follow a democratic process and are the result of previous unsuccessful attempts at negotiation with the parent State, they can be understood as legal and legitimate appeals to international society for recognition as a new State.[692] Principles such as those of Justice as multinational fairness ought to guide recognition of these emerging States, even if they do not fully comply with the traditional elements of the principle of effectiveness.

According to the Supreme Court of Canada, "although recognition by other states is not, at least as a matter of theory, necessary to achieve statehood, the viability of a would-be state in the international community depends, as a practical matter, upon recognition by other states." Quebec Secession Reference points out that the process of recognition may be guided by legal norms, including the legitimacy of the secession process. At the very least, compliance with legitimate obligations would facilitate international recognition. More precisely, the Reference warns that non-compliance with the duty to negotiate in accordance with the principles of

[690] As Kosovo was a Yugoslav province and not a republic, the European Community and its 12 Member States denied it international recognition. Like the republics, the province of Kosovo had its own constitution, government, courts, national bank, voice in the collective presidency, etc. The autonomy of Kosovo, however, had been abolished in 1989. Yugoslav socialist constitutionalism had considered the republics nations (*narodi*) and the province of Kosovo a nationality (*narodnosti*). The republic as a nation was a national community that was part of the Yugoslav nations. By contrast, the province of Kosovo, as a nationality, was formed mainly by members of an external national community (ethnic Albanian). The distinction drawn by Yugoslav federalism therefore turned into a distinction that could apply to international law as a result of the *uti possidetis* doctrine of the Badinter Commission. The massive offensive launched by Serbia in 1998 against the Kosovo-Albanian ethnics led to intervention by NATO which turned Kosovo into an autonomous area under *de facto* international control. From that year on, Serbia's sovereignty over Kosovo was nominal. As a result of the independence of Kosovo, the *uti possidetis* principle might work once again against the Serb minorities in Northern Kosovo. See CAPLAN, R. *Europe and the Recognition…*, pp. 137-44.

[691] See ICJ Opinion on Kosovo, par. 81.

[692] See ch. 2.2 above.

democracy, constitutionalism and rule of law, federalism and protection of minorities can harm the parent State or the seceding territory, respectively, when it comes to international recognition. For the Court, a Quebec that had negotiated in conformity with these principles in the face of unreasonable intransigence on the part of the Federation and other provinces would be more likely to be recognized than a Quebec which did not itself act according to these principles in the negotiation process. This led the Court to conclude that the obligation to negotiate would be evaluated indirectly by international society.[693]

On the other hand, the political discretion that this chapter claims (in order to introduce moralization and juridification beyond facticity) poses the danger of enhancing the political arbitrariness of the hegemons. In other words, while the principle of effectiveness refers to *faits accomplis*, disregarding the facts could lead to recognition or non-recognition of State realities based on purely political expediency of the most powerful international or regional players.[694] Despite the obvious danger that discretion could result in power politics and self-interest, political discretion can be positive as a boost or brake to consolidate effectiveness. Could it not be even more danger to let the facts reign over the norms? If only the former were relevant to recognize States, would it not lead or push the hegemonic powers to intervene directly or indirectly in order to condition or alter the *faits*? Even if it is difficult and dangerous to escape from facticity (the "is") in favour of the normativity (the "ought"), it is a reasonable trend in the evolution of humanity. Discretionary recognition can gradually evolve into a more consensual and principled practice. Through collective recognition and the force of precedent, coherent doctrines may develop and thus reduce the capacity of powerful States to manipulate the system to their advantage.

Additionally, since this study focuses on the European region and the liberal-democratic world, the fear of discretion turning into arbitrariness or pure convenience diminishes in comparison to illiberal and undemocratic contexts. In

[693] See *Reference re Secession of Quebec*, pars. 103, 142-3, 155.
[694] According to Bridget Coggins, the Great Powers, which "play an especially important role in the selection of new States", are not "impartial, apolitical arbiters when assigning recognition to the new peers". Their "leaders approached diplomatic recognition as an expression of mutual self-interest and not – as many jurists would have it – as a matter dictated by international law". COGGINS, B. *Power Politics and the State Formation in the Twentieth Century*, pp. 216-7.

particular, the Resolution of the General Assembly of the UN, of 9 September 2010 (A/RES/64/298), acknowledged the content of the ICJ advisory opinion on the Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo and welcomed the readiness of the EU to facilitate a process of dialogue between Belgrade and Pristina. In this connection, the European Parliament Resolution, of 18 April 2013, on the European integration process of Kosovo recalled that 98 of the 193 UN Member States, including 22 of the 27 EU Member States, recognized Kosovo's independence. The Resolution encouraged the remaining five EU Member States to recognize Kosovo and to facilitate economic, social and political relations.[695]

Beyond the arguments based on Justice as multinational fairness, international recognition can be granted to new States for more practical reasons based on regional peace and stability. In the case of Kosovo, international and European society neither recognized its statehood nor intervened until the conflict had escalated to major levels of violence and human rights violations. In fact, international recognition seems to ensue only secessions which are agreed or constitutional (Montenegro) or unilateral secessions where recognition would perform the function of intervening and ending a serious conflict (Kosovo). The absence of reasonable ways to secede is therefore an incentive for violence, since the seceding State needs to achieve effective control of its territory and population and the parent State will try to prevent it. If the seceding entity cannot seize the monopoly of force, it may seek to provoke an excessive reaction by the State in order to generate a right to external self-determination or international recognition.[696] As the disproportionate reaction from Belgrade shows, the doctrine of international recognition could play another role in favour of secessionist claims: if the parent State uses excessive force and repression against a seceding nation which peacefully and democratically pursues secession, the other States and international organizations could condemn this conduct and progressively recognize a right to secede or an emerging statehood.[697]

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[695] Spain, Cyprus, Romania, Slovakia and Greece were the EU Member States that had not recognized the statehood of Kosovo.
[696] See BOSSACOMA, P. "Secession in Liberal-Democratic Contexts."
[697] See § 1.4.8 above. This assumption is exemplified not only by the disintegration of Yugoslavia and the secession of Kosovo but also by other cases such as that of East Timor, which in 2002

became a new member of the UN. In reverse, non-recognition generally works as a sort of sanction against conduct that States reprove. In particular, refusal of legal recognition of a situation produced by violating self-determination of peoples is a common countermeasure in international law.

3. SECESSION IN CONSTITUTIONAL LAW

3.1. Constitutional right to secede and constitutional reform

3.1.1. Constitutionalizing the right to secede as a type of constitutional reform

This section will defend constitutionalization of the right to secede as a special mechanism for constitutional amendment, which should juridify the principles of Justice as multinational fairness. By doing so, principles such as that of democracy are made compatible with the principle of constitutionalism. Multinational union, constitutional law and right to secede could be in harmony. For cases in which there is no constitutional right to secede (or if such a constitutional right is inappropriate or far too demanding), a constitutional theory of secession will be proposed to defend unilateral secession based on the awakening of a constituent people. The final sections of this book will discuss this unilateral exit, bearing in mind that unilateral secessions are a kind of revolutionary acts, for they involve a rupture of and with the constitutional order. Since liberal democracy requires respect for the rule of law, any such constitutional break must be exceptional in these contexts. Therefore, only after a long path seeking negotiated and constitutional ways would democratic unilateral ways, backed by intense, sustained and long-lasting mass mobilization, be able legitimately to overcome the constitutional barriers and raise the seceding nation as a constituent people.

Most constitutional orders (of both unitary and federal States) do not recognize any right to secede or to external self-determination for their minority nations, self-governing units or sub-State territories. To the detriment of these rights, constitutions often establish unity, indivisibility and/or territorial integrity.[698] Despite the lack of general constitutional recognition of the right to external self-determination and to secede, there are some current and historical examples.

[698] VENICE COMMISSION, *Self-Determination and Secession in Constitutional Law*, 1999. MANCINI, S. "Secession and Self-Determination", p. 481. MONAHAN, P.J.; BRYANT, M.J. *Coming to Terms…*, pp. 5-11. ARGULLOL, E.; VELASCO, C. (dir.) *Institutions and Powers in Decentralized Countries*, § III (6). Weill, R. "Secession... Worldwide", pp. 905-89.

However, many of these examples do not belong to liberal-democratic contexts and are rather nominal recognitions (without real normative force). Several constitutional provisions (in the broad sense) that enshrine a right to secede or to external self-determination can be listed:

1. The preamble and Article 39 of the current Constitution of the Federal Democratic Republic of Ethiopia of 1994 enshrine the right to self-determination, including secession, of the nations, nationalities and peoples of the Federation. The same provision gives a sociological definition of them as groups of people who share a culture, customs, language, beliefs, identity and psychology and who inhabit an identifiable, predominantly contiguous territory.[699]
2. Article 113 of the current Constitution of the Federation of Saint Kitts and Nevis of 1983 stipulates the right to secede of the Island of Nevis.[700]
3. Article 4.2 of the current Constitution of Liechtenstein of 1921, according to the constitutional reform of 2003, provides that individual communes have the right to secede from the Principality if the majority of the citizens residing in the municipality vote in favour.[701]
4. Article 50 of the current Treaty on European Union of 2007 enshrines a sort of unilateral right of each Member State to secede from the Union if no withdrawal agreement is reached after two years.[702]

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[699] After a provisional government of the Eritrean People's Liberation Front (1991), Eritrea held a referendum on independence under international observation and became a UN Member State (1993). "Eritrea asserted its independence from Ethiopia in 1993, following a United Nations supervised referendum in which over 99 per cent of voters favoured this result." ODUNTAN, G. *International Law and Boundary Disputes in Africa*, p. 181. The independence of Eritrea and the constitutional recognition of the right to secede could be the result of an alliance between Eritrean and other Ethiopian forces to fight together against the military regime in Addis Ababa. REMIRO, A; *et al. Derecho Internacional*, p. 193. Thus, Ethiopia's secession clause may serve a cohesive purpose. MANCINI, S. "Secession and Self-Determination", p. 495.

[700] This constitutional provision gives Nevis a unilateral right to secede which requires approval by Parliament first, by not less than two-thirds of all the votes, followed by further approval by referendum by not less than two-thirds of all the valid votes cast by citizens of Nevis who have the right to vote for the representatives of Nevis. Moreover, a new draft Constitution of Nevis must be submitted to its citizens before the referendum is held. Constitutionally, no specific role is reserved for the federal Parliament. In 1998, 61.7% of the electorate of the Island of Nevis voted in favour of secession, short of the two-thirds majority required. NORMAN, W. *Negotiating Nationalism*, p. 176. NORMAN, W. "From quid pro quo to modus vivendi...", pp. 188-202.

[701] See VENICE COMMISSION, *Opinion on the amendments to the Constitution of Liechtenstein…*, 2002, par. 36-9.

[702] Interestingly, this right of *withdrawal* from the EU is inspired by Article I-60 TCE of the failed Treaty establishing a Constitution for Europe. Once a Member State starts the exit process, the right to leave is tied to a consensual procedure in which all the leading political institutions of the EU take part (the European Council sets the guidelines for the agreement, the Commission nominates the negotiator and the Council approves the agreement by qualified majority after approval by the European Parliament). Therefore, in the first instance, this would not be a secession resulting merely from the unilateral will of the Member State. Presumably, the EU would have a duty to negotiate in good faith and reach agreement on the withdrawal. Under Article 50.3 TEU, if the negotiations fail to produce a result, the Member State could secede unilaterally after two years. The right to withdraw

5. Section 1 of the current Northern Ireland Act of 1998 provides for annexation of Northern Ireland to the Republic of Ireland if the majority of the Northern Irish vote for this in a referendum.[703]
6. Article 1.4 of the current organic Law on the Special Legal Status of Gagauzia 1994 recognizes a right to external self-determination of the people of Gagauzia in the event of a change in the status of the Republic of Moldova as an independent State.[704]
7. Article 74 of the current Constitution of the Republic of Uzbekistan of 1992 establishes the right to secede of the Republic of Karakalpakstan, which is a sovereign republic according to Article 70 of the same Constitution.[705]
8. Section 21 of the Act on Greenland Self-Government of 2009 stipulates that "decision regarding Greenland's independence shall be taken by the people of Greenland".[706]
9. Article 77 of the current Constitution of France of 1958 provides the right for New Caledonia to hold a referendum to obtain full sovereignty.[707]

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in Article 50 is consistent with several points of this book's theory of secession. First, EU law aims at union and integration but expressly regulates a right to exit. In similar vein, constitutional law may seek union and, at the same time, recognize secession. Second, Article 50 TEU shows that the hypothetical multinational contract may not be so far from reality, despite the former being a right to secede of Member States and the latter endorsing a right to secede of minority nations. Third, Article 50 is also a positive legal implementation of the *Principle of agreement and negotiation*. Although it is coherent that failure of an agreed solution to withdraw should lead to a unilateral right to secede, patience, compromise, stability and legal certainty are of paramount importance. See BOSSACOMA, P. *Secesión e integración*, § 3. BOSSACOMA, P. *Sovereignty in Europe*, § 5. HILLION, C. "Leaving the European Union, the Union way".

[703] The Northern Ireland Act 1998 is one of the devolution Acts, which are considered part of the territorial constitution of the UK. According to Schedule 1(2) of the Act, the Secretary of State for Northern Ireland (a British Government minister) shall exercise his power to call a referendum "if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland". Some see this regulation as an example of constitutionalization of a right to secede. NORMAN, W. *Negotiating Nationalism*, p. 176. NORMAN, W. "From quid pro quo to modus vivendi...", p. 188-9. However, according to this book's terminology, it should be considered a right of external self-determination and, specifically, of a right of redemption. See ch. 1.1 above.

[704] That is to say, Gagauzia may secede if Moldova integrates or associates with Romania. See VENICE COMMISSION, *Opinion on the Law on Modification and Addition in the Constitution of the Republic of Moldova in particular concerning the Status of Gagauzia*, 2002.

[705] Article 1 of the Constitution of the Republic of Karakalpakstan also enshrines the sovereignty of this Republic and its right to secede from the Republic of Uzbekistan. Although the right to secede shall be based on a referendum "held by the people of Karakalpakstan", Article 78.6 of the Constitution of Uzbekistan seems to grant a last word to the central legislature on the "approval of decisions to secede from the Republic of Uzbekistan". In addition, some contend that as long as Uzbekistan remains an autocracy, the right to secede is nominal. See ROEDER, P.G. *Where Nation-States Come From*, p. 67.

[706] According to this provision, if a decision to secede is taken, negotiations to introduce independence shall start between the Danish Government and the Greenland Government. The resulting agreement shall have the consent of the Parliament of Greenland and be endorsed by a referendum in Greenland. The agreement shall finally be consented by the Danish Parliament. Beyond Section 21, the Preamble recognizes the people of Greenland as holder of the international right to self-determination. See GAD, U. "Greenland", pp. 98-118.

[707] A referendum on full sovereignty and independence of New Caledonia was held on 4 November 2018 (about 56% against and 44% in favour of independence). See Title 9 of the organic statute 209 of 19 March 1999 on New Caledonia. Beyond this case, Article 53 of the French Constitution has

10. Article 219 of the Interim Constitution of Sudan of 2005 granted to the people of Southern Sudan the right to self-determination through a referendum to determine their future status. In this referendum, according to Article 222, South Sudanese people may confirm unity or vote for secession.[708]
11. Article 60 of the former Constitutional Charter of the State Union of Serbia and Montenegro of 2003 established the right to secede for the States of the Union.[709]
12. Article 1.2 of the former Soviet Constitution of 1918 established the Russian Soviet Republic as a free union of free nations, Article 4 mentioned the right to self-determination of peoples and Article 6 expressly recognized the independence of Finland and the right to self-determination of Armenia.[710]
13. Article 4 of the former Soviet Constitution of 1924 stipulated the right to secede of the Soviet Republics.
14. Article 17 of the former Soviet Constitution of 1936 enshrined the right to secede of the Soviet Republics.[711]
15. Article 72 of the former Soviet Constitution of 1977 provided that each Republic shall retain the right freely to secede from the USSR.[712]
16. Articles 201 and 206 of the former Constitution of the Union of Burma of 1947 established a right to secede for the States of the Union with the approval of two-thirds of the

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been interpreted broadly to allow self-determination and secession referendums regarding other overseas territories.

[708] As the Constitution mandated, the National Legislature promulgated the Southern Sudan Referendum Act 2009. The referendum was held in January 2011 and an overwhelming majority voted for secession. See THE CARTER CENTER, *Observing the 2011 Referendum on the Self-Determination of Southern Sudan. Final Report*. See also §§ 3.4.2 and 3.4.3 below.

[709] Article 60 provided a right to secede only for the Member States of the Union (*i.e.* Serbia and Montenegro, not the autonomous province of Kosovo, which was part of the State of Serbia). Article 60 stipulated that the decision to break the Union had to be taken by referendum. See §§ 3.4.2 and 3.4.3 below.

[710] See § 2.1.2 above.

[711] On the requirements that Stalin demanded of the republics in order to secede, see § 1.2.7 above.

[712] Article 72 of the Soviet Constitution of 1977 was developed by the Law on Procedure for Resolving Questions Connected with a Union Republic's Secession from the USSR (April 3, 1990). It was a remarkably thorough legislation on the external right to secede of sub-State units (detailed regulation on borders, personal property, citizenship, human rights, protection of minorities, extradition, administration, criminal cases, etc.). However, the democratic requirements for exercising the right were too demanding: (1) a majority of two-thirds of the population resident in the seceding territory was required in a first referendum on secession; (2) there would be a five-year transition period during which the Supreme Soviet or one-tenth of the permanent residents in the territory could demand another referendum that would once again require a qualified majority of two-thirds; (3) even if the majorities required were reached, the secession would be submitted for negotiation and ratification by the Federation; (4) if this majority of two-thirds was not reached, secession could not be resubmitted to a referendum for a minimum of ten years; (5) the territories within the seceding republic that wished to remain part of the Soviet Federation had the right to hold a referendum to stay within the Federation. In spite of the merits of this Law on secession, it was never applied partly because of the abovementioned insurmountable hurdles. See CASSESE, A. *Self-Determination of Peoples*, pp. 264-8.

representatives of the seceding State and, subsequently, of a referendum in the seceding State.[713]

17. Article 14 of the former Constitution of the Peoples' Republic of China of 1931 recognized the right to self-determination of national minorities and their right to secede to form a new independent State. Specifically, it recognized a right to full self-determination for Mongolians, Tibetans, Koreans, Miao and Yao.[714]
18. The "Preliminary Title. Fundamental principles" of the former Constitution of Yugoslavia of 1974 included the right to self-determination and to secede for the nations and nationalities.[715]
19. The preamble of the former Czechoslovak Constitution of 1960, according to the major reform in a federal direction in 1968, (re-)established the right to self-determination, even including the separation of the two republics.[716]
20. The former Danish-Icelandic Act of Union of 1918 recognized the full sovereignty of Iceland and placed an obligation on it to maintain a personal union (*i.e.* union of the crowns) between the two sovereignties for 25 years. After this deadline, Iceland's right to secede unilaterally was recognized.[717]

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[713] This right was granted solely to the States of Shan and of Kayah. BUCHHEIT, L.C. *Secession*, p. 100. Breen, M.G. "Asymmetry… in Myanmar" in Popelier, P.; Sahadžić, M. (ed.) *Constitutional Asymmetry in Multinational Federalism*, p. 356. Article 10 of the current Constitution of Myanmar of 2008 prohibits the secession of Regions, States, Union Territories and Self-Administered Areas. RAIČ, D. *Statehood and the Law of Self-Determination*, p. 313. Mancini says that the 1974 Constitution of Burma includes a secession clause, but no such clause has been found in this constitutional text. MANCINI, S. "Secession and Self-Determination", p. 495. She might mean the 1947 Constitution, as the 1974 Constitution, according to Buchheit, removed this "unique attempt to define a substantive right of secession and the procedural rules for exercising the right."

[714] However, this seemed to be socialist rhetoric devoid of real constitutional normativity. This was a communist strategy to take power. Once in power, the right to secede was no longer interesting. BUCHHEIT, L.C. *Secession*, pp. 101-2. Article 4 of the current Chinese Constitution of 1982 prohibits all acts that could impair unity or instigate secession.

[715] Yet, Article 5 of the Constitution stipulated that the frontiers of the Federation could not be altered without the consent of all the republics and self-governing provinces. See RAIČ, D. *Statehood and the Law of Self-Determination*, pp. 313-4.

[716] "In the 1920 Constitution, the principle of national self-determination was mentioned only once, in the preamble. In the 1968 Constitution, by contrast, it was invoked in the preamble as well as in Article 1. In the preamble, it was mentioned twice: 'We, the Czech and Slovak nation, (…) recognizing the inalienable right to self-determination even to the point of secession, and respecting the sovereignty of every nation (…), convinced that a voluntary federal union is an appropriate expression of the right to self-determination and equality, (…) decided to form a Czechoslovak federation.' According to Article 1, 'The foundation of the Czechoslovak Socialist Republic is a voluntary union of the equal nation-states of the Czech and Slovak nation, based on the right to self-determination of each nation.' (…) The preamble of the 1938 Constitutional amendment recognized the Slovaks as a separate and sovereign nation, but did not explicitly invoke the principle of national self-determination, although it was implied: 'The Parliament, departing from the fact that the Czechoslovak republic originated through an agreement of the sovereign wills of two equal nations…'.". BAKKE, E. "The principle of national self-determination in Czechoslovak constitutions 1920-1992", p. 5. SAIZ ARNAIZ, A. "Constitución y secesión", p. 3.

[717] See § 3.5 below.

21. The former Constitution of the Federation of Malaya (the predecessor of the Federation of Malaysia) could have included the right to secede for a short time.[718]

Despite these examples of constitutionalization of the right to secede or to self-determination, a question is still relevant: Why do liberal-democratic States not tend to constitutionalize a right to secede? Beyond reasons of *realpolitik*, one possible answer could be traced back to Ciceronian thought according to which any State or polity should be constituted to be eternal.[719] For Cass Sunstein, to place a right to secede in a founding document would endanger the prospects for long-term self-governance.[720] In this regard, President Lincoln stated that "perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper ever had a provision in its organic law for its own termination."[721] More technically, for Kelsen, the right to secede exists only when the legal order admits it expressly and subjects it to certain conditions – then due exercise of this right implies no breach of any constitutional or (con)federal pact.[722] According to Alejandro Saiz, accepting a right to secede would be recognizing the temporary spirit or will of the State that establishes the constitution.[723] In Kelsen's opinion, the federal State can have limited time validity – as norms of positive law may generally have. Hence, the possibility of limiting the validity of the federal constitution which entails the right to secede is not incompatible with the essence of the federal State, provided that it is subject to certain conditions or limits.[724] In fact,

[718] BUCHANAN, A. *Secession*, p. 9. This information cannot be corroborated. No right to secede has been noticed in the Federal Constitution of Malaysia and many deny the presence of any such constitutional right. See, for instance, MOKHTAR, K.A. "Confusion, Coercion and Compromise in Malaysian Federalism", in HARDIN, A.J.; CHIN, J. (ed.) *50 Years of Malaysia*, pp. 220-65. However, as will be discussed in § 3.5, the separation of Singapore from the Federation of Malaysia took place in 1965.

[719] This passage of Cicero's can be found in *De Re Publica*, in note 46 to book 3: "*Debet enim constituta sic esse civitas ut æterna sit*." Following Cicero, the death of a society is considered a penalty or punishment for it.

[720] Sunstein takes inspiration from the Madisonian spirit that encourages constitutional provisions to prevent the defeat of the basic enterprise. SUNSTEIN, C.R. "Constitutionalism and Secession", pp. 633-4.

[721] BUCHHEIT, L.C. *Secession*, p. 111, note 269.

[722] KELSEN, H. *Teoría General del Estado*, p. 377.

[723] SAIZ ARNAIZ, A. "Constitución y secesión", p. 5.

[724] KELSEN, H. *Teoría General del Estado*, p. 376. In Kelsen's opinion, interpreting an essential eternity or perpetuity would be falling into jusnaturalist reasoning. On the other side, according to him, establishing a right to secede with no conditions and no limits would go beyond the borders of the realm of law. It would be a kind of rule that would say "enforce (federal law) if you want". A so-called rule that says "you shall do what you want" would not be law according to Kelsen. Generally, law and legal norms must impose a certain dualism between the 'is' and the 'shall be', between reality and normative mandate. Yet, in the creation of new States, special normative relevance is

the recognition of the right to secede might ease the union and integration of previous sovereign entities since, in the last resort, they will be able to recover sovereignty in a democratic way. That is to say, the existence of a way out often makes the way in easier.

Even if we accept that the aspiration of constitutionalism and federalism is to maintain the union in perpetuity, just as the will of a marriage is to create a lifelong union, this desire neither necessarily implies, nor seems sufficient reason for, impeding a constitutionalization of the right to secede. If a multinational federation were eventually to be broken up due to a constitutional right to secede, this would be neither a terrible precedent nor a moral failure.[725] Such a federation would have served to accommodate different nations within a single polity for decades without resorting to violence, would have tolerated minority nations expressing their will to be independent through a legal procedure and would have made it possible to build a new State in a manner compatible with the contract theory proposed in Part 1. Perhaps making State territorial borders unchangeable may entail more worrying objections and problems than constitutionalizing a qualified right to secede. In this regard, remember Rousseau's warning that the nature of the State, like humankind, is neither perpetuity nor eternity:

> **The Death of the Body Politic**
> Death is the natural and inevitable tendency of the best constituted governments. If Sparta and Rome perished, what state can hope to last for ever? If we want to establish a long-lived form of government, let us not even dream of making it eternal. If we're to succeed, we mustn't attempt the impossible, or flatter ourselves that we are endowing the work of man with a stability that the human condition is not in fact capable of.[726]

Accordingly, even the best polity, as well as the best constitutions, have a finite nature. Liberalism conceives the State as a means at the service of people and not as an end in itself. Therefore, the legal enshrinement of a right to secede is consistent with the spirit of democratic constitutionalism.[727] The principles of democracy and of popular sovereignty create an obligation to make provision for constitutional reform mechanisms within the constitution itself and militate against

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attached to the factual. In other words, neither is the law extraneous to or independent of the facts, nor do the facts automatically and unconditionally become law.

[725] See KYMLICKA, W. *Politics in the Vernacular*, p. 119.

[726] See ROUSSEAU *The Social Contract*, Book III, ch. XI, p. 45.

[727] WEINSTOCK, D. "Constitutionalizing the Right to Secede", p. 194. NORMAN, W. *Negotiating Nationalism*, p. 202. NORMAN, W. "From quid pro quo to modus vivendi...", pp. 186, 200-1.

eternity clauses – which are more tolerable when they protect human dignity or the republican form of government than when they protect unity and territorial integrity.[728] Perpetual constitutions often involve a principle of violent destruction. For instance, many of the unchangeable constitutions of France did not last long and frequently perished by violence. According to Dicey, the rigidity of a constitution tends to check gradual innovation but, just because it impedes change, may occasion or provoke revolution.[729] Therefore, if the principle of democracy and the principle of peaceful solution of conflicts create an obligation to think about constitutional reform clauses, should not the constitutional right to secede be conceived as a new type of constitutional reform? There ought to be appropriate legal mechanisms to change both the *demos* and the *cracy*, and there is no need for a single constitutional amending procedure.

Constitutionalization of the right to secede as a type of constitutional reform would provide a means of making compatible the principles of constitutionalism, rule of

[728] *Eternity clauses* are constitutional provisions establishing that certain matters, parts, articles or principles cannot be amended. In other words, they are *supra-constitutionality* clauses that petrify certain substantive issues of the constitution. See ROZNAI, Y. *Unconstitutional Constitutional Amendments*. Let us explore some examples: the Bonn Basic Law (German Constitution) sets many limits to constitutional reform on the matters of federalism, participation by the *Länder* in the legislative process, human dignity and other principles regarding basic rights (Art. 79.3). The Federal Constitutional Court has declared itself competent to review the substance of constitutional amendments, but has never struck down a single one. The 1958 Constitution of the Fifth Republic of France contains an eternity clause relating to the republican form of government (Art. 89.5). Conversely, it does not contain an eternity clause on territorial integrity, but simply a temporary limit or circumstantial conditions for revision of the Constitution (Art. 89.4). The French Constitutional Council has ruled that the constituent power is sovereign, except for the material limit set in Article 89.5 and the temporary limits in Articles 7, 16 and 89.4 (Decision of the Constitutional Council of 2 September 1992, *Maastricht II*, par. 19). The Italian Constitution expressly establishes the eternity of the republican form of government (Art. 139). In addition, the Constitutional Court Judgement 1146 of 1988 warned that there are some *supreme* constitutional principles and values that cannot be amended by constitutional reform or any other constitutional statute. In this respect, the Court declared itself competent to review constitutional amendments and constitutional laws that go against the supreme constitutional principles. Specifying the Judgement of 1988, the later Judgement 118 of 2015 seems to understand that there is an implicit eternity clause to protect the unity of Italy. The Portuguese Constitution includes a long list of principles that any constitutional reform must respect such as the national independence and unity of the State (Art. 288). Paradoxically, this constitutional provision has been amended before (formerly Art. 290). Article 152.1 of the Romanian Constitution establishes an eternity clause to protect the national, independent, unitary and indivisible character of the Romanian State, among other issues. Article 157 of the Ukrainian Constitution stipulates an eternity clause to protect human rights and both the independence and territorial integrity of Ukraine. Nonetheless, Article 73 provides that "alterations to the territory of Ukraine shall be resolved exclusively by the All-Ukrainian referendum". See Ukrainian Constitutional Court Judgement of 14 March 2014. ROZNAI, Y; SUTEU, S. "The Eternal Territory?", pp. 542-80.

[729] See DICEY, A.V. *Introduction to… the Law of the Constitution*, pp. 129-31. Spanish constitutional history seems to indicate that the more rigid the procedure to amend the Constitution was, the less the Constitution lasted. MUÑOZ MACHADO, S. *Vieja y nueva Constitución*, p. 76.

law, popular sovereignty, multinationalism, democracy and majority rule. Since the constitutional principle of territorial integrity may even ban peaceful and democratic unilateral secessions (in contrast to this principle under international law), constitutionalization of the right to secede would fully dismiss the issue.[730] If a right to secede is duly constitutionalized, the principle of unity could be harmonized with that of national pluralism, since in multinational societies union and togetherness should be understood in more flexible and provisional forms.[731]

Constitutionalizing a qualified right to secede can be a more rational and just public choice than submitting secession to negotiation under no abstract constitutional provisions. Although agreement(s) on each specific secession seem unavoidable, it may be easier and fairer to agree *ex ante* on abstract constitutional principles, for the latter provide a sort of veil of ignorance.[732] In this respect, ideally, a constitutional secession clause should enshrine the principles of the hypothetical multinational contract defended in Part 1: the *Principle of democracy*, the *Principle of agreement and negotiation*, the *Principle of need for liberal nationalism*, the *Principle of respect for human rights and protection of minorities*, the *Principle of territoriality*, the *Principle of viability and compensation* and the *Principle of avoiding serious damage to third parties*.[733] It seems better to articulate and interpret the clause in the form of principles rather than of rules.[734] As in international law, there is no need to define constitutionally the *nation* or *people* that has the right to secede.[735] It is neither necessary to name the specific sub-State nations nor to specify the kind of public law units which hold the right to secede.

A pragmatic argument to refuse constitutionalizing the right to secede may claim that secession is part of a mainly political area, for it creates a new independent

[730] See ch. 2.2 above.
[731] See chs. 1.3 and 1.4 above.
[732] See VAUBEL, R. "Secession in the European Union".
[733] See § 1.2.3 above.
[734] While it seems wiser to express substantive issues in the form of principles, rules might perhaps be more appropriate for procedural issues. Yet, if substantive issues are regulated by principles, designing very specific procedural rules can be complicated. What is more, remember that even secession requisites such as clear majorities could depend on practical issues such as the relative wealth of the minority nations compared to that of the parent State.
[735] Nevertheless, those who wish to define the nation constitutionally could draw inspiration from the abovementioned Article 39 of the Ethiopian Constitution.

State, a new sovereign *demos* and a new *pouvoir constituant*. It is, therefore, a terrain at the edge if not beyond constitutional law. Constituent power is not the object of constitutional adjudication but the starting-point of this right. On top of that, excessive juridification of politics could make constitutions irrelevant – as political actors may tend to start eluding and disregarding constitutional principles and provisions.[736] Beyond politics, sceptics about constitutionalizing a right to secede often plead that regulation of secession is a matter of international law. In liberal and democratic contexts, however, international law is not satisfactory to channel democratic pro-secession claims since, among other reasons explained in Part 2, many international law-makers are non-liberal and non-democratic States. In contrast, constitutional law is an adequate tool for peaceful, rational and fair solution of conflicts about national pluralism and territorial organization including the issue of secession. In addition, constitutionalizing a (unilateral but qualified) right to secede is a rational way to prevent and deter unilateral secession.

Some reject constitutionalizing a right to secede in order to promote and protect deliberation and compromise. According to them, constitutionalization of this right gives sub-State units the possibility of blackmailing with secession if they disagree with a constitutional decision by the parent State.[737] For Sunstein, constitutionalizing a right to secede is contrary to constitutionalism understood as embodying a set of "precommitment strategies" to protect and promote deliberation, compromise, cooperation and collective rationality, while removing potentially explosive questions and threats from the ordinary political agenda and, thus,

[736] See SAIZ ARNAIZ, A. "Constitución y secesión".

[737] The *Lega Nord* and its Padanian nationalism could be mentioned as an empirical example of using a threat of secession to achieve a federal fiscal system and to reduce the solidarity with the south of Italy. "A critical mass of supporters of the movement had no real interest in seceding from Italy, but rather wanted to reform the system (...) in order to reduce the 'subsidizing' of the south". NORMAN, W. *Negotiating Nationalism*, pp. 206-7. NORMAN, W. "From quid pro quo to modus vivendi...", p. 203. Padania – for some an imaginary nation resulting from economic interests, for others a nation in the making or re-definition phase – would be formed by rich northern regions of Italy. This is not, however, a sufficiently representative case to build a theory around it. On this topic, Keating stated: "Nationality may be a slippery term and nations very difficult to identify using objective criteria; but there is a sociological difference between communities that have developed strong forms of collective political identity and a historical narrative to underpin it and mere communities of convenience. The distinction is clearer in some contexts than in others, but it is not difficult to distinguish between Scotland and the 'nation' of Padania, invented by the Italian *Lega Nord*". KEATING, M. *The Independence of Scotland*, pp. 80-1.

avoiding or limiting conflicts between groups and factions.[738] Despite accepting that certain secessions could be morally justified, Sunstein advises against both express and implicit constitutionalization.[739] However, by virtue of the principle of effectiveness of international law, secession threats can also occur in the absence of a constitutional right to secede.[740] And a threat based on facticity could be less desirable than a threat based on constitutional principles and provisions. Moreover, some rights may trump consequential considerations.[741]

The objection of the secession threat is inspired by Abraham Lincoln and identified by Anthony H. Birch. For Lincoln, secession is against majority rule and ends up bringing anarchy or despotism.[742] According to Birch, the losing groups in the democratic process can threaten to withdraw if they do not share the decision of the majority. Hence, for Birch, a *right to exit* is not necessary when there is a proper *right to voice*, since the rights to free speech and to free association allow minority groups to become a majority or more influent in the future.[743] Nonetheless, should liberal democracy tolerate that, by virtue of majority rule, a minority nation concentrated in a given territory is doomed to be a perpetual minority? Should not a minority nation located in a defined territory be able to decide, by virtue of applying majority rule on a smaller territorial scale, to become a national majority within a new independent State? Thomas Jefferson wrote in 1816 that "if any State in the Union will declare that it prefers separation (…) to a continuance in union (…) I have no hesitation in saying, 'let us separate'."[744] Even if a constitutional right to secede could be a threat to the constitutional commitment to democratic decision-

[738] SUNSTEIN, C.R. "Constitutionalism and Secession", pp. 634-43. SUNSTEIN, C.R. *Designing Democracy*, pp. 96-105.
[739] Although Sunstein and Buchanan share a fear of the threat of secession, the latter defends the constitutionalization of the right to secede subject to certain requirements that would be difficult to meet in order to disable the threat. Nevertheless, the Soviet constitutionalization and regulation of the right to secede show that, if the requirements are set too high, secessionist groups resort to the factuality and morality of secession instead of appealing to the internal legal right at issue.
[740] MANCINI, S. "Secession and Self-Determination", p. 495. WEINSTOCK, D. "Constitutionalizing the Right to Secede", p. 196.
[741] WELLMAN, C.H. *A Theory of Secession*, p. 131. On the priority of right over aggregated utility under justice as fairness, see § 1.3.4 above.
[742] SUNSTEIN, C.R. "Constitutionalism and Secession", pp. 634-5, note 8.
[743] BIRCH. A.H. "Another Liberal Theory of Secession", pp. 598-9.
[744] BUCHHEIT, L.C. *Secession*, p. 109. SUNSTEIN, C.R. "Constitutionalism and Secession", p. 657. Along similar lines, Jefferson considered that "nothing is unchangeable but the inherent and unalienable rights of man" (amongst which he included the rights to resistance and revolution). ARENDT, H. *On Revolution*, pp. 223-5.

making procedures, this argument could be turned round to transform this menace into something constitutionally and democratically positive.[745]

While some reject the right to secede since it allows minorities to blackmail and exploit the majority, others argue that not every threat or exploitation is, nor should be, immoral, illegitimate or undesirable.[746] The threat of secession can loosen the power of majority rule as well as encourage deliberation, agreement and accommodation. If we agree that all too often it is the majority that abuses or ignores the minority, the right to secede becomes more like a shield than a weapon against the former. Following this line of argument, the right to secede would be empowerment to rebalance, deliberate and compromise more than a weapon for blackmail. Indeed, contemporary democracies are tending to become more consensual than majoritarian, and this does not seem normatively regrettable.[747] Therefore, a qualified constitutional right to secede can be one more step away from majoritarian and towards consensual democracy. What is more, constitutionalizing the right to secede is also a move towards *de jure* plurinational democracy, since it adds respect, recognition and precommitment to national pluralism.[748]

Despite accepting that constitutionalization of the right to secede can be a strong disincentive to oppression and discrimination, Sunstein prefers to consider secession as a type of moral right to revolution.[749] This thought, similar to Lincoln's, is inspired by the US Declaration of Independence. However, since all too often the right to revolution involves intimidation, violence, chaos and uncertainty among other problems, constitutionalization can bring many benefits and advantages. In

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[745] In similar vein, see NORMAN, W. *Negotiating Nationalism*, pp. 204-7. NORMAN, W. "From quid pro quo to modus vivendi...", p. 195.
[746] See WELLMAN, C.H. *A Theory of Secession*, ch. 6.
[747] See LIJPHART, A. *Patterns of Democracy*. Even the British model of majoritarian democracy, despite keeping the doctrine of parliament sovereignty and the "first past the post", has moved towards consensual democracy in several ways: EU law empowered British judges to set aside legislation; the European Convention on Human Rights together with the Human Rights Act introduced weak judicial review of legislation; the devolution processes endorsed vertical division of power; rights to external self-determination of Scotland and Northern Ireland have been granted; a coalition government ruled the UK from 2010 to 2015; etc.
[748] Even an author so convinced not to constitutionalize the right to secede seemed to admit implicitly that a secession clause can foster multinational integration and federalization: "For the European Community, for example, a right to secede may therefore be more sensible, and indeed it will provide a greater incentive to join in the first instance." SUNSTEIN, C.R. *Designing Democracy*, p. 105.
[749] See SUNSTEIN, C.R. "Constitutionalism and Secession", pp. 654-69.

some countries, bills of rights have enshrined a constitutional right to revolution in the hands of the population or a section of it.[750] But this seems insufficient to surmount brute force and other troubles. Constitutional reform may be understood as a domestication of the right to revolution. Along similar lines, constitutionalizing the right to secede can be a way of domesticating secession.

Having mentioned some contentions against secession of former US President Abraham Lincoln, ten of his most common arguments will now be listed and then contested: (1) perpetuity of the Union, (2) contractual obligation, (3) majority rule, (4) infinite secessions, (5) equivalence of secession to expulsion, (6) economic harm to the population of the south, (7) federal debt and investments in the south, (8) protection of the republican government, (9) bad precedent for humankind and (10) lack of a moral right to secede for the southern States.[751] For Lincoln, there was a need for federal consent to make a secession constitutional. The lack of federal assent could be filled only by a revolutionary moral right to secede.

Lincoln's first argument against secession was based on the assertion that the USA is a perpetual union.[752] Even if the Federal Constitution does not expressly establish perpetual union, Lincoln claimed that the Union made independence possible. Nonetheless, the Declaration of Independence of 1776 reads that the thirteen former colonies are "free and independent States".[753] Similarly, in the peace Treaty of Paris of 1783, which put an end to the American War of Independence, the British Crown

[750] Article 35 of the 1793 French *Déclaration des Droits de l'Homme et du Citoyen* established that: "When the government violates the rights of the people, insurrection is for the people and for each portion of the people the most sacred of rights and the most indispensable of duties."

[751] For further discussions on Lincoln's arguments against secession, see RADAN, P. "Lincoln… and Secession" and WELLMAN, C.H. *A Theory of Secession*, ch. 4.

[752] "…in legal contemplation, the Union is perpetual, confirmed by the history of the Union itself. The Union is much older than the Constitution. It was formed in fact, by the Articles of Association in 1774. It was matured and continued by the Declaration of Independence in 1776. It was further matured and the faith of all the then thirteen States expressly plighted and engaged that it should be perpetual, by the Articles of Confederation in 1778. And finally, in 1787, one of the declared objects for ordaining and establishing the Constitution was "to form a more perfect Union." But if [the] destruction of the Union, by one, or by a part only, of the States, be lawfully possible, the Union is less perfect than before the Constitution, having lost the vital element of perpetuity." LINCOLN, A. "First Inaugural Address". Washington, D.C., 4 March 1861.

[753] The last paragraph of the Declaration of Independence of 4 July 1776 states that: "We, therefore, the Representatives of the United States of America, (…), solemnly Publish and Declare, That these United Colonies are, and of Right ought to be, Free and Independent States; (…); and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do."

formally recognized the former colonies as "free, sovereign and independent States".[754] Recalling that the Articles of Confederation and Perpetual Union of 1777 established a perpetual Union, Lincoln sustained that this perpetual Union was reaffirmed by the Federal Constitution of 1787 when the latter set the objective of forming "a more perfect Union". This argument would be more solid, however, if the Federal Constitution had been passed following the requirements laid down by the Articles of Confederation. The Articles of Confederation required the unanimous consent of the thirteen parliaments or State assemblies, whereas Article 7 of the Federal Constitution stipulated that the approval of nine of the thirteen States was sufficient.[755] James Madison justified neglecting the amending formula of the Articles of Confederation among other grounds on basis of the priority of substance over form together with the people's right to revolution enshrined in the Declaration of Independence.[756] This *revolutionary reform* makes it more difficult to plead the perpetual Union proclaimed in the former.[757] What is more, the perpetuity of the Union might be more acceptable if this constitutional change and future constitutional reforms required or acquired the consent of all States. Last but not least, the "more perfect Union" seems to refer to a federal government with more powers and more operative procedures and majorities, which is compatible with a qualified exit right.

Lincoln's contractual obligation argument upholds that, "if the United States be not a government proper, but an association of States in the nature of contract merely",

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[754] Even though the parties to the Treaty were the British Monarchy and the USA, Article 1 of the Treaty of Paris of 1783 stipulates that: "His Britannic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, to be free sovereign and Independent States; that he treats with them as such, and for himself his Heirs & Successors, relinquishes all claims to the Government, Propriety, and Territorial Rights of the same and every Part thereof."
According to Calhoun, the introductory formula of the 1787 US Constitution "We, the people of the United States of America" kept referring to the people of the several States of the Union acting as "free, independent, and sovereign States". The expression "United States of America" designated, based on language and history, "the States in their aggregate character". CALHOUN, J.C. "A Discourse on the Constitution and Government of the United States" in *Selected Writings and Speeches*, pp. 72-4.

[755] Article 13 of the Articles of Confederation of 1777 stipulated that "the Articles of this confederation shall be inviolably observed by every State, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every State."

[756] MADISON, HAMILTON, JAY *The Federalist*, No. 40 and No. 43.

[757] See § 3.7.1 below.

would not the consent of all the parties be required "to lawfully rescind it"?[758] As his conditional sentence indicates, Lincoln did not truly believe that the USA was a mere association of States. In fact, if the federation is believed to be like an association, freedom of association includes the right to abandon it unilaterally.[759] Furthermore, many civil law contracts can be terminated by the will of one of the parties (without prejudice to payment for damages).[760] On top of that, a contractual defence of the moral right to secede can be upheld through a hypothetical multinational contract.[761]

Lincoln's majority rule argument runs as follows: as unanimity or perfect identity of interests between States and citizens is impossible, the majority principle must be followed. Beyond this principle, only forms of anarchy or despotism may flourish.[762] In contrast, a decade before the presidency, Lincoln defended a *sacred right* "of any people anywhere (…) to rise up, and shake off the existing government, and form a new one that suits them better".[763] His anti-secessionist argument, already as president, can be contested at least in three ways: (1) secession can be defended on the basis of majority rule, but applied on a different territorial scope; (2) the majority principle can be used to decide extraordinarily the scope of the majority rule in more ordinary decision-making; (3) some decisions should not be subject to certain democratic majorities.

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[758] LINCOLN, A. "First Inaugural Address". For a defence of the secession of the South, see SAMUEL, B. *Secession and Constitutional Liberty.* See also the *Writings and Speeches* of John C. Calhoun.

[759] See § 1.2.6 above.

[760] Some examples on civil law may raise doubts about the Lincolnian contractual argument: (1) marriage contracts and the possibility of separation and divorce, (2) termination of services and works contracts because of loss of trust in the other party, (3) redemption of emphyteusis contracts and long leases of residential property, (4) general termination of a contract because of non-compliance by one of the parties, (5) annulment of abusive clauses and interpretation of ambiguous clauses in favour of the weaker party, especially in adhesion contracts, (6) the *rebus sic stantibus* clause, which allows release from a contractual obligation in the event of a fundamental change of circumstances. The liberal principle of freedom of contract rarely involves the entirety of a person and is usually subject to termination. For that reason, Schmitt defends that the constitutional contract (in particular, the federal contract between several independent political units) is not a *free* contract but a *status* contract. The latter constitutes an enduring life relationship, such as medieval contracts of vassalage or traditional marriage. See SCHMITT, C. *Constitutional Theory*, § 7.

[761] See ch. 1.2 above.

[762] "Plainly, the central idea of secession is the essence of anarchy. A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it does of necessity fly to anarchy or to despotism. Unanimity is impossible. The rule of a minority, as a permanent arrangement, is wholly inadmissible. So that, rejecting the majority principle, anarchy or despotism in some form is all that is left." LINCOLN, A. "First Inaugural Address".

[763] See BUCHHEIT, L.C. *Secession*, pp. 110-1.

A minority concentrated in a given territory can exercise its democratic right to secede by invoking the majority principle. According to some, the principles of democracy and of majority rule can justify the birth of the new State by means of a secession referendum.[764] In reality, though, two legitimate democratic majorities in two different but overlapping territories tend to co-exist. Therefore, it is not only a question of majority rule against the minority but a confrontation between majorities in overlapping territories. Arguably, multinational State union should be based more on a sort of ongoing consensus than secession.[765] In addition, as many territorial borders were set by pre-democratic procedures, this may reduce the fairness and legitimacy of majority rule or, more precisely, of certain majorities. All too often, the principle of effectiveness is a non-democratic doctrine that establishes the territorial scope of democracy. The majority principle does not work in one way. It is neither an absolute limit nor a magic solution, but should be a surmountable limit and part of the solution.

An over-simplistic understanding of the majority rule can be defied, since decision-making in liberal-democracy takes multiple forms: qualified majorities to approve and amend constitutional laws, more ordinary legislative procedures through representatives, referendums and popular initiatives, many participatory administrative law procedures, independent public authorities such as central banks, courts of justice distanced to some extent from the prevailing democratic majorities, supreme or constitutional courts often with strong legal-political powers, and so forth.[766] In view of these many forms of decision-making processes, it would be neither paradoxical nor contradictory to constitutionalize a qualified right to secede as a type of constitutional reform in which part of the parent State's population is given a leading role in the making of a particular decision.

The fourth Lincolnian argument against secession was connected to the majority rule argument in this way: if a right to secede were recognized, the minorities that disagreed with the majority rule could always secede. This would create the

[764] See BERAN, H. "A Liberal Theory of Secession", p. 27. See § 1.2.6 above.
[765] See § 3.6.1 below.
[766] See MARGALIT, A.; RAZ, J. "National Self-Determination", p. 448.

problem of infinite secessions, which has already been discussed and greatly reduced by defending a qualified right to secede.[767] The fifth argument saw secessions as equivalent to expulsions, but, as already argued, a distinction must be drawn between secession by the majority and by minorities, and between secession by the centre and of the periphery.[768]

The sixth argument was that secession of the South would be economically counterproductive for the meridional population since it would lose the industrialized North. The seventh objection was that the South could not secede because of the heavy investments that the North had made in the new territories of the South, and the substantial federal deficit this had generated. Under Justice as multinational fairness, the loss of economic capacity on the part of the seceding population that freely decides to secede should not be a sufficient reason to prevent secession normatively. In particular, the *Principle of viability and compensation* requires agreeing a *secession fee* to pay off the federal investments made in the South. If investments are (to be) repaid, this objection should not impede secession.[769] That said, if secession is the result of an injustice like those described earlier by the parent State against the seceding territory, any such investment will have been made purely at the risk of the parent State without any right to compensation or to any secession fee.

The eighth argument questioned the true liberal and democratic will of the southern population and reaffirmed the obligation of the Federation and of the rest of the States to protect the republican form of government. According to Lincoln, the Declarations of Independence of the southern States omitted the provision of the

[767] "If a minority in such case will secede rather than acquiesce, they make a precedent which in turn will divide and ruin them, for a minority of their own will secede from them whenever a majority refuses to be controlled by such minority." LINCOLN, A. "First Inaugural Address". See §§ 1.2.7 and 1.3.3 above.

[768] See ch. 1.1 and § 1.2.3 above.

[769] Let us consider the *analogy of services and works contracts.* Under Continental civil law, services contracts can be revoked in the event of loss of trust in the other party (with the commensurate indemnification). Under common law contracts of personal service, even if one party fails to comply with the contract it cannot be forced to at the instigation of the other. By analogy with contracts of personal service, James Buchanan (US President from 1857 to 1861) took the view that, although the southern secessionist States had broken the constitutional contract (by violating the federal Constitution), the central Government could not make them remain in the Union by force. For him, a war to put an end to secession was normatively reproachable. RADAN, P. "Lincoln… and Secession", p. 65. Even in works contracts, desisting from the construction tends to be possible with due compensation.

Declaration of Independence of 1776 that "all men are created equal". Instead, their provisional Confederal Constitution replaced the "We the People" in the Federal Constitution of 1787 by "We the deputies of the sovereign and independent States". Although the Declaration of Independence of 1776 declared that all men are created equal, the Federal Constitution of 1787 established a temporary unamendable clause to protect slave trade. Despite the Federal Constitution of 1787 opening with the words "We the People", neither was the Declaration of Independence preceded by a referendum nor was the Constitution of 1787 ratified by a referendum. The US federal level was, and still is, based on representative democracy – without mechanisms for direct participation by the citizens, even in approving and amending the Constitution. Thus, in those historical times, these stipulations by the South were perhaps not entirely reactionary, but technically more accurate.

The ninth argument pleaded that one of the most advanced liberal democracies of the time could not succumb to the centrifugal and fragmenting force of secessionism. As with the ancient realism of Thucydides with regard to Athenian democracy, the most advanced liberal and democratic republic of the time could not show itself weak in the eyes of the whole world that were turned on it. This argument, however, overly subjugates the inhabitants of the South to an alleged greater good.[770] In fact, if slavery was not the main reason to deny the right to secede to the South, the precedent that the North American republic left to humankind on the right to secede is neither very democratic nor very liberal. Let us not forget that, less than a century earlier, the USA had seceded unilaterally from the UK, which could be considered one of the most advanced, liberal and representative systems of that time.

As his tenth and last argument, Lincoln denied that the southern States held any moral right to revolution. Based on the Declaration of Independence, the former North American President founded a moral right to revolution on an attack by the government on the vital constitutional rights of individuals and of minorities. According to him, since the Union was not violating any such rights in the South of North America, the Confederate States of the South had no revolutionary moral

[770] In this vein, WELLMAN, C.H. *A Theory of Secession*, p. 84.

right to secede.[771] A violation of the basic right to property in order to stop the citizens of the South from peacefully benefiting from their slaves was hardly acceptable in moral terms, even for the liberalism of those times. Nonetheless, three secessionist arguments will now be outlined that, alone or combined, could have been pleaded by the southern States to demand the right to secede based on the Lincolnian moral right to revolution.

The first could be the break of the constitutional pact that would give the southern States a right to secede. Article 4 of the Constitution of 1787 established that slaves who escaped from a territory had to be returned to their master, and that no statute or regulation could free them from such service. This constitutional provision seems to have been violated repeatedly by non-slave States.[772] Although Article 4 was eventually reformed by the 13th Amendment (the American War of Secession is commonly considered to have begun in 1861 after the assault of Fort Sumter by the Confederated States of the South, whereas the 13th Amendment was proclaimed in 1865 and the 14th in 1868), a recurrent breach of the constitution or a constitutional change with such an impact on an economy and culture like the south of North America would have justified a right to secede if the dispute had not been about slavery.[773] A second argument would be that the 13th and 14th Amendments were passed without following the procedure for constitutional reform set out in Article 5

[771] "All profess to be content in the Union, if all constitutional rights can be maintained. Is it true, then, that any right, plainly written in the Constitution, has been denied? I think not. (…) Think, if you can, of a single instance in which a plainly written provision of the Constitution has ever been denied. If by the mere force of numbers, a majority should deprive a minority of any clearly written constitutional right, it might, in a moral point of view, justify revolution – certainly would, if such right were a vital one. But such is not our case. All the vital rights of minorities, and of individuals, are so plainly assured to them, by affirmations and negations, guaranties and prohibitions, in the Constitution, that controversies never arise concerning them. But no organic law can ever be framed with a provision specifically applicable to every question which may occur in practical administration. No foresight can anticipate nor any document of reasonable length contain express provisions for all possible questions. Shall fugitives from labor be surrendered by national or by State authority? The Constitution does not expressly say. May Congress prohibit slavery in the territories? The Constitution does not expressly say. Must Congress protect slavery in the territories? The Constitution does not expressly say." LINCOLN, A. "First Inaugural Address".

[772] "We assert that fourteen of the States have deliberately refused, for years past, to fulfill their constitutional obligations, and we refer to their own Statutes for the proof." Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union (1860).

[773] Regarding Article 4, the Declaration of 1860 reads: "This stipulation was so material to the compact, that without it that compact would not have been made." In addition, the US Congress broke the convention that new States would be admitted to the Union on the basis of one slave State for one free State. See BIRCH. A.H. "Another Liberal Theory of Secession", pp. 600-1.

of the Constitution of 1787.[774] Consequently, a significant constitutional reform that failed to follow the formal procedure would be an additional argument in favour of secession. The third argument to support the moral right to revolution would be the discriminatory redistribution mentioned a few paragraphs ago.

The will to perpetuate slavery should preclude the South from claiming a moral right to secede.[775] Furthermore, as close to half of the population were slaves, the southern States' moral claim to secede was not democratic.[776] A legitimate moral justification, therefore, to impede secession of the South would have been liberation of the slaves.[777] Under Justice as multinational fairness, the perpetuation of slavery would disqualify the southern States from exercising external self-determination and, as a corollary, would give the Federation the moral power to oppose it. The right to secede cannot be turned into a tool to maintain or rekindle illiberal and non-democratic systems. In this regard, the demand for secession on the part of the Southern Confederacy would possibly violate three of the principles required to exercise the right to external self-determination: the *Principle of democracy*, the *Principle of need for liberal nationalism* and the *Principle of respect for human rights and protection of minorities*. Nevertheless, rather than banning secession straightaway, a better option may be to give the parent State a power to set conditions for secession (and third States to set conditions for international recognition). If agreement could be reached to abolish slavery, secession should not be questioned.[778]

Nonetheless, Lincoln recognizes that the reason for the War of Secession was to save the Union and not to abolish slavery. According to Radan, the will of the Southern Confederacy to perpetuate slavery was not the reason why Lincoln denied the moral justification of secession of the South, unlike the radical abolitionists such

[774] When the 13th and 14th Amendments were passed, Southern States did not have their representatives in Congress and remained unrepresented until the amendments were ratified. What is more, a sort of military occupation was in place. The ten Southern States were divided into five military districts and the Union Army controlled the transition to statehood. See ACKERMAN, B. *We the People (2)*, ch. 4.
[775] RAWLS, J. *The Law of Peoples*, § 4.2, note 45. For a similar interpretation of Rawls, see RADAN, P. "Lincoln… and Secession", p. 72.
[776] RAWLS, J. *The Law of Peoples*, § 5.4.
[777] BUCHANAN, A. *Secession*, p. x (*preface*).
[778] See WELLMAN, C.H. *A Theory of Secession*, pp. 86-7.

as William Lloyd Garrison who argued that defending slavery made the secession illegitimate.[779] In his inaugural address of 1861, on the eve of the war, Lincoln reiterated that he had neither the right nor the intention, directly or indirectly, to interfere with slavery in the States where it existed.[780] One year later, as war raged, the former President recognized once again in a letter that if he could save the Union without freeing any slave, he would.[781] While warning against the typical misconception that the aim of the war was to end slavery, Buchanan recalls that Lincoln had the "cool ability to separate ruthlessly the issue of slavery from that of secession".[782]

The 1869 US Supreme Court Judgement of *Texas v. White* collected some of Lincoln's anti-secession arguments and thesis.[783] The opinion of the Court, delivered by Chief Justice Chase, reads as follows:

> The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the Articles of Confederation. By these, the Union was solemnly declared to "be perpetual." And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?
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> But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government, by the States. Under the Articles of Confederation, each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still all powers not delegated to the United States nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already

[779] RADAN, P. "Lincoln… and Secession", p. 67.
[780] "I do but quote from one of those speeches when I declare that 'I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so.' Those who nominated and elected me did so with full knowledge that I had made this, and many similar declarations, and had never recanted them." LINCOLN, A. "First Inaugural Address".
[781] "My paramount object in this struggle is to save the Union, and is not either to save or destroy Slavery. If I could save the Union without freeing any slave, I would do it, and if I could save it by freeing all the slaves, I would do it, and if I could save it by freeing some and leaving others alone, I would also do that. What I do about Slavery and the colored race, I do because I believe it helps to save this Union, and what I forbear, I forbear because I do not believe it would help to save the Union." A Letter from President Lincoln. Reply to Horace Greeley. Slavery and the Union: The Restoration of the Union the Paramount Object. *The New York Times.* Published 24 August 1862.
[782] BUCHANAN, A. *Secession*, p. 1.
[783] See RADAN, P. "Lincoln… and Secession", pp. 70-2.

> had occasion to remark at this term that the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence, and that, "without the States in union, there could be no such political body as the United States." Not only, therefore, can there be no loss of separate and independent autonomy to the States through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States.
>
> When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration or revocation, except through revolution or through consent of the States.

Interestingly, in his dissenting opinion, Justice Grier wrote:

> The ordinance of secession was adopted by the convention on the 18th of February, 1861, submitted to a vote of the people, and ratified by an overwhelming majority. I admit that this was a very ill-advised measure. Still, it was the sovereign act of a sovereign State, and the verdict on the trial of this question, 'by battle,' as to her right to secede, has been against her.

Some years later, in the *Daniels v. Tearney* case, the Supreme Court ruled that the ordinance of secession had already been rendered void by "the arbitrament of arms and the repeated adjudications of this Court". Thus, is it the violent *facts* of a war or is it the *law* that made the unilateral secession unconstitutional? For Buchheit, "the issue decided upon the battlefields of the American Civil War – that the union was indivisible and component states could not unilaterally secede from it – was given judicial recognition at the war's end. The answer in terms of constitutional law was, of course, a reaffirmation of the legality of the unionist wartime cause".[784] At the summit of constitutional law, facts can be of capital importance and have the power to write and re-write this law. Closer to our times, though, various US Presidents have expressly authorized Puerto Rico to secede.[785] Could the precedent set by Puerto Rico be a sign of slight evolution of the North American doctrine on

[784] BUCHHEIT, L.C. *Secession*, pp. 111-2.
[785] SORENS, J. *Secessionism*, p. 74.

secession?[786] In the 2006 and 2010 cases of *Scott Kohlhaas v. State of Alaska*, the Supreme Court of Alaska considered that the *Texas v. White* doctrine was fully in force and applicable.[787]

In general, primary theories of secession seem more inclined to defend the constitutionalization of the right to secede than remedial theories. However, even denying a primary moral right to secede, remedial theorists can also defend so for more pragmatic or functional reasons. According to Weinstock, when morally problematic behaviour is practically inevitable and proper legal regulation can help to control that behaviour and its negative consequences, practical reasoning might favour the creation of a legal right even in the absence of a corresponding moral right. Consequently, like other morally disputed conducts such as abortion, prostitution or drugs, secession can be legalized when: (1) people would probably engage in these activities even if they were illegal, (2) the act in question does not imply violation of any absolute moral prohibition and (3) the consequences of non-regulation could be worse than the consequences of regulation. Constitutionalization of the right to secede seems to meet these requirements: (1) history shows that secessions, attempts at secession and pro-secession movements happen with or without legal recognition; (2) secession does not violate any absolute moral prohibition; and (3) prohibition can engender violence and resentment, whereas the legal enshrinement of a right to secede could bring greater multinational fraternity and stability.[788]

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[786] The precedent set by Puerto Rico can weaken if it is taken into account that: (1) the secessionist claims of Puerto Rico are very low; (2) Puerto Rico is not part of the federal organization of the USA; (3) insularity is always treated as a special case in comparative politics and law; (4) despite not being on the UN's list of non-autonomous territories, Puerto Rico could be considered a kind of colony, since Puerto Ricans do not vote in presidential elections and have only a single commissioner in Congress with a right to speak but no vote. See the "Concurrent Resolution" of the Senate and the House of Representatives of Puerto Rico to request the President and the Congress of the United States to respond diligently and effectively, and to act on the demand of the people of Puerto Rico, as freely and democratically expressed in the plebiscite held on November 6, 2012, to end, once and for all, its current form of territorial status and to begin the process to admit Puerto Rico to the Union as a State.

[787] See § 3.4.5 below.

[788] WEINSTOCK, D. "Constitutionalizing the Right to Secede", pp. 186-203. NORMAN, W. *Negotiating Nationalism*, pp. 189-92.

Although upholding a remedial theory of secession, Norman defends the constitutionalization of a qualified right to secede for the following reasons:[789] (1) To channel peacefully, democratically and legally pro-secession claims, which would exist with or without legal recognition especially in multinational States. (2) To recognize a symbol of voluntary assent. Because many sub-State nations, even in liberal democracies, have not voluntarily chosen to be part of their parent State, one way of recognizing their different national identity is to endow it with a constitutional right to secede. A constitutional pact on secession can be understood as a powerful symbol of recognition. In particular, if sovereignty includes the power to transform or reshape the constitutional order, a constitutional right to secede could signify a recognition of shared sovereignty. (3) To appease minority nationalism and to avoid secessionist resentment. In particular, a constitutional right to secede can promote anti-assimilationist trust-building, institutional loyalty and multinational stability. This is especially relevant in cases of recent totalitarian or authoritarian regimes, in which minority nations suffered an oppressing State nationalism. (4) To eliminate secession as a realistic objective of ordinary politics by making it difficult for minority nationalisms to take advantage of fleeting passions. A qualified constitutional right to secede can remove the issue of secession from the political agenda until the majorities and reasons for secession are powerful enough. (5) To prevent both separatists and unionists from setting their own biased rules, which may lead to the imposition of the will of the strongest and the arbitrariness of *faits accomplis*. (6) In the absence of an impartial referee, the procedural mechanisms can demonstrate a just cause as a remedy for a grievance. According to Norman, a broad democratic majority supporting secession would be a sign of a serious enough injustice to trigger secession. However, this hypothesis is questionable.[790]

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[789] NORMAN, W. *Negotiating Nationalism*, pp. 175-211. NORMAN, W. "From quid pro quo to modus vivendi...", pp. 191-201.

[790] According to Moore, it is not proven that secessionist mobilization is closely linked to current injustices. This intuition is plausible but unsupported. MOORE, M. *The Ethics of Nationalism*, p. 148. Sorens argues that overwhelming support for secession almost always occurs in countries with a long history of autocracy or repression (the Baltic Republics, Kosovo, Croatia, Slovenia, Iraqi Kurdistan, Eritrea, East Timor, South Sudan and Western Sahara), whereas there are only two contemporary examples of mass secession claims within what he considers "stable democracies": India's Kashmir Valley and the Palestinian territories under Israeli control. SORENS, J. *Secessionism*, p. 156. That said, the independence of Norway from Sweden and of Iceland from Denmark were both supported by overwhelming majorities but do not seem to have been the result of any injustices of commensurate magnitude at that time. See ch. 3.5 below. By contrast, there can be

According to Sunstein, an argument in favour of the constitutionalization of a right to secede is that "a well-functioning nation" will not face serious secession threats, among other reasons, because the costs of secession will usually be at least as large for the sub-State unit as for the rest of the parent State.[791] Stéphane Dion developed a theory on the dynamics of secession which gave empirical reasons why secession is difficult in "well-established democracies".[792] Although some historical and comparative experiences may cast doubt over these predictions, they may ease the acceptance of a primary moral right to secede and a qualified constitutional right to secede.[793] In other words, if in *well-functioning nations* (Sunstein), in *well-established democracies* (Dion), in *advanced democracies* (Sorens) or in *fairly just and prosperous multinational states* (Weinstock) secession rarely has or would have the support of the majority, many conventional objections to the right to secede lose much of their potential.[794] In particular, the more difficult secession is, the less founded are the fears of illegitimate threats, excessive fragmentation and unlimited disintegration.[795]

Some may fear that constitutionalizing a right to secede could encourage the better-off sub-State units to exercise it.[796] Explanatory theories on secession, however, are divided over whether the richest (Hechter and Vaubel) or the poorest (Horowitz) sub-State groups are more inclined to secession.[797] According to Jason Sorens, sub-State units of advanced democracies try more intensely to secede when they: (1) have their own language, (2) have a history of independence, (3) lack irrendentist

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injustices (resulting from colonization and occupation, for instance) that give birth to movements, alterations and repressions of population that can hinder achievement of large majorities in favour of secession.

[791] SUNSTEIN, C.R. "Constitutionalism and Secession", p. 652.

[792] DION, S. "Why is Secession Difficult…?", pp. 269-83.

[793] As emphasized earlier, the USA withdrew from the UK when the latter had one of the most modern representative liberal systems of the time; the southern States of North America tried to secede from the USA, one of the first liberal and democratic republics in the world; almost half of Quebecers have questioned the union with the rest of Canada despite the latter being a worldwide model of a democratic, liberal and multinational federation; about half of Scots favour independence, despite the UK being a very consolidated liberal democracy and taking firm steps towards recognition and accommodation of its national pluralism in the last few decades.

[794] SORENS, J. *Secessionism*, ch. 3. WEINSTOCK, D. "Constitutionalizing the Right to Secede", p. 201.

[795] See § 1.2.7 above.

[796] See SUNSTEIN, C.R. "Constitutionalism and Secession", p. 659 *et seq*.

[797] See HECHTER, M. "The Dynamics of Secession", pp. 267-83. VAUBEL, R. "Secession in the European Union". HOROWITZ, D.L. *Ethnic Groups in Conflict*.

potential, (4) have higher incomes, (5) are more populous, (6) are in parent States with many other secessionist movements, (7) are ideologically distinct from the parent State, (8) have a multiparty political system, (9) are geographically separate from the parent State, and (10) world trade is growing.[798]

Let us end this section by remembering the academic narrative which tends to classify the historical evolution of constitutional rights into generations of rights.[799] In the first wave, civil rights were recognized, in consideration of the more individualist and bourgeois liberal thought (liberal State). In the second, democratic rights were universalized thanks to the protection of the sphere of individual liberty offered by liberal regimes (democratic State). Those democratic rights and the suffering of the World Wars led to constitutionalization of social rights in a third wave (welfare State). At the end of the 20th century, a fourth wave of rights started bringing consideration and institutionalization of group rights (multicultural State). Not only does the constitutionalization of a qualified right to secede fit well in this fourth wave of rights, but also the progress of *de jure* multinational States depends especially on due recognition and guarantees of this right.[800]

3.1.2. Constitutional reform and secession

The constitutionalization of a right to secede can be both express (enshrined and regulated in the constitution) or implicit (recognized by the highest legal or political bodies). The previous section mainly referred to the former, whereas this one will focus more on the latter. Starting from the Scotland-UK and Quebec-Canada cases, this section will show that the absence of express constitutional recognition of a right to secede has not stopped their constitutional orders looking for doctrines, interpretations and instruments to respond in legal, democratic and negotiated ways to secessionist claims. An illustration of this attitude is that the Prime Ministers of

[798] SORENS, J. *Secessionism*, p. 110.
[799] A rigorous historical analysis would call into question any strict division.
[800] Beyond the right to external self-determination, within the label *multicultural State* there can be rights to internal self-determination, territorial autonomy, cultural and linguistic rights, etc.

both the UK and Canada have publicly declared that they would allow their minority nations to secede if this were their clear desire.[801]

The fundamental doctrine of British constitutionalism stipulates that sovereignty lies with Parliament in Westminster (more precisely with the Crown in Parliament).[802] The principle of sovereignty in the hands of the monarch in Parliament sidestepped the idea of popular sovereignty and the problem of identifying the people who hold it.[803] The UK has neither a codified nor a rigid constitution, but a constitution which is uncodified (with a combination of statutes, conventions, academic writings and judicial decisions) and flexible (there is no need for qualified majorities to amend constitutional law).[804] As a result, Scotland's current autonomy is based on a statute of the UK Parliament (the Scotland Act), which is considered constitutional legislation but that Parliament itself can amend with an ordinary legislative majority.[805] This lack of rigidity of the British constitution, which has traditionally

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[801] These declarations seemed to refer specifically to Scotland in the UK and to Quebec in Canada. NORMAN, W. *Negotiating Nationalism*, p. 175. NORMAN, W. "From quid pro quo to modus vivendi...", p. 187. MOORE, M. *The Ethics of Nationalism*, p. 212. GREER, S. in ARGULLOL, E.; VELASCO, C. (dir.) *Institutions and Powers in Decentralized Countries*, § III (6).

[802] As famously summarised by Dicey, the monarch in Parliament has "the right to make or unmake any law whatsoever; and further, no person or body is recognised by the law as having a right to override or set aside the legislation of Parliament". See DICEY, A.V. *Introduction to… the Law of the Constitution*, p. 40. Supreme Court Judgement of 24 January 2017 *R v Secretary of State for Exiting the European Union*.

[803] KEATING, M. *The Independence of Scotland*, pp. 26, 38. In contrast, there has long stand a principle of political morality in Scotland that provides a sort of (ultimate) sovereignty of the people. This principle can be traced back to the 16th century writings of George Buchanan (*De Jure Regni Apud Scotos*) and has re-emerged energetically during both the devolution process of the late 20th century (see the 1988 Claim of Right for Scotland) and the independence process of the early 21st century (see the 2014 Scottish Independence Bill: A consultation on an Interim Constitution for Scotland). Article 2 of this Bill was titled *Sovereignty of the people* and read: "In Scotland, the people are sovereign." See MACCORMICK, N. *Questioning Sovereignty*, chs. 4, 8. TIERNEY, S. *Constitutional Law and National Pluralism*, pp. 109-17.

[804] See LEYLAND, P. *The Constitution of the United Kingdom*. For case law, see High Court Judgement *Thoburn v. Sunderland City Council* (2002) and Supreme Court Judgement *R v Secretary of State for Exiting the European Union* (2017).

[805] Although the doctrine of the sovereignty of the UK Parliament is still in force, from 1998 a convention emerged (once called the Sewel Convention) establishing that, in order to legislate in any devolved area, the UK Parliament needs the consent of the Scottish Parliament. At the same time, in order to reform the Scotland Act, an express amendment seems to be needed. In this way, any implied repeal of the Scotland Act by any ordinary statute of Westminster would be limited to a certain extent. See LEYLAND, P. *The Constitution of the United Kingdom* and the abovementioned case of *Thoburn v. Sunderland*. From Scotland, the sovereignty of Westminster has sometimes been qualified or limited by virtue of the Union of Parliaments of 1707. In the 1953 case of *MacCormick v. Lord Advocate*, the Court of Session considered that the Articles of the Union were fundamental law, therefore not ordinary Acts of Parliament. See MACCORMICK, N. *Questioning Sovereignty*, pp. 53-60. TIERNEY, S. *Constitutional Law and National Pluralism*, pp. 109-17. Nevertheless, the Acts of Union between English and Scottish Parliaments were later amended, for instance, by the Westminster Parliament through the Universities (Scotland) Act of 1853, which relieved most

been seen as a problem for Scotland in theories of federalism, has turned into a virtue when it comes to seeking independence, both to hold a referendum and to implement secession. Westminster needs no rigid constitutional reform to devolve or transfer to Holyrood the power to call a secession referendum nor to accept and enact the outcomes as law.

On a theoretical perspective, however, if the Westminster Parliament were to establish Scotland as an independent and sovereign State, this would cause some tension with the British constitutional doctrine that "Parliament cannot irrevocably bind its successors", since such a recognition could entail perpetual self-limitation of the scope of British law.[806] Still, if the British Parliament was created from the Union of the English and Scottish Parliaments in 1707 and basically inherited the powers of its predecessors (especially of the English Parliament), could this imply that the British Parliament has a power of self-dissolution? Could this also imply, by analogy or *a fortiori* argument, that the Westminster Parliament may partly limit itself for the future?

Under the Statute of Westminster of 1931, the British Parliament bound itself to no longer legislate for the Dominions without them requiring it and giving their consent to it (thus, a somehow recognition of their independence). Dicey suggested that this Statute could be repealed in future by Parliament itself, since a subsequent parliamentary majority has the right to undo any previous statute. In the *British Coal Corporation v. The King* judgement of 1935, the Judicial Committee of the Privy Council acknowledged that, although "as a matter of abstract law" the Imperial Parliament may repeal such a Statute, "that is theory and has no relation to realities".[807] This constitutional interpretation can be questioned since it is international law that determines when a new State emerges and this emergence then limits the ambit of sovereignty of other States. In this regard, the Westminster Parliament could repeal anything established in the past as long as it is still within the spatial, personal and temporal spheres of validity of the British legal order. Therefore, the act of declaration of independence of a territory previously under

professors of Scottish universities from subscribing to the Confession of Faith. DICEY, A.V. *Introduction to… the Law of the Constitution*, p. 65.

[806] See HART, H.L.A. *The Concept of Law*, pp. 121, 149-52.

[807] See Introduction by E.C.S. Wade in DICEY, A.V. *Introduction to… the Law of the Constitution*.

British sovereignty could be an exception to the abovementioned constitutional doctrine. Such an exception would be proof of the (re)interpretation of British constitutional law in favour of the creation of new States. In Article 2 of the Canada Act of 1982, the Westminster Parliament bound itself not to legislate for Canada.

Despite the influence of British constitutionalism, the Quebec-Canada case is different when it comes to constitutional reform. The Federal Constitution of Canada is more codified (it includes two written constitutional acts – one from 1867, the other from 1982 – plus a range of other acts, conventions, doctrines and unwritten constitutional principles), superior to ordinary legislation (Art. 52 of the Constitution Act of 1982) and rigid (Part V of the Constitution Act of 1982 provides five different amending procedures, ranging from the federal Parliament alone to the assents of this legislature and all Provinces).[808] The Canadian Constitution is silent on the ability of a province to secede and sets no material limits to its reform (*i.e.* every part of the Constitution is amendable).[809] Even though the Supreme Court of Canada interpreted a kind of implicit secession clause in Canadian constitutionalism, it also expressed the need to implement secession by means of constitutional amendment.[810]

Interestingly, there are conventions of the constitution, most of which are unwritten norms, which can clarify, complement or, in exceptional cases, neutralize rules of the written Constitution.[811] According to the Supreme Court, the unwritten constitutional principles of the Canadian legal order have normative value *per se* and also help to interpret, implement and develop the written constitutional

[808] HOGG, P.W. *Constitutional Law of Canada*, chs. 1, 4. "Canada's gradual evolution from colony to nation has denied it any single comprehensive constitutional document" (p. 11).
[809] MONAHAN, P.J.; BRYANT, M.J. *Coming to Terms…*, pp. 20-2.
[810] See ch. 3.5 below. *Reference re Secession of Quebec*, pars. 84, 97. Although the Court did not specify the type of constitutional reform, many consider that the unanimous consent of all the Provinces is necessary, but others consider that the general amending formula would be applicable. WOEHRLING, J. in ARGULLOL, E.; VELASCO, C. (dir.) *Institutions and Powers in Decentralized Countries*, § III (6). MONAHAN, P.J.; BRYANT, M.J. *Coming to Terms…*, p. 25. From a textual interpretation, Section 41 of the Constitution Act of 1982 seems to exclude secession from the unanimity procedure. Section 3(1) of the Clarity Act stipulates that: "It is recognized that there is no right under the Constitution of Canada to effect the secession of a province from Canada unilaterally and that, therefore, an amendment to the Constitution of Canada would be required for any province to secede from Canada, which in turn would require negotiations involving at least the governments of all of the provinces and the Government of Canada."
[811] WOEHRLING, J. in ARGULLOL, E.; VELASCO, C. (dir.) *Institutions and Powers in Decentralized Countries*, § II (2).

provisions.[812] By virtue of the constitutional principles of democracy, constitutionalism and rule of law, federalism and protection of minorities, the Court considered that the Federation is under an obligation to negotiate if a clear majority of Quebecers vote yes to a clear question on secession.[813] The same principles that engender this obligation to negotiate ought to inspire and guide constitutional change. Such a principled negotiation should facilitate the task of amending the Constitution. Although the Court deems constitutional reform to be mandatory, it does say that "the Constitution is not a straitjacket".[814]

Before the 1998 Quebec Secession Reference, Patrick J. Monahan and Michael J. Bryant warned that an important question is "how to ensure that the applicable constitutional amending formula does not become a straitjacket preventing the implementation of a fairly bargained agreement between Canada and Quebec over terms of secession". Since the authors considered amending the 1982 Constitution "extremely cumbersome and unwieldy", they proposed the creation of a "negotiating body to represent the collective 'Canadian' interest in any negotiation, thus ensuring that Canada speaks with a single voice" (including representatives of aboriginal peoples in this negotiating authority). In the view of the proponents, all governments and legislatures should commit themselves in advance to voting on any agreement recommended by this negotiating body as a single package, without any amendments.[815] This proposal of a negotiating authority may be worth considering even beyond the Canadian context.

The Spanish Constitution is codified and rigid.[816] Before looking at the content, the first question is its democratic legitimacy. The Spanish Constitution was ratified by

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[812] *Reference re Secession of Quebec*, pars. 49-54.
[813] *Ibid*. "The Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those principles must guide our overall appreciation of the constitutional rights and obligations that would come into play in the event that a clear majority of Quebecers votes on a clear question in favour of secession."
[814] *Ibid*. par. 150.
[815] MONAHAN, P.J.; BRYANT, M.J. *Coming to Terms…*, p. 25 (see also pp. 31-51).
[816] See FERRERES, V. *The Constitution of Spain*.

a broad majority of Spanish citizens in the referendum of 6 December 1978.[817] The political compromise was encouraged by a shared will to overcome the dictatorship and to establish an enduring democracy. Nonetheless, it was drafted in the midst of a transition from an authoritarian regime, in a context of weak recognition of human rights, hurried legalization of political parties, strong pressures and threats of a coup d'état by the armed forces and police, and armed violence by both unionist and secessionist groups, on left and right alike.[818] Because the transition to democracy was the product of a political reform conducted by certain elites of the previous regime, some prices had to be paid, namely enshrinement of "the indissoluble unity of the Spanish nation, the common and indivisible homeland of all Spaniards".[819] Notwithstanding the costs, the compromise reached was broad enough to consider the Spanish Constitution as much more than the programme of a political faction. According to Cruz Villalón, the political transition in Spain (1977-8), like the constituent assemblies in Italy (1947), Germany (1948), France (1958) and Greece (1974), was not an "orthodox", "perfect" or "ideal" constituent process.[820]

Regarding constitutional reform, there are many arguments to deny the existence of any material limits to amending the Spanish Constitution: the explicit possibility of total revision, the absence of constitutional eternity clauses, the express provision for a more rigid amending procedure, the sovereignty of the Spanish people, the principle of democracy and the knowledge that legal norms are products of history and context.[821] While recognizing that the Constitution establishes no material limits, some believe that this is not an issue reducible to positive law alone. A distinction could be drawn between constituent power (*i.e.* substitution power) and amending power (*i.e.* reform power). In this respect, Pedro de Vega considers the principle of popular sovereignty as a limit to constitutional reform.[822] But *popular* sovereignty should be distinguished from *national* sovereignty: while the former

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[817] In the whole of Spain, the turn-out was 67%, with 88% voting yes, 8% no and 4% blank. In Catalonia, the turn-out was 68%, 90% voted yes, 5% no and 4% blank. In the Basque Country, the turn-out was only 45%, 69% voted yes, 22% no and 6% blank. Own calculation from data from the Spanish Parliament website: http://www.congreso.es/consti/elecciones/referendos/ref_consti.htm
[818] See COLOMER, J.M. *El arte de la manipulación política*, pp. 115-41.
[819] See SOLÉ TURA, J. *Autonomies, Federalisme i Autodeterminació*, pp. 79-83. LOPEZ BOFILL, H. "Hubris…".
[820] BOGDANDY, A.; CRUZ VILLALÓN, P.; HUBER, P.M. *El derecho constitucional…*, pp. 19-21.
[821] See ARAGÓN, M. *Estudios de Derecho Constitucional*, pp. 207-10.
[822] VEGA, P. *La reforma constitucional…*, pp. 219-22, 285-91.

tends to ensure that ultimate power rests with the people, the latter tends to identify which people(s) are sovereign.[823] According to Vega, the principle of popular sovereignty entails the material limits of conceiving the Government as constituted power and as having limited powers (through division of powers and recognition of fundamental rights). Even if it could be argued that there are implicit limits to constitutional reform, these should not be extended to the personal and territorial scope of the Constitution.[824] In particular, implicit limits should not forbid constitutionalizing secessions which fulfil the requisites of Justice as multinational fairness.

For Muñoz Machado, the constitutional amending power is a constituted power and thus within the limits of the Constitution. Hence, any right to secede or mechanism for secession would be a matter reserved to the constituent power. However, not even the *pouvoir constituant*, according to this jurist, would be able to decide its own extinction or an irrecoverable cession of power.[825] This line of thinking seems inspired by the constitutional theory of Carl Schmitt, which distinguishes between constituent power and amending power. The latter is in the hands of the constituted authorities such as the Parliament, whereas the former is in the hands of the people. On top of that, since for Schmitt the Constitution and the legal order rest on the existence and will of a concrete political unity, one may assume that it is for the emerging polity to *give itself* a new Constitution rather than for the previous sovereign to establish a constitutional clause to disintegrate itself. "Prior to the establishment of any norm, there is a fundamental *political decision by the bearer of the constitution-making power*" and this political power tends to protect its "existence, integrity, security and constitution". The constituent power is, according to Schmitt, "unified and indivisible".[826]

In similar vein, although considering that the rigid amending procedure of Article 168 enshrines a sort of right to revolution, Manuel Aragón rejected that an amendment could constitutionalize the right to secede since "there is no State, no

[823] BOSSACOMA, P. *Sovereignty in Europe*, p. 22.
[824] RUIZ SOROA, J.M. "Regular la secesión", pp. 192-5.
[825] MUÑOZ MACHADO, S. "Más allá de la intentona independentista", p. 7. MUÑOZ MACHADO, S. *Vieja y nueva Constitución*, p. 191.
[826] SCHMITT, C. *Constitutional Theory*, §§ 1-3, 8, 11.

Constitution, and no legal order if there is a right to secede; they are simply irreconcilable entities".[827] Aragón does not base this assertion on Schmitt's *Constitutional Theory* but on Kelsen's *General Theory of State*. However, even though Kelsen considers it highly dubious that the amending provisions of the constitution of the union can be applied for its own dissolution, he does assert that the constitution of the union can establish a right to secede provided that it is both expressly stipulated and subject to certain conditions. Hence, according to Kelsen, if the right to secede is granted by law and subject to certain conditions, due exercise of this right implies no violation of the legal order.[828]

The case law of the Spanish Constitutional Court has continuously rejected the existence of any material limits to constitutional reform, expressly regarding territorial integrity and national sovereignty.[829] Judgement 48/2003 asserted that the Spanish Constitution is subject only to formal and procedural limits, since it contains no constitutional eternity clauses.[830] Judgements 103/2008 and 114/2017 confirmed the possibility of secession of part of the State after a constitutional reform under Article 168. Nevertheless, since sovereignty rests with the Spanish people and this people forms an indissoluble unity (following the wording of Articles 1.2 and 2 of the Constitution), external self-determination of a nationality or region concerns the whole Spanish people.[831] Accordingly, the Constitutional Court concludes that the rigid constitutional reform procedure shall be followed to constitutionalize secession or a right to secede.[832] Beyond normative and technical reasons, part of the explanation for this jurisprudence is the difficulty of fulfilling the requirements of Article 168: approval by two-thirds of both chambers of the

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[827] ARAGÓN, M. *Constitución, democracia y control*, p. 35. ARAGÓN, M. *Estudios de Derecho Constitucional*, p. 209.
[828] KELSEN, H. *Teoría General del Estado*, pp. 374-8. See § 3.1.1 above.
[829] *Inter alia*, Judgements 48/2003, 103/2008, 31/2010 and 42/2014.
[830] Judgement 48/2003 ruled that the Spanish Constitution neither excludes any of its provisions from the possibility of being amended nor subjects the power to amend the Constitution to any more explicit limits than the strictly formal and procedural. Judgements 48/2003 and 42/2014 recognized that the Spanish constitutional democracy is not a *militant democracy* because the Constitution includes no eternity clauses. In short, since the whole of the Constitution is amendable, the democratic debate has no limits *prima facie*.
[831] So, note that the Constitutional Court is not strictly denying the value of the principle of democracy but ruling that these democratic decisions are to be made by the Spanish people as a whole.
[832] In similar vein, see LÓPEZ BOFILL, H. "The Limits of Constitutionalism" in LLUCH, J. (ed.) *Constitutionalism...*, pp. 76-7. CORCUERA ATIENZA, J. "Soberanía y Autonomía", p. 339. FERRERES, V. *The Constitution of Spain*, p. 191.

Spanish Parliament, followed by dissolution and re-election of them, re-approval of the text by two-thirds of both chambers and, finally, ratification by a referendum of all Spanish citizens.[833]

According to Cruz Villalón, while apparently there are no material limits to constitutional revision, the specifically rigid procedure of Article 168 covers up in fact an *essential* Constitution (since part of the Constitution is practically unamendable).[834] This is particularly true regarding secession. Moving beyond a strictly legal analysis, a more political one confirms and emphasizes the complexity of constitutional reform under Article 168. In order to obtain a positive result in the amendment referendum, it should be held at the beginning of the parliamentary term to avoid both changes of opinion within the voting population and punishment vote against the government and the parliamentary majority. By contrast, party politics claim or push dissolution of the Spanish Parliament to the end of the parliamentary term in order to hang on to power for as long as possible and share out the public posts in the meantime. Beyond their specific primary purposes, organizations share the secondary purpose of securing their survival. In sum, the combination of referendum dynamics and party dynamics leads to contradictory results on the right time to pass the constitutional reform under Article 168, thus further complicating the already rigid amending procedure.[835]

Unlike the Canadian Supreme Court, the Spanish Constitutional Court neglects that, beyond the principles of constitutionalism and rule of law, constitutions ought to have other sources of legitimacy and to be interpreted in the light of the principle of democracy.[836] This principle is manifested not only when all Spanish citizens express their opinion, but also when the citizens of one nationality do so. According to Araceli Mangas, neither constitutional law nor international law should be used

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[833] See ch. 3.5 below. BOSSACOMA, P.; LÓPEZ, H. "The Secession of Catalonia".
[834] CRUZ VILLALÓN, "El ordenamiento constitucional" in *La curiosidad del jurista persa…*, p. 113. In similar vein, see MUÑOZ MACHADO, S. *Vieja y nueva Constitución*, p. 140. OTTO, I. *Obras completas*, p. 858. VEGA, P. *La reforma constitucional…*, pp. 148-9: "The mechanism (of Article 168) is so complex that it can be forecast that it will never work. Instead of an amending procedure, it should be labelled as a procedure to prevent reform." COLÓN-RÍOS, J.I. *Weak Constitutionalism*, pp. 67, 142: "In fact, the process established in Article 168 of the Spanish Constitution seems to have the purpose of making fundamental transformations close to impossible."
[835] Moreover, the current Spanish tendency towards multipartyism can make the amending procedure even more difficult.
[836] See LASAGABASTER, I. *Consulta o Referéndum*.

against a self-determination claim that it is both persistent and intense. Law should not be an excuse to find civilized and democratic ways to channel this sort of demand.[837] For Rubio Llorente, if a territorialized minority concentrated in a specific part of the country, administratively delimited and with the necessary dimensions and resources to become a State, wants its independence, the principle of democracy precludes placing in the way of this will any formal obstacle that can be removed. If the Constitution impedes it, it must be reformed, but before that, the existence and solidity of this will must be ascertained.[838]

Express constitutional reform to recognize the secession of Catalonia or Basque Country could be accomplished, among other ways through: establishing a specific secession procedure in the Constitution; enshrining a general right to secede; amending the principles of unity and indissolubility in order to allow secession; recognizing that a particular territory is no longer part of Spain; passing a constitutional law establishing the constitution of a new independent State – with a *patriation* clause placing, from then onwards, the constituent power in the hands of this new sovereign nation. Nevertheless, any of these constitutional changes would be extremely difficult to negotiate and to pass (both for the main Spanish political parties and for the Spanish citizenry as a whole).

For the moment, various conclusions can be drawn. Spanish constitutional law, like most European constitutional orders, does not recognize a right to secede for the nationalities and regions that form the State. Despite this, secession can be dealt with through the more rigid amending procedure of Article 168. Thanks to the absence of material limits to constitutional reform and to the constitutional recognition of fundamental rights, democracy, political pluralism and autonomy of the nationalities, the self-determination process driven by pro-secession representatives, the attempts to consult the citizens on independence and the attempts to negotiate secession with the central State can be, in principle, constitutional. However, pro-secession negotiators must not forget the difficulty of materializing an agreement by means of a constitutional reform. In contexts where amending the Constitution is so complicated, a complex question is whether or not

[837] MANGAS, A. "La secesión de territorios en un Estado miembro", pp. 52-3.
[838] RUBIO LLORENTE, F. "Un referéndum para Cataluña", *El País,* 8 October 2012.

the secessionist should try to amend it. On the one hand, it seems advisable to try to conduct the process in a legal and agreed fashion. In addition, unionists cannot refuse a proper amending proposal to constitutionalize secession on purely legal grounds but on political arguments. On the other hand, a Spanish Parliament and Executive inclined to recognize a consensual secession would be condemned to dissolution if they sought to amend the Constitution following Article 168.

Since constitutional reform could squander a consensual secession process with the State, a more informal instrument might be used to reflect the agreement on secession such as a broadcast declaration by the Spanish Premier or a public agreement between political parties without legal formalization. An informal covenant should avoid or hinder an application to the Constitutional Court and, in the end, could prevent a binding referendum of all Spaniards and dissolution of the Spanish Parliament. Following the informal agreement, recognition by other States and international organizations could be started. Once the seceding unit became a new subject of international law, the issue would no longer be a matter of Spanish law, since definition of territorial boundaries comes under international law (which defines the territorial, personal, material and temporary spheres of validity of State legal orders). In a subsequent stage, the agreement could be formalized through an international treaty.[839]

An alternative way of avoiding the more rigid procedure provided for by Article 168 could be to amend this provision following Article 167. In other words, to reform the more rigid amending procedure through the less rigid one. However, there are normative and pragmatic objections to this option. Although a literal interpretation could allow amendment of Article 168 via Article 167, a rigorous finalistic and systematic interpretation would reject it. If important features of a Constitution are its rigidity and protection of a historic political compromise, this constitutional reform could be branded as a constitutional fraud.[840] Comparative law provides some instances for making constitutional change possible. In particular, despite Article 290 (now Article 288) of the Portuguese Constitution excluded (and keeps

[839] This option could be treated as a kind of constitutional mutation (or as an implicit or tacit constitutional reform), by acquiescence of the branches of central government and consolidated by international law.
[840] See FERRERES, V. *The Constitution of Spain*, pp. 61-2. OTTO, I. *Obras completas*, pp. 865-6.

excluding) various topics from the possibility of constitutional reform, it was amended in 1989. As a result, the belief that this clause is amendable prevails.[841] If a provision establishing material limits on constitutional revision can be amended through the ordinary amending procedure, an *a fortiori* comparative argument could accept the same regarding a provision on the more rigid amending procedure. A pragmatic objection may warn that both amending procedures include a referendum. While the referendum in Article 168 is compulsory in every case, the referendum in Article 167 is compulsory when one tenth of either of the chambers of the Spanish Parliament demands it. Hence, if one or more political forces have one tenth of the votes in either of the chambers, they can put the constitutional reform to a referendum of all Spanish citizens. Thus, an amendment under Article 167 would not exclude the possibility of having to consult the whole Spanish people through referendum.

If, in the end, the Constitutional Court were asked to rule on the constitutionality of the secession of Catalonia or Basque Country, two lines of argument could be followed to avoid the need for a constitutional reform. The first would plead that secession is a matter of constitutional politics, not constitutional law and adjudication. Remember the theses of Sunstein or Saiz in this regard.[842] Following a similar reasoning, Joaquim Ferret criticizes the need for a constitutional reform to achieve independence, since secession processes generally occur outside the constitutional framework and under international law alone. The same also happened in Spain when overseas territories considered Spanish provinces became independent without amending the Constitution.[843]

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[841] See Article 191 of *Constitutional Statute No. 1/89*. FERRERES, V. *Constitutional Courts & Democratic Values*, p. 107 and footnote 39.

[842] See § 3.1.1 above. Actually, treating secession as a matter of constitutional politics rather than constitutional justice may have a chance of becoming an "incompletely theorized agreement", with some of the virtues of that kind of agreement described by Sunstein. See SUNSTEIN, C.R. *Designing Democracy*, ch. 2. However, it is doubtful that, by their very nature, secessionist conflicts, as well as many other disputes, are only *political* and, therefore, not *justiciable*. Constitutional law and adjudication is intrinsically related to political (and territorial) disputes. Thus, considering a conflict to be political excludes neither treating it as a legal dispute nor the role of constitutional adjudication. In contrast, see SCHMITT, C. *Constitutional Theory*, § 11. In similar vein, Lord Justice Reed, dissenting in the mentioned *Miller case* (par. 240), warned: "It is important for courts to understand that the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary".

[843] FERRET J. "Nació, símbols i drets històrics", p. 46.

The constitutional history of Spain also shows that, from the beginning of the 19th century, the succession of Spanish constitutions did not follow the mechanisms for constitutional reform.[844] Instead, the substantial constitutional changes occurred as a consequence of *faits accomplis* (coups d'état, military takeovers, revolutions, elections, changes of government, etc.). In a way, this *praxis* extended until the 1977-8 Transition to democracy. According to the official narrative, the Transition was a process of reform "from the law to the law through the law" (indeed, it was a process based on the 1977 Fundamental Act for the political reform, adopted by the assembly of a dictatorial regime). However, as Ángel Garrorena points out, "the word *reform* was used to cover an authentic *rupture*".[845] Certainly, Article 1 of the 1958 Fundamental Act of principles of the National Movement established that the principles mentioned in it were "permanent and unalterable".[846] Hence, if one takes into account that the 1977 Fundamental Act for the political reform and the constitutional order engendered by it were essentially contrary to those principles, the Transition to democracy can be considered a process of *revolutionary reform*. In Spain it was also labelled as a process of *ruptura desde la reforma*.[847]

That said, most of the Spanish Constitutions were not normative constitutions in a strict sense, but nominal constitutions.[848] As a normative constitution *stricto sensu*, the 1978 Spanish Constitution ensures its supremacy and ultimacy in the internal legal order by means of: (1) *Formal super-legality* with rigid amendment procedures. (2) *Material super-legality* safeguarded by Courts and especially the Constitutional Court. (3) The attribute of *norma normarum* as the basic criterion for the validity of the other norms within the legal order. In other words, the Constitution as *norm of norms* establishes the main mechanisms for establishing,

[844] Not only were Spanish Constitutions rarely reformed following their amending clauses, but the more rigid the procedure was, the less the Constitution lasted. MUÑOZ MACHADO, S. *Vieja y nueva Constitución*, p. 76.
[845] GARRORENA, Á. *Derecho Constitucional*, p. 115.
[846] Moreover, Article 3 of the 1958 Fundamental Act stipulated that "statutes and provisions of all types that violate or erode the Principles proclaimed in the present Fundamental Act of the Kingdom are null and void." In more technical terms, although the 1958 and 1977 Fundamental Acts had the same legal rank, the relevant question was whether or not the 1958 Fundamental Act established a sort of eternity clause and if the 1977 Fundamental Act violated this clause.
[847] See GARRORENA, Á. *Derecho Constitucional*, pp. 114-7.
[848] See SOLÉ TURA, J.; AJA, E. *Constituciones y períodos constituyentes en España (1808-1936).*

approving, amending and repealing laws within its legal order.[849] Today's Spanish constitutionalism fits into European constitutionalism with its characteristic "stability", "normativity" and "important role of constitutional adjudication".[850]

Most of the earlier Spanish constitutions did not meet these legal requirements. They were rather programmatic, in that they expressed the political programmes of the forces or factions in power. The 1978 Spanish Constitution departed from this historical trend. The process followed, the clauses contained and the broad agreement reached show it is more than a factional product. Spanish constitutionalism had been part of a certain European tradition that had reneged on constitutional reform "in such a way that the changes *in* the Constitution implied changes *of* the Constitutions". But the procedure for constitutional reform has been normalized in European constitutional law and apparently in Spanish law as well.[851] Nevertheless, the 1978 Spanish Constitution has been amended only twice, on both occasions because of needs stemming from European integration. Both reforms were very specific and followed the ordinary procedure of Article 167. The 1978 Spanish Constitution has never been amended by the more rigid procedure of Article 168.[852]

Beyond the strategy appealing to the indifference of constitutional law, the second line would directly invoke the principle of nationality together with the principle of democracy as drivers of constitutional interpretation in the direction of Justice as multinational fairness. The following sections will try to show constitutional keys in this regard. Nonetheless, comparative constitutional case law, apart from the Canadian jurisprudence, still seems far from the ideas defended in this book.

3.2. The principle of democracy and secession

[849] GARCÍA DE ENTERRÍA, E. *La Constitución como norma…*. See FERRERES, V. *The Constitution of Spain*, ch. 3.
[850] BOGDANDY, A.; CRUZ VILLALÓN, P.; HUBER, P.M. *El derecho constitucional…*, p. 34.
[851] *Ibid*. p. 31.
[852] There is a sort of "political taboo when it comes to revising the Spanish Constitution". FERRERES, V. *The Constitution of Spain*, pp. 55-9.

The *Principle of democracy* is one of the requisites for secession under Justice as multinational fairness. The clause of the hypothetical multinational contract reads that "unilateral secession shall be the result of a democratic process within the minority nation with clear majorities and extensive, intense and reasonable deliberation". This chapter will focus on the principle of democracy as a driving force for constitutional interpretation to allow creation of new States. As a shared principle of contemporary liberal constitutionalism, the principle of democracy could be the keystone for constitutionalizing secession. In *ordinary democratic times*, the principle of democracy ought to operate in line with the principle of constitutionalism. Modern democracy generally exists within the framework of liberal constitutions, not outside them. In *extraordinary democratic times*, however, the principle of constitutionalism may adapt to the principle of democracy. One such exceptional time would be when, by virtue of the principle of democracy, a sub-State nation presents itself as a new sovereign *demos* and new constituent power.[853]

Liberal constitutionalism tends to qualify, moderate and limit majority rule, in order to avoid oppression over minorities. Therefore, majority rule is legitimate in liberal constitutionalism, provided minorities are guaranteed protection and, in some cases, the possibility of becoming majorities. Many minority nations, however, have been condemned to be long-term (not to say permanent) minorities. In fact, national groups who make up a large portion of the population of the parent State seem unlikely to be secessionist, for they have a chance of gaining or sharing central power.[854] Since most States are not nationally neuter but nationalizing, and since many of their nationalities are fated to remain minorities as long as they stay within them, it is both rational and fair to recognize a qualified right to secede.[855] This idea will now be discussed in greater detail drawing a distinction between majoritarian and consensual democracies.

The principle of democracy has two schools of thought which coincide with two practical types of democracy: (1) the principle of democracy understood as strict

[853] This *democratic dualism* will be discussed in § 3.7.1 below.
[854] SORENS, J. *Secessionism*, pp. 71, 158.
[855] See §§ 1.2.2 and 1.2.3 above.

majority rule is related to majoritarian, competitive democracies, (2) the principle of democracy which requires deliberation and compromise especially for taking fundamental decisions is related to deliberative, consensual democracies.[856] Each of these interpretations of the principle of democracy could put the emphasis on arguments of its own to defend or criticize the right to secede. Both types of democracy presuppose that unanimous democratic decision-making is a non-realistic utopia, but proponents of consensual democracy believe that the most significant decisions, most dangerous for minorities and most difficult to change should have the support of qualified majorities. One problem with consensual democracy is that it presupposes that the *status quo* is fair or, at least, preferable (for pragmatic reasons) to the democratic alternative based on a simple majority. Conversely, one problem with majoritarian democracy is that, if it is not accompanied by minority rights (among them, the right to secede), it can easily lead to oppression of minorities by the majority.

Under the principle of strict majority rule, the right to secede can be criticized for giving too much power to minorities to reject a decision legitimately taken by the majority.[857] According to this view, the theoretical or abstract possibility of the minority turning into the majority is enough on its own to duly meet the requisites of the principle of democracy. Nonetheless, the principle of democracy understood as majority rule can also be an argument in favour of the right to secede. Minority nations could plead that the principle of democracy requires not only the abstract possibility of becoming the majority, but also a more concrete or practical possibility. Hence, minority nations may have a morally legitimate choice, grounded on the principle of majority rule applied to their territory, to build a new State and stop being a minority. That is to say, minority nations concentrated in a given territory can choose to secede by majority decision.[858]

Another argument in favour of constitutionalizing a right to secede is that majority rule may gain legitimacy if it allows its minority nations to become independent.

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[856] For a comparative distinction between majoritarian and consensual democracies, see LIJPHART, A. *Patterns of Democracy*.
[857] Section 3.1.1 discussed Lincoln's idea that "rejecting the majority principle, anarchy or despotism in some form is all that is left".
[858] In similar vein, see BERAN, H. "A Liberal Theory of Secession", pp. 21-31.

The majority nation can more legitimately force minority nations to conform to the decisions it takes. If the decisions of the former are systematically damaging the rights and interests of the latter, there is the exit option. If a proper right to exit were available, complains should lessen intensity, support and justification. The right to secede can be a strong argument to counter protest against the choice of the majority: "if you are so dissatisfied or uncomfortable, you may leave". In addition, a constitutional right to secede may also allow more centralization, integration and stability. In the final analysis, in a multinational State, majority rule is not nationally neuter.[859]

Under the principle of democratic consensus, constitutionalizing secession can be objected to jeopardizing democratic precommitment, deliberation, compromise and cooperation.[860] Yet, a qualified constitutional right to secede (under the conditions explained in the course of this book) is an incentive to recognize, respect and accommodate minority nations. "Ironically, thus, secession might constitute an important step in the pursuit of satisfactory forms of accommodation within, and not beyond, multinational States".[861] Understood in this sense, a right to secede may be an incentive to take national pluralism seriously and to adopt forms of consensual democracy that would displace the strict rule of the majority (nation). For this reason, a right to secede provides protection against the fear voiced by Lord Acton that "it is bad to be oppressed by a minority, but it is worse to be oppressed by a majority", given that the power of the majority can seldom be resisted and, against such a force, "there is no appeal, no redemption, no refuge but treason."[862] Thus, Acton himself, although criticizing the principle of nationality, wrote that: "Secession filled me with hope, not as the destruction but as the redemption of Democracy".[863]

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[859] MOORE, M. *The Ethics of Nationalism*, p. 90. In a deeply divided multinational State, national majorities and minorities are likely to vote following their national identities (p. 125).
[860] See SUNSTEIN, C.R. "Constitutionalism and Secession". SUNSTEIN, C.R. *Designing Democracy*, ch. 4. SAIZ ARNAIZ, A. "Constitución y secesión".
[861] MANCINI, S. "Secession and Self-Determination", p. 482.
[862] ACTON, J.E.E. "The History of Freedom in Antiquity", in *The History of Freedom and Other Essays.*
[863] Letter to General Robert E. Lee, 4 November 1866, after the American War of Secession.

The classic issue of preventing the *tyranny of the majority* still applies in the national and cultural dimensions of contemporary democracies.[864] In a democracy, according to Tocqueville, the minority would respect the decisions of the majority since it would have the expectation of eventually becoming the majority.[865] And vice versa, the majority might refrain from mistreating the minorities, in anticipation that it could itself become a minority one day.[866] What is more, the mistreated minority today may turn into a mistreating majority tomorrow. However, this logic does not work properly in many cases of concurrence of national majorities and minorities, for all too often minority nations are deemed destined to be permanent minorities. In those cases, a constitutional right to secede could compensate for the impossibility of minority nations ever becoming a democratic majority in the multinational State as a whole. On top of that, constitutionalizing secession would deter the majority nation from mistreating or disregarding minority nations. Yet, despite considering the right to secede as a form of empowerment of minorities, Hirschman warned that the ease of exit increases the effectiveness of the voice but it reduces the predisposition to use the latter.[867] Likewise, constitutional loyalty is compatible with a qualified right to secede, but hardly with an easy way out.

Three kinds of rights of sub-State units can help to secure broad consensus, prevent domination by majorities over minorities and ensure that the various members that make up the multinational State are recognized and accommodated: (1) the *right to secede*, (2) the *right of veto*, and (3) the *right of nullification*.[868] The EU has instances of all these rights: (1) Member States have a legal right to withdraw from the Union;[869] (2) unanimity is required, among other cases, to reform the founding treaties and accept new Member States;[870] (3) individual Member States are allowed to opt out of selected powers, laws or policies of the Union, such as the common

[864] REQUEJO, F. *Las democracias*, p. 239.
[865] TOCQUEVILLE, A. *Democracy in America*, Vol. 1, chs. XIV-V. There Tocqueville also warned about the unlimited power of the majority (or the "tyranny of the majority") as a great danger of democracy.
[866] MOORE, M. *The Ethics of Nationalism*, p. 89.
[867] HIRSCHMAN, A.O. *Exit, Voice, and Loyalty*, p. 83.
[868] In a broad sense, the right of nullification is a legal power of a sub-State unit to make a certain provision or programme inapplicable on its territory. See, for instance, Article 33 of the Canadian Charter of Rights and Freedoms.
[869] See Article 50 TEU and § 3.1.1 above.
[870] See Articles 48 and 49 TEU, respectively.

monetary policy, EU social policy or rights, the internal border controls and recognition of fundamental rights.[871]

Clearly, the rights of veto and nullification respect more the constitutional principle of territorial integrity. Beyond this, the rights of veto and nullification are often thought to be less obstructive (less capacity of the minority to paralyze or collapse the whole system) and less threatening (less capacity to bend the will of the majority) than the right to secede.[872] This intuition is questionable. In particular, the right of veto may represent a sort of return to the state of nature, according to Locke.[873] Taking the example of the EU again, the UK's eurosceptic policy has created various opportunities to prove that rights of veto and nullification can be more powerful, more real and more lasting mechanisms than the right to secede.[874] Even if an implicit threat of withdrawal from the EU was permanently behind British claims, this threat can only be materialized once and its execution seems very costly.[875]

Let us compare nullification and veto separately in relation to secession. Specifically, the right of nullification of a fiscal rule can be more of a problem than the right to secede: "if they do not pay, we will not either" is more likely than "if they exit, so will we". The threat of exit is generally less real because it is less likely to happen. If the threat is less likely to be carried out, its obstructing and bending effects also decrease. Turning to the veto, what would give the UK more power: a hypothetical right to withdraw from the UN or the right of veto in the Security

[871] HARTLEY, T.C. *The Foundations of European Union Law*, pp. 8-10.
[872] BUCHANAN, A. *Secession*, pp. 144-6. SUNSTEIN, C.R. *Designing Democracy*, pp. 101-12.
[873] "When any number of men have, by the consent of every individual, made a community, they have thereby made that community one body, with a power to act as one body, which is only by the will and determination of the majority. For that which acts any community, being only the consent of the individuals of it, and it being one body, must move one way, it is necessary the body should move that way whither the greater force carries it, which is the consent of the majority, or else it is impossible it should act or continue one body, one community, which the consent of every individual that united into it agreed that it should; and so every one is bound by that consent to be concluded by the majority." LOCKE *Two Treatises of Government*, ch. VIII, § 96.
[874] For example, the nullification in the form of the UK opt-out from the common monetary policy, the social policy or rights, the internal passport controls, fundamental rights, etc. UK veto of any reform of the EU's founding treaties to tackle the economic crisis which started in 2008 forced the other Member States to adopt the Fiscal Compact through two international treaties outside EU law.
[875] However, as long as the notification to withdraw from the Union is deemed revocable unilaterally by the Member State, the threat of exit may normalize and rise. See European Court of Justice Judgement of 10 December 2018 (C-621/18).

Council? A British threat to exit from the UN seems a weaker power than the right of veto in the Council. Ultimately, it is unclear whether free riding is easier with constitutional recognition of the right to secede than with the rights of veto or nullification. Of course, much would depend on the specific regulations and circumstances of the case.

Despite the controversy between majoritarianism and consensualism, the principle of democracy is a fundamental principle of contemporary liberal constitutionalism. Focusing on the Spanish constitutional order, the principle of democracy is recognized in Article 1.1 of the Spanish Constitution alongside superior values such as liberty, justice and equality. The first paragraph of the first article of the Constitution is by no means an insignificant location. The principle of democracy and these superior values can be complemented by other constitutional provisions to legitimize self-determination and secession such as the principle of nationality, the right to autonomy of nationalities and regions, the protection of all peoples of Spain, the principle of public participation, the right to political participation and the right of individual and collective petition.[876]

As many constitutions, the Spanish Constitution does not expressly prohibit secession but the prohibition is implied through certain principles enshrined in the Constitution such as those of sovereignty of the Spanish people, of indissoluble unity, of solidarity among regions, of territorial integrity, and of constitutionalism and rigid constitutional amendment.[877] Nevertheless, these principles and provisions could be interpreted in ways that would not impede a peaceful and democratic secession of Catalonia or the Basque Country. That sovereignty lies with the Spanish people may not ban democratic secession as a result of emergence and recognition of a new constituent people.[878] The principles of unity and of indissolubility could be interpreted as a prohibition to break the unity of the State by an ordinary decision of constituted powers, but may allow secession of a sub-State unit constitutionally recognized as a nationality and erected as a new constituent

[876] See Preamble and Articles 2, 9.2, 23.1, 29, 137, 143 of the Constitution and Preamble and Articles 1, 2, 3, 4 and 29 of the Statute of Autonomy. Historical rights could be added in the terms defended in § 1.4.7 above.
[877] See Articles 1, 2, 8, 167 and 168 of the Spanish Constitution. For comparative constitutional law, see VENICE COMMISSION, *Self-Determination and Secession in Constitutional Law*, 1999.
[878] See ch. 3.7 below.

power. These principles shall impede secessions which are not democratic, liberal or peaceful. These principles may forbid expulsion of any significant part of Spanish territory or people (without local consent). Likewise, these principles could prohibit significant transfers of territory to other States without consent of the population affected. Secession may not be contrary to the principle of solidarity, and the latter would in turn guide the agreements on secession and, in particular, secession taxation.[879] The principle of territorial integrity would not be an absolute limit to secession if a sort of ICJ Kosovo doctrine were internalized. Since the principle of territorial integrity stems from Article 8 and this provision entrusts the army with defending the territorial integrity of Spain, it could be understood as a norm against external threats and attacks. Regarding internal threats, the army ought to resist non-democratic, non-liberal, violent and abrupt secessions.

All these principles seem to limit secession, but do not necessarily have to act as limits to secession in absolute terms (nor limit all kinds of secession). In hard cases such as secession, constitutional law ought not to be concerned only about pure constitutional legality, but also about constitutional legitimacy. In these cases, constitutional provisions should be applied with caution and considering the principle of democracy as a source of legitimacy pushing for flexible interpretation.[880]

3.3. Representative democracy and secession

3.3.1. Importance and dangers of the principle of representation

Ideally, the principle of democracy should be expressed both via representatives and via referendum. In liberal-democratic contexts, a majority of the representatives of the seceding territory ought to push forward and endorse the secessionist political project. Without this boost and endorsement from their representatives, the people's will expressed in a referendum would be insufficient for several reasons. First, liberal democracies are predominantly run by the principle of representation, which

[879] See § 1.3.4 above.
[880] This idea can be perceived in the background of the Quebec Secession Reference.

sets out from a theory of division of labour between governors and governed. Second, the representative principle is crucial in order to take due account of the internal pluralism and complexities of modern societies, especially taking into consideration that a secession referendum, if it is to be clear and effective, will not include many important nuances and details. Third, representatives are needed to negotiate the process and terms of secession (including the referendum itself). Moreover, many issues related to secession are so complex they need to be entrusted to representatives and other political and legal experts to negotiate, agree, proclaim and execute the will of the people. A constituent and constitutional matter such as the creation of a new State needs a harmonious combination of consultation and representation. Popular sovereignty is not only to be exercised through direct participation of the people.

Mass demonstrations demanding a self-determination referendum and independence, such as those in Catalonia between 2012 and 2017, are not enough to legitimize a secession process in a liberal-democratic context. Unavoidably, the demand for such a complex issue (which involves numerous matters, several generations and the break of many bonds) should be legitimized by one or more political parties, or coalitions, that would stand for election on a manifesto expressing their will to secede after the holding of an independence referendum. This manifesto should express the will to negotiate the terms of the referendum and of secession if the result is clear enough. If no such referendum is allowed, the representatives ought to have a clear and significant democratic legitimacy to approve a UDI. In short, the political parties must express their intention of moving towards the creation of an independent State, as clearly as possible, in their election manifestos and campaigns.

Even if broad parliamentary support is secured, ideally a referendum should still be suitable since the majority will of the representatives does not always coincide with the majority desire expressed in a direct consultation of the people. Only if the parent State were repeatedly to refuse the negotiation, authorization and organization of a referendum on secession could the secessionist route be taken at the instigation of democratic representatives alone. In such a nonideal case, the relevance of the fact that the political forces that hold the parliamentary majority

had stood for election with a clearly pro-secession programme would increase.[881] In other words, if there is no possibility of holding a legal and agreed referendum, the democratic legitimacy of the representatives itself would have to endorse the secession process. However, there is a strong objection to expressing the will for secession through representatives only: the selfish search for greater power at the expense of the opinions, interests and welfare of the people represented.[882] Just as central leaders often wish and seek greater centralization, peripheral leaders tend to desire more decentralization or separation. These plausible and dangerous dynamics of power must be counteracted, if the parent State does not prevent it, by directly consultation the people through referendum.

3.3.2. Declaration towards independence

In parliamentary democracies, secession can be triggered by two main kinds of parliamentary declaration: a *declaration towards independence* and a *declaration of independence*. The former may start the process of secession by announcing and setting out a *roadmap* to an independent State, whereas the latter proclaims secession, legitimizes a new constituent power and appeals to the world for international recognition. Of course, a declaration of independence will be quite different if the previous process of negotiation succeeds or fails. If the negotiations fail, the declaration will take the form of a UDI.[883] Both a *declaration towards independence* and a *unilateral declaration of independence* should stress the will to negotiate secession with the parent State, since peaceful unilateral secession is something alien to consolidated liberal democracies.[884]

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[881] Catalan politicians have coined the term *plebiscitary election* to describe this kind of election. This points to the need to map out the path to secession in the election manifesto so that voters can take a position on it. However, the term *referendary election* seems more appropriate in a continental context, since French (and European to some extent) political and legal culture understands plebiscite in a pejorative sense (with negative connotations), as a popular consultation more related to authoritarian regimes and often promoted by the Executive, the President or the Leader to the detriment of the Legislative and other constitutional structures and safeguards. See TIERNEY, S. *Constitutional Referendums*, pp. 130-7. Strictly referendary elections make sense only after the Catalan institutions have tried various ways to hold a referendum and the Spanish institutions have systematically denied it.

[882] See WELLMAN, C.H. *A Theory of Secession*, p. 94. The disintegration of Czechoslovakia, for instance, might have suffered from this problem to a certain extent. See ch. 3.5 below.

[883] See ch. 2.2 above and § 3.7.3 below.

[884] See ch. 3.5 below.

A *declaration towards independence* could open the path to secession and indicate the steps to be taken (roadmap function), empower the government to negotiate the process and terms of secession with the parent State (negotiation empowerment) and open consultations with the appropriate international players that could mediate the conflict and recognize the new statehood (international announcement). A parliamentary declaration of this kind to start the process would have to legitimize and guide negotiation by the secessionist government with the players, both inside and outside, that need to be involved. This declaration, as a sort of roadmap for citizens and international society, could make the secession process more predictable; this predictability could, in turn, favour the process in terms of procedural justice.

This section will now focus on specific declarations towards independence in the Catalan case drawing comparisons with other declarations and experiences elsewhere. In particular, two Resolutions by the Parliament of Catalonia intended to set out the road to independence: the Declaration of sovereignty and right to decide of the people of Catalonia, of 23 January 2013,[885] and the solemn Declaration of 9 November 2015 starting the process of creation of an independent State of Catalonia (officially called the Resolution on the start of the political process in Catalonia as a consequence of the electoral results of 27 September 2015).[886]

Neither of these Resolutions defines Catalonia as a nation nor appeals to the moral right to secede of national communities. The first refers to the people of Catalonia (following the wording of the Statute of Autonomy) and the right to decide. As will be explained later, the notion of right to decide can be considered redundant, insincere, opportunistic and superfluous.[887] By contrast, invocation of the principle

[885] This Resolution was passed with 85 votes in favour, 41 against and 2 abstentions.
[886] This Resolution was passed *grosso modo* with 72 votes in favour, 63 against and no abstentions.
[887] See § 3.4.2 below. The idea of *right to decide* is extremely, or even excessively, ductile. For a defence of the right to decide, see LÓPEZ, J. "From the right to self-determination to the right to decide". VILAJOSANA, J.M. "The democratic principle and constitutional justification of the right to decide". For a critique, see TORNOS, J. "El problema catalán". FERRERES, V. "Cataluña y el derecho a decidir". TORBISCO, N. "National Minorities, Self-determination and Human Rights", in KRAUS, P.A.; VERGÉS, J. *The Catalan Process*, ch. 10. In Catalonia, in particular, the demand for a "right to decide" was misleading because it was, in reality, a claim for a right to national self-

of self-determination of peoples would be morally and legally sounder. Both declarations seem to give disproportionate weight to the principle of democracy while disregarding the importance of the principles of nationality, constitutionalism and rule of law. Despite this inflated emphasis on democracy, there was not enough democratic support to adopt some extreme and vehement pronouncements included in these declarations.

The 2013 Declaration lists numerous principles, the first being the principle of *sovereignty*, expressed as follows: "the people of Catalonia has, for reasons of democratic legitimacy, the nature of a sovereign political and legal subject." However, neither before nor after the Declaration does the people of Catalonia seem to be sovereign, neither in fact nor in law. Catalonia has the potential to become independent and sovereign, but remains a nationality within Spain with a degree of autonomy granted by the Spanish legal order. If Catalonia were already a sovereign political and legal subject, it could simply exercise sovereignty effectively and seek international recognition as an independent State. Instead of a referendum on secession, the people of Catalonia could have exercised its constitution-making power directly and started acting as an independent and sovereign State. But since Catalonia was not a sovereign political and legal subject, it had to embark on a democratic process to legitimize the claim for acquiring sovereignty and independence.

What would happen to the declared sovereignty if the secession referendum demanded by the same declaration were lost? If so, what should we have understood: that the people of Catalonia kept being sovereign, had never been sovereign or was no longer sovereign? Is there any difference between a unilateral declaration of sovereignty and a unilateral declaration of independence? If both are unilateral, they are almost inseparable in time.[888] Nevertheless, comparative politics shows that many unilateral declarations of sovereignty preceded declarations of independence and that the former were used to legitimize the latter. Comparative

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determination, for instance the 2013 interparty manifesto expressed that "Catalonia is a nation, and every nation has the right to decide its political future".

[888] Under the regional powers to propose constitutional reform, the Parliament of Catalonia could try to seek recognition of the sovereignty (partial, shared or full) of the people of Catalonia. This would mean that, if the attempt to achieve sovereignty was consensual (*i.e.* not unilateral), a declaration of sovereignty could be dissociated from a declaration of independence.

politics can, however, be misleading when the cases compared are not similar enough and when comparison of experience engenders internal contradictions within the process itself.

In non-liberal-democratic contexts, declarations of sovereignty have sometimes preceded declarations of independence. The Supreme Soviets of the Baltic republics, as well as many former Soviet Republics, issued declarations of sovereignty prior to their referendums and declarations of independence.[889] The Baltic cases have some distinctive features: (1) In 1940, the Baltic republics were occupied by the USSR in contravention of international law, with the result that many Western countries did not legally recognize Soviet sovereignty over these republics.[890] (2) Article 76 of the 1977 Soviet Constitution recognized the republics as "sovereign socialist Soviet States". (3) Article 72 of the same Constitution established the right to secede of the Soviet republics.[891] (4) The Declarations of sovereignty of the Baltic republics had a more normative character, in that they defined sovereignty as indivisible and as supreme power over the territory, among other effects, with a clause that federal law would apply only insofar as it was not against the State law. (5) On the basis of these declarations of sovereignty, the republics intended to negotiate their status with the Union.[892]

Some of the Yugoslav republics also approved declarations of sovereignty before their declarations of independence.[893] The Balkan cases share some similarities with

[889] The first declarations of sovereignty were approved by the still Soviet parliaments of the Baltic republics: LITHUANIA: Declaration of sovereignty on 18 May 1989, Declaration of independence on 11 March 1990 and independence referendum on 8 February 1991 (support for independence: 90.47%). ESTONIA: Declaration of sovereignty on 16 November 1988, Declaration of independence on 30 March 1990, referendum on 3 March 1991 (support for independence: 77.83%) and declaration of independence on 20 August 1991. LATVIA: Declaration of sovereignty on 28 July 1989, Declaration of independence on 4 May 1990, referendum on 3 March 1991 (support for independence: 73.68%) and declaration of independence on 21 August 1991. "Fifteen new States emerged from the former Soviet Union. All of them, with the exception of Georgia, had made declarations of sovereignty". PICAZO, S. "First sovereignty. And then what?" *Presència*, 28 April 2013, pp. 4-7, 54-5. See WALKER, E.W. *Dissolution: sovereignty and the breakup of the Soviet Union*, pp. 63-75. TIERNEY, S. *Constitutional Referendums*, pp. 67-8. CRAWFORD, J. *The Creation of States…*, p. 394. SUNSTEIN, C.R. "Constitutionalism and Secession", pp. 645-6.
[890] CASSESE, A. *Self-Determination of Peoples*, pp. 258-64.
[891] See § 3.1.1 above.
[892] WALKER, E.W. *Dissolution: sovereignty and the breakup of the Soviet Union*, pp. 63-4.
[893] SLOVENIA: Declaration of sovereignty on 2 July 1990 that declared Yugoslav law inapplicable on Slovenian territory (and which the Yugoslav Constitutional Court declared unconstitutional), referendum of independence on 23 December 1990, Declaration of independence and constitutional

the Baltic ones: (1) The 1974 Constitution of Yugoslavia included the right to self-determination and to secede of the nations and nationalities.[894] (2) The declaration of sovereignty of Slovenia was, to some extent, legally equivalent to a UDI since it created a new constituent power superimposed on the constituted federal powers. If not a UDI properly, this declaration was already a significant legal rupture. (3) The disintegration process of Yugoslavia was a process supervised by the European Community with the initial intention of reaching a multilateral, peaceful and definitive agreement between the federation and the republics. (4) In this context, the declarations of sovereignty could aim to secure a negotiating position for the republic, to show that the Socialist Federal Republic of Yugoslavia was in the process of dissolution, to urge international recognition and to avoid considering the conflict an internal affair.[895]

In contrast, in liberal-democratic contexts, it seems uncommon for declarations of sovereignty to precede referendums and declarations of independence. In the Basque Country, the 2008 attempt to consult the Basque citizens on the "right to decide" was not preceded by a declaration of sovereignty.[896] The 2014 Scottish independence referendum was not preceded by any declaration of sovereignty by the Scottish Parliament. In the UK there is a generally accepted tradition that sovereignty lies with Parliament in Westminster.[897] The Quebec referendums of 1980 and 1995 were not preceded by any declaration of sovereignty, since they addressed sovereignty more than independence. According to the tripartite agreement on the sovereignty plan of 12 June 1995, following a *Yes* victory in the

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act adopting the Basic Constitutional Charter on the sovereignty and independence of the republic of Slovenia on 25 June 1991. BOSNIA AND HERZEGOVINA: Declaration of sovereignty on 15 October 1991, referendum on independence on 29 February-1 March 1992, Declaration of independence on 3 March 1992. CROATIA: no prior declaration of sovereignty. The independence referendum was held on 19 May 1991. Once the referendum had been held, the Declaration of sovereignty and independence was adopted on 25 June 1991 (the same day as Slovenia). MACEDONIA: referendum in favour of the sovereignty and independence of Macedonia within an association of Yugoslav States on 8 September 1991, adoption of the new constitution and proclamation of independence on 17 November 1991. *Inter alia*, see Opinion No. 1 of the Badinter Commission.

[894] See § 3.1.1 above.

[895] See ch. 2.3 above.

[896] Declaration of sovereignty should not be confused with other parliamentary declarations or resolutions "on the right to self-determination of the Basque people" such as *Proposición no de ley sobre el derecho de autodeterminación del Pueblo Vasco*, plenary adoption on 6 February 1990 and *Proposición no de Ley 100/2014, relativa al derecho de autodeterminación de Euskal Herria*, plenary adoption on 29 May 2014.

[897] See § 3.1.2 above.

referendum, the National Assembly of Quebec would be empowered to proclaim the sovereignty of Quebec. Section 6 of the Quebec Act of 13 December 2000, respecting the exercise of the fundamental rights and prerogatives of the Quebec people and Quebec State, establishes that Quebec is sovereign in the matters assigned to its power within the scope of statutes and conventions of constitutional nature. This legal provision could therefore be understood as a vindication of shared sovereignty of a federal nature.

After this comparative approach, let us analyse the *declarations towards independence* of the Parliament of Catalonia of 2013 and 2015. A legal argument used repeatedly to defend these declarations was to deny the legal nature and legally binding force of parliamentary resolutions of this kind. Indeed, traditionally these politically driven resolutions (also called non-statutory proposals) were considered to have no legal effects and enforcement.[898] Unlike a declaration towards independence, a true declaration of sovereignty or independence would have some sort of normative nature and the aim of engendering real and fundamental legal effects: the establishment of a new sovereign *demos* and recognition of a corollary new *pouvoir constituant*.[899] The latter declaration would thus have a political and legal nature and purpose of the highest order. As the Supreme Court of Canada states, "secession is a legal act as much as a political one".[900] As seen, the declarations of sovereignty of the Baltic republics had a normative dimension, in that they defined sovereignty as indivisible and as supreme power over the territory, among other effects, with a clause that federal law would apply only insofar as it was not against State law. Unlike mere declarations towards independence, the Baltic declarations of sovereignty were intended to have actual and crucial legal effects.

At the time when a new sovereign people and thus a new constituent power emerge, politics and law merge and mingle. Hence, any unilateral declaration of

[898] See BAYONA, A. "El futur polític de Catalunya", p. 6. FOSSAS, E. "Interpretar la política", p. 281.
[899] Constitutional Court Judgements 42/2014 and 259/2015 considered that a parliamentary resolution must have legal effects if it is to be judicially reviewed. In this respect, the Court argued that the self-proclamation of the Parliament of Catalonia as repository of sovereignty and constituent powers may have legal effects.
[900] *Reference re Secession of Quebec*, par. 83.

independence or sovereignty could have a normative function similar to a *constitution in the legal-logical sense* (in Kelsen's terms) or a will to establish a new *rule of recognition* (in Hart's terms).[901] For this reason, the question of whether or not it is binding might depend on whether or not the aim is to change the *legal-logical constitution* or the *rule of recognition*. If this were the case, it would tie law and politics, because at the apex of the *pouvoir constituant* is where law and politics meet, blend and wed. What would then be the legal effects of a real declaration of sovereignty? It would be a political and legal message to the top political and legal actors that the ultimate origin of the constituent power would have changed and thus enabling this emerging power to amend or repeal current law.[902] Legal effects can be understood as "those consequences that have an interest for law because they create or change legal situations".[903] If this definition is sound, genuine attempts to create a new constituent power or to change either the *legal-logical constitution* or the *rule of recognition* are consequences of capital interest for law.

The beginning of this section underlined the need for the secession process to start with a parliamentary declaration setting out the *roadmap* which could make the secession process more predictable. This predictability, however, can turn into a disadvantage when the coercive mechanisms of the parent State issue legal threats against those institutions and authorities planning to follow the roadmap. Such an unwelcome turn is more likely if the tone of the declaration is categorical and inflammatory and if there is not an intensive and extensive majority backing the end and the means of the *roadmap*. This was more or less the case with the abovementioned solemn Declaration of 9 November 2015 starting the process of creation of an independent State of Catalonia, entitled "Resolution on the start of the political process in Catalonia as a consequence of the electoral results of 27 September 2015". So what were the results of those elections? For the first time, the

[901] See § 3.7.2 below. Although Hart's *rule of recognition* has a factual nature from an external point of view, it has a normative nature from an internal point of view, for it helps to identify the law. HART, H.L.A. *The Concept of Law*, pp. 111-2.
[902] In other words, both a real unilateral declaration of sovereignty and of independence would be parliamentary declarations of a rather normative nature with the aim of engendering legal effects such as: securing recognition of the sub-State people as a sovereign political body, making the parent State Constitution inapplicable (or of merely secondary application) on sub-State territory and its population, allowing the emergence of a new constituent power and establishing a new constitution in the *legal-logical sense* or a new *rule of recognition*.
[903] FOSSAS, E. "Interpretar la política", p. 283.

political parties that explicitly stated their will to achieve independence in their election manifestos and campaigns obtained an overall majority of seats in the Parliament of Catalonia (reflected in 72 votes in favour of the Resolution out of a total of 135 seats). Nevertheless, the pro-independence political parties fell short of 50% of the votes (they won 48%). Moreover, pro-secession parties tend to obtain worse results in central Parliament elections, despite these being also important electoral tests that should be passed to confirm the rise of a new sovereign people.

Considering these results, was there a clear democratic majority in favour of independence that would legitimize adoption of the abovementioned Resolution? What is more, was there a sufficient majority to declare independence unilaterally? This is a fair question because some passages of the 2015 Resolution could be considered materially a unilateral declaration of independence or sovereignty. For instance, the Resolution stated that "the Parliament of Catalonia, as the repository of sovereignty and as expression of constituent power, reiterates that this chamber and the process of democratic disconnection from Spain shall not be subject to the decisions of the institutions of Spain".

The Spanish Constitutional Court showed itself united and eager to speak about issues concerning sovereignty and secession, in particular regarding the parliamentary resolutions of 2013 and 2015.[904] Judgement 42/2014 considered the declaration of sovereignty unconstitutional and interpreted the declaration on the right to decide in conformity with the Constitution, whereas Judgement 259/2015 declared the whole 2015 Resolution unconstitutional and null. The Constitutional Court was deeply annoyed by the later Resolution, because of the intensity and intemperance of the pronouncements and, in particular, because it deemed the Court devoid of legitimacy and jurisdiction. As for the 2013 Resolution, even if the wording of the principle of sovereignty was assertive and categorical, a comprehensive interpretation could conclude that this was more of a *roadmap* to exercise the so-called *right to decide.* Nonetheless, Judgement 42/2014 ruled the

[904] Indeed, the Court usually managed to issue quick and unanimous rulings concerning the sovereignty and secession of the Basque Country and Catalonia. In this respect, see FERRERES, V. "The Spanish Constitutional Court Confronts Catalonia's…".

principle of sovereignty unconstitutional and null, in a display of the *demotic monism* on which the Spanish constitutional order is based:

> Article 1.2 of the Spanish Constitution reads that "national sovereignty belongs to the Spanish people, from whom all State powers emanate." This provision, "the basis of all our legal order" (Judgement 6/1981), attributes, therefore, the holding of national sovereignty exclusively to the Spanish people, the ideal unity of constituent power and, being so, the basis of the Constitution and the legal order and the origin of any political power (Judgements 12/2008, 13/2009, 31/2010). If in the current constitutional order only the Spanish people is sovereign, and it is so in an exclusive and indivisible way, no public power can attribute the status of sovereign to any other subject or State body or to any fraction of this people. An act of this power that affirms the category of "legal subject" of sovereignty as a feature of the people of a self-governing unit entails the negation of the national sovereignty which, according to the Constitution, only belongs to the Spanish people as a whole. Thus, sovereignty cannot be entrusted to any fraction or part thereof.

In tune with the rest of the Judgement, the principle of sovereignty could have been interpreted as a legitimate political goal (like secession).[905] Yet, as the wording of the principle was clear and assertive, this interpretation would have been *manipulative*. That said, the whole Judgement 42/2014 is manipulative since it makes the Declaration say what it does not state. According to the Court, the right to decide is constitutional provided that: it does not mean a right to self-determination, it does not involve a unilateral right to hold a self-determination consultation and it is conducted in accordance with the Constitution (in particular, with the constitutional amending procedures). However, if right to decide is not, according to the Court, synonymous with right to self-determination, what is it? This confusion about what right to decide really meant seemed to be in the interest of both sovereigntist and unionist sides. While the right to decide seems close to the principle of democracy and the Constitutional Court considers it one of the supreme values enshrined in Article 1.1 of the Constitution, the Court warns that "all expressions of the principle of democracy are reflected in the text of the Constitution and cannot be exercised beyond it". That is to say, the Catalans can democratically decide everything the Spanish Constitution allows them to decide with the possibility, ultimately, of initiating a constitutional reform. By contrast, in Catalonia, the right to decide was generally understood as a sort of synonym,

[905] The principle of sovereignty, for instance, could have been reconstructed as follows: the people of Catalonia *will (or may) have*, for reasons of democratic legitimacy and *after the corresponding constitutional reform procedure*, the nature of a sovereign political and legal subject.

euphemism or approximation for right to self-determination. In the end, only a weak right to decide reconstructed by the Court survived.

The Constitutional Court expressly prohibits unilateral referendums on self-determination. To reach this conclusion, Judgement 42/2014 draws inspiration from the Quebec Secession Reference. In particular, it reads that "this conclusion is of the same tenor as that formulated by the Supreme Court of Canada in the opinion of 20 August 1998". But this Canadian Reference takes no position either in favour or against Quebec's capacity to hold sovereignty, self-determination or secession referendums. Instead, the Canadian Court endorses, implicitly, holding secession referendums since, when they meet the requirements of clarity, they give birth to an obligation to negotiate on the part of the Federation. Notwithstanding the differences, this statement can be used to re-read the Spanish Constitutional Court jurisprudence in the "same tenor" as the Canadian opinion.[906]

In Judgement 42/2014, the Constitutional Court attaches special importance to the principle of dialogue incorporated in the 2013 Resolution. When the Court accepts and underlines the relevance of dialogue and cooperation, it recognizes that the Constitution does not address every major question and that some issues not envisaged by the Spanish Constitution cannot be resolved by the Court. The Court nevertheless recalls that its function is to ensure that the procedures implemented as part of this dialogue are in line with the constitutional requirements. Although this tune is reminiscent of the Quebec Secession Reference, the dialogue is more contained and does not establish, as was the case in Canada, an express obligation to negotiate the pro-secession claim in conformity with the principles of democracy, constitutionalism and rule of law, federalism and protection of minorities. That said, if the Parliament of an autonomous community presents an initiative for constitutional reform, Judgement 42/2014 requires the Spanish Parliament to consider it.[907] Although this Judgement did not overrule the earlier jurisprudence, it

[906] See ch. 3.5 below. ARZOZ, X. "Nación minoritaria, principio democrático y reforma constitucional".

[907] In this regard, the Spanish Constitution (Art. 87.2 in conjunction with Art. 166) empowers the parliaments of the autonomous communities to propose constitutional reforms. In Canada, the Supreme Court underlined the importance of the constitutional reform initiative of the provinces and the corollary duty to open constitutional debates. A constitutional amendment initiative backed by

did change the tone and urged the political forces to engage in a kind of constitutional dialogue or deliberation.[908]

In some contrast to Judgement 42/2014, Judgement 259/2015 emanates a kind of *constitutional fundamentalism*. According to the latter, there is no legitimacy beyond legality, there is no democracy outside the Constitution and there is no principle of democracy independent from the principle of constitutionalism. Literally, the Judgement reads: "Without conformity with the Constitution there is no legitimacy to be claimed". For the Court, the primacy of the Constitution protects the principle of democracy, since the Constitution preserves the popular will expressed by the *pouvoir constituant*. Certainly, in normal political times, law and democracy would be two sides of the same coin. Nevertheless, it seems exaggerated and excessive to consider that there is no legitimacy beyond legality. Legality is indeed an important source of legitimacy, but not the only one. Morality, democracy, outcomes and traditions may be sources of legitimacy as well. In fact, history offers many examples that draw a distinction between legality and legitimacy, since not all laws and legal orders have been legitimate. In liberal-democratic contexts, however, legitimacy and legality (and, in particular, democracy and constitutionalism) are and ought to be difficult to separate.

The harmonious interplay between legitimacy and legality is captured better by the Quebec Secession Reference. Judgement 42/2014 claims to follow it, whereas Judgement 259/2015 made no mention of it. In the wording of the Supreme Court of Canada, the Constitution cannot be understood or used as a *straitjacket.* There is a duty to negotiate when a clear majority of citizens of one of the nationalities that make up the State clearly express their will to become independent. If the State neglects this obligation of principled negotiation, it fuels unilateral routes.[909] The Canadian Supreme Court not only seemed to accept other sources of legitimacy beyond legality, but also tried to integrate some of these other sources within

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the force of the principle of democracy would generate an obligation to negotiate. See *Reference re Secession of Quebec*, par. 69.

[908] See BOSSACOMA, P.; LÓPEZ, H. "The Secession of Catalonia".

[909] However, unilateral routes require more clear and persistent democratic mobilization. See ch. 3.5 and § 3.7.1 below.

Canadian Constitutional law and to interpret this law in accordance with other sources such as democratic legitimacy.

The last issue to be discussed before closing this section concerns the presumption of constitutionality statutes and resolutions of democratic parliaments normally enjoy. In particular, this presumption related to political resolutions could extend further than in the case of statutes, since statutes can generally endanger the primacy of the Constitution more than ordinary politically driven resolutions. The less crucial, real and specific the legal effects of resolutions driving political action are, the higher the level of tolerance courts of justice could show. Somehow, when moving away from legal effects understood as consequences that concern law, political representatives may have more leeway. In this regard, for the Spanish Constitutional Court, the mere formulation of a statement contrary to the Constitution does not constitute the direct object of its jurisdiction if it has no legal effects.

According to Judgement 259/2015, the 2015 Resolution endorses not an ordinary unconstitutionality, but an express denial of the binding force of the Constitution against which a new repository of sovereignty and of constituent power is being opposed. “A clear denial of the current constitutional order”, highlights the Court. This entailed a significant constitutional effect as regards future related provisions and resolutions: the loss of the presumption of their constitutionality. This loss would be seen in the subjective aspect of the presumption, insofar as, in future resolutions and acts related to this Resolution, it could no longer be said that the Parliament of Catalonia intended to operate within the Spanish constitutional framework. For the Constitutional Court, the Parliament had put itself outside it. Moreover, since Judgement 259/2015, unlike Judgement 42/2014, considered the entire Resolution unconstitutional, it made it easier to contaminate further related resolutions and acts. In sum, finding the whole Resolution exceptionally unconstitutional helped to expand the contamination effects on future laws and decisions of the Parliament of Catalonia and to diminish their presumption of constitutionality.

3.4. Referendum democracy and secession

3.4.1. Significance and problems of the referendum

The ideal democratic procedure would combine the will of the representatives with endorsement by a majority of citizens. The referendum could be either to trigger the secession process or to ratify it (or even two referendums could be held, one for each of these two functions and stages). In contemporary liberal democracies, there are three types of democratic decisions which are often triggered, supported or ratified by referendum: (1) approval and amendment of the constitution, (2) major decisions on the territorial organization of the State and (3) entry into, major changes to or exit from international organizations. All of them are close to the topic of secession.[910]

Comparison of today's liberal democracies points to the conclusion that direct participation by citizens in significant constitutional decisions is usually *complementary*, not *substitutive* of the position and responsibility of representatives. Direct participation is not *exceptional* in the sense of being uncommon or unaccepted, but it may be exceptional as opposed to *frequent*, since ordinary constitutional issues are usually decided by representatives – and it seems wise to keep it that way. The more irreversible the political decision is, the more appropriate it is to back up the representatives' decision with a referendum. It is important to see referendums as part of, and not apart from, representative democracy. In other words, referendums should not be conceived as an institution of direct democracy independent from representative democracy, but an instrument for direct participation by citizens to bring representatives and the represented closer together.[911]

Even if minority nations such as Quebec, Scotland or Catalonia have no international right to external self-determination, the international principle of self-determination of peoples should guide secession processes. In this regard,

[910] See CASTELLÀ ANDREU, J.M. "Democracia, reforma constitucional y referéndum…", p. 179. BOSSACOMA, P. *Secesión e integración…*, § 4. DUNSMUIR, M. "Referendums", pp. 29-32. Spain, in particular, has examples of all three of these types of referendum decision.
[911] TIERNEY, S. *Constitutional Referendums*, p. 299. LUCIANI, M. "Il referendum", p. 158 *et seq*. BOSSACOMA, P. "Competències…", pp. 244-5.

referendums are more common and recommended to exercise the international right to external self-determination of colonized territories than representative mechanisms.[912] This sidelining of representation in a colonial context can be explained because colonized territories often had no institutionalized and consolidated systems for democratic representation. Moreover, in those territories, it might be easier to corrupt, coerce or manipulate the representatives than the whole voting population. In liberal-democratic contexts, although a referendum is important to legitimize transcendental decisions such as secession, it should go hand in hand with the will of the democratic representatives. Whenever possible, the decision to secede by the sub-State unit ought to bring together democratic majorities expressed by both representation and by people's direct participation. The problems with referendums in general and with secession referendums in particular that will be discussed add strength to the need for this concurrence.

Regarding secession referendums, a group of Catalan experts wrote that "the direct decision of the people must prevail over that of the political institutions, because the former is closer to the source of sovereignty than the latter".[913] Although these experts believe that this is one of the basic ideas behind the Quebec Secession Reference, a clear majority in the referendum would give rise to an obligation to negotiate via representatives and a constitutional amendment would be necessary to enact secession, according to the Canadian Supreme Court. Binding referendums, in general, may stand in tension with parliamentary systems and, more specifically, with the doctrine of parliamentary sovereignty and the principle according to which Parliament cannot bind itself.[914] In contrast to a relationship based on prevalence or substitution, this book considers secession referendums as an appropriate complement to the democratic representatives' decision. As liberal democracy ought to prevent the tyranny of the majority, referendums must not always have the

[912] See § 2.1.3 above.
[913] VIVER, C.; *et al.* "The consultation…", § 7.1.1.
[914] MONAHAN, P.J.; BRYANT, M.J. *Coming to Terms…*, pp. 14-9. The House of Lords Select Committee on the Constitution, in its 2010 report on *Referendums in the United Kingdom*, considered that referendums cannot be legally binding in the UK because of the sovereignty of Parliament (par. 197). The High Court of England and Wales Judgement *Miller v. Secretary of State for Exiting the EU* reads as follows (par. 106): "the basic constitutional principles of parliamentary sovereignty and representative parliamentary democracy which apply in the United Kingdom, which lead to the conclusion that a referendum on any topic can only be advisory for the lawmakers in Parliament unless very clear language to the contrary is used in the referendum legislation in question."

last word. Referendums, as a mechanism within representative democracy, should neither substitute nor prevail over other *checks and balances* of liberal democracy.

Referendum democracy tends to be majoritarian and competitive, whereas representative democracy facilitates deliberation and compromise.[915] While a referendum is a more appropriate instrument for *demos-cracy*, representation is more suited for *demoi-cracy*.[916] Democracy in multinational States seems to work better when it is reserved for political elites, since they are often more inclined to negotiation and agreement.[917] Popular democracy tends to be more passionate, unsophisticated and turbulent, whereas elite democracy can be more unemotional, refined and compromising. In addition, while representative democracy places responsibilities on the governors, referendum democracy can serve for governors to avoid responsibilities or even make them irresponsible.[918] The optimum level of democracy does not always correspond to the maximum level of democracy. In the final analysis, although referendums may not be appropriate instruments to regulate cohabitation between nations, there is a growing consensus that they are required to break multinational cohabitation.

The same Catalan experts add that "the exceptional nature of a direct pronouncement by the people in this system is precisely what strengthens the primacy it must be given over the ordinary actions of the representative institutions".[919] Instead of supporting referendums as a form of direct democracy, this book defends them as an instrument for direct participation by citizens to bring representatives and constituents closer together, rooted in the framework of representative liberal democracy.[920] Referendums, understood within this framework, should tend to respect the rule of law, division of powers, fundamental rights, and so on. Generally, referendums are not a direct expression of sovereignty

[915] Since deliberative democracy "is meant to combine political accountability with a high degree of reflectiveness and a general commitment to reason-giving", Sunstein believes that constitutional structures should seek to create a genuine republic, neither a direct democracy nor a government run on the basis of popular referendums. SUNSTEIN, C.R. *Designing Democracy*, pp. 6-7.
[916] See BOSSACOMA, P. *Sovereignty in Europe*, § 7.
[917] See MOORE, M. *The Ethics of Nationalism*, pp. 95-6.
[918] "The plebiscite puts an end to the citizen's right to vote, to choose and to control their government". ARENDT, H. *On Revolution*, p. 220.
[919] VIVER, C.; *et al*. "The consultation…", § 7.1.1.
[920] BOSSACOMA, P. "Competències…", pp. 244-5.

but, in order to express sovereignty, ought to embrace representative democracy. Quite often the establishment of new *demoi* and the passing or amending of liberal-democratic constitutions are not the result of isolated referendum democracy but of concurrence of the wills of the representatives and of the citizens. If referendums prevailed over the will of the democratic representatives because the former is closer to the source of sovereignty, such a doctrine would be an obstacle to division and separation of powers and judicial review in particular. In liberal democracies, however, decisions taken by referendum are often checked by political or judicial authorities.

This concurrence and these checks are necessary since referendums on secession, like other referendums, might pose many problems: (1) the lack of information, time, capacity, competence, experience and technical expertise on the part of ordinary citizens compared to the elected representatives and governors; (2) possible manipulation by the elites; (3) misuse by the government to disempower parliament or opposition forces; (4) the undermining of representatives and representative democracy in general; (5) the possibility that voters do not really answer the actual question but express their opinion on other connected, surrounding or more general issues; (6) the usual presentation as a dichotomy and without nuances of a complex and inter-dependent political reality; (7) the non-holistic approach to politics and law; (8) the over-simplistic demonstration of political pluralism; (9) the danger for minorities of confrontation with the majority in the form of competitive democracy, instead of deeper deliberation, compromise and judicial review; (10) the promotion of division and polarization of the society; (11) the high economic costs of holding a referendum properly combined with the fact that it might not settle the issue in question; (12) the excessive use of public or private funding in favour of one of the options; (13) the possibility of the media informing with bias and excessively defending one of the options; (14) the clarity of the question; (15) the turn-out and approval quorums; (16) the territorial scope of the consultation; (17) the timing and effects of the referendum, among others.[921]

[921] See TIERNEY, S. *Constitutional Referendums*, pp. 19-42. DUNSMUIR, M. "Referendums", pp. 1-12. SELECT COMMITTEE ON THE CONSTITUTION, *Referendums in the United Kingdom*, pp. 16-20.

The next sections will take a closer look at some of these points in relation to secession referendums. Despite the abovementioned intrinsic legal and political problems with referendums, proper legal regulation and political practice should be able to overcome these objections to a large extent. Secession referendums are a form of constitutional referendum that put us in the sphere of a new constituent power and their exceptional nature turns them into a genuine referendum which, to a certain degree, can sweep away the criticisms set out above, among other reasons because: the time, information, interest, deliberation and expertise on the part of citizens are increasing; the criticism concerning the non-holistic approach to politics and law is no longer so powerful; and the constituent power, from a republican perspective, is closely linked to popular sovereignty and to the need for consulting citizens.[922] Yet, ultimately, the democratic representatives will have to debate, negotiate and implement the decision emerging from the secession referendum. Therefore, close harmony between the will for secession conveyed through the referendum and through the representatives is needed.

3.4.2. The clarity of the question

This section will defend that the objectives in the wording of a clear question should be *intelligibility*, *conciseness*, *simplicity*, *vernacularity*, *straightforwardness*, *neutrality* and *legal correctness*. These requirements can be understood as follows: *Intelligibility* aims to avoid ambiguity and reduce vagueness. *Conciseness* means using as few words as possible. *Simplicity* seeks plain language by avoiding lexical and syntactic complexity. *Vernacularity* reflects regional ways of speaking and of understanding terms. In multinational or multilingual contexts, vernacularity includes formulating the question in several languages or dialects. *Straightforwardness* refers to the objective of formulating a question which is as direct as possible (avoiding circumlocution). *Neutrality* means trying to avoid ideological bias in the question and in the answer, while not favouring one response over the other. *Legal correctness* aims to find a technical wording compatible with the current legal order.

[922] TIERNEY, S. *Constitutional Referendums*.

The relationship between these requirements may not be harmonious but dialectical. Three tensions can appear: (1) Between clarity, understood as intelligibility, conciseness, simplicity or straightforwardness, and the technical or legal correctness and the sophistication of the question aiming to comply with the principle of constitutionalism and the rule of law. (2) Between clarity and the radicalism of the question, the latter in the sense of asking without nuances or qualifications about secession. Although a radical question on secession often favours clarity, lack of radicalism does not necessarily imply lack of clarity but affects the obligation to negotiate secession and the legitimacy of unilateral secession. (3) Between clarity and agreements concerning the question. Although a certain degree of clarity can be sacrificed in order to increase the degree of consensus between factions, not all agreements deserve similar sacrifices. Transversal compromise between secessionist and unionist factions may legitimize bigger losses of clarity than agreements within one of these two groups of factions. Transversal agreements between secessionists and unionists are nonetheless expected to endorse the requirements of clarity defended in this section.

The requirement of putting a clear question to citizens was emphasized in the 1998 Quebec Secession Reference. According to this celebrated advisory opinion, from the balancing of four fundamental principles of the Canadian Constitution (democracy, constitutionalism and the rule of law, federalism and protection of minorities) arises an obligation for the Federation and its components to negotiate if a "clear majority" of Quebecers express their will to secede in reply to a "clear question". Setting out from these four principles, the Supreme Court of Canada gave a Solomonic opinion which developed a deliberative conception of democracy, constitutionalism, federalism and secession. Implicitly, the Supreme Court objected the clarity of the questions in the 1980 and 1995 Quebec sovereignty referendums. In 1980 the question was long and complex, included a mandate to negotiate a political association agreement and remained subject to a further referendum.[923] The

[923] "The Government of Quebec has made public its proposal to negotiate a new agreement with the rest of Canada, based on the equality of nations; this agreement would enable Quebec to acquire the exclusive power to make its laws, levy its taxes and establish relations abroad — in other words, sovereignty — and at the same time to maintain with Canada an economic association including a common currency; any change in political status resulting from these negotiations will only be implemented with popular approval through another referendum; on these terms, do you give the

1995 question was briefer and apparently simpler, but contained a reference to another text and a vague combination of the terms "sovereignty" and "partnership".[924] Both words were intended to condense the offer of confederal association made in the 1980 question. Even if not expressly stated in the 1995 question, it seemed that, if the negotiations were not successful, the *Belle Province* would have declared its independence unilaterally. In this context, the bill referred to in the 1995 question was a long text that prepared the ground for a unilateral proclamation of sovereignty if the Canadian Federation denied the "partnership".[925]

According to the Supreme Court, Quebec holds no unilateral right to secede but if, in reply to a clear question, a clear majority of Quebecers were to favour independence, the Canadian Federation would be forced to negotiate this democratically expressed desire. Nonetheless, the Court considered that the clear majority and clear question are political issues and, thus, to be determined politically.[926] In the light of the Reference, the Parliament of Canada passed, on 29 June 2000, an Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference, commonly known as the *Clarity Act*. Under this Act, if the question or the majority are not clear, no negotiations will be entered into with the province seeking secession. The same Act stipulates that the federal Parliament has the power to decide whether the question put in the referendum and the majority in favour of secession are clear. If this Parliament rejects the question for lack of clarity, the Act excludes the duty to negotiate secession.

Government of Quebec the mandate to negotiate the proposed agreement between Quebec and Canada?"

[924] "Do you agree that Quebec should become sovereign after having made a formal offer to Canada for a new economic and political partnership within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995?"

[925] DUMBERRY, P. "Lessons learned from *Quebec Secession Reference* before the Supreme Court of Canada" in KOHEN, M.G. (ed.) *Secession. International Law Perspectives*, p. 420. NORMAN, W. *Negotiating Nationalism*, pp. 192-3. MONAHAN, P.J.; BRYANT, M.J. *Coming to Terms…*, pp. 8, 22-3. See Section 26 of the bill referred to in the 1995 question (Bill 1, An Act Respecting the Future of Quebec, 1995). On declarations of sovereignty, see § 3.3.2 above.

[926] *Reference re Secession of Quebec*, par. 100: "A right and a corresponding duty to negotiate secession cannot be built on an alleged expression of democratic will if the expression of democratic will is itself fraught with ambiguities. Only the political actors would have the information and expertise to make the appropriate judgement as to the point at which, and the circumstances in which, those ambiguities are resolved one way or the other."

The Clarity Act establishes the requirement of asking directly whether the province should cease to be part of Canada, with no nuances that could obscure the direct expression of the will to secede (such as an economic and political partnership with Canada).[927] If this requirement is not met, no duty to negotiate independence on the part of the Federation will emerge. Implicitly, the Clarity Act warns that this duty would not arise from questions such as those of 1980 and 1995. Some criticized, however, that this federal statute mixes and confuses the clarity and the radicalism of the question.[928] Beyond the question of whether a referendum that directly formulated an authorization to secede would have been illegal under the Federal Constitution, political expediency could be one of the reasons for requiring a radical question on secession, since statistics indicated that the more radically secessionist the question was, the less support it obtained from Quebecers.[929] Conversely, the vaguer the question about sovereignty for Quebec, the more support it received. That is to say, many Quebecers desired no radical break with Canada, but wanted more sovereign powers within a looser multinational (con)federation.

This requirement of a radical question on the pretext of clarity also featured in the UK debate. Also in Scotland the more drastic independence was pictured, the less popular support it attracted.[930] The Scottish Government had devised a strategy for a consultation built around a *light independence* and a *full devolution*, while the British Government wanted a single question with the most straightforwardness on secession and the shortest timespan possible. In the Edinburgh Agreement of 2012, the British and Scottish governments decided that Westminster would transfer the legislative powers to Holyrood, on condition that it formulated a single question within two years.[931] Under the same Agreement, the question would focus on independence and would be direct and simple. The Scottish Government and Parliament would decide the wording of the question under the advice of the Electoral Commission, an independent body linked to the UK Parliament. Among others, two wordings were discussed:

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[927] Section 1(3-4) of the Clarity Act.
[928] TAILLON, P. *Le référendum…*, pp. 200-1.
[929] See TIERNEY, S. *Constitutional Referendums*, p. 143.
[930] See KEATING, M. *The Independence of Scotland*, pp. 72-3.
[931] *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*, Edinburgh, 15 October 2012.

> "Do you agree that Scotland should be an independent country?"
>
> "Should Scotland be an independent country?"

The first question was proposed by the Scottish Government, the second by the Electoral Commission.[932] The latter was accepted by the Scottish Government, then included in Section 1(2) of the Scottish Independence Referendum Act 2013 and, finally, put to the Scottish population on 18 September 2014. Before the Edinburgh Agreement, however, the Scottish Government had intended to ask a dual question.[933] The terms used in the debate about the dual question on sovereignty for Scotland were "independence-lite" and "devolution max".[934] The procedure for putting more than one question was discussed: a single ballot paper with various options (putting 1 next to the preferred option and 2 next to the second preference) or a different ballot paper for each question (with a simple yes or no answer to each). The Scottish Government opted for the latter, since it simplified voting and the count. Following this method, what would happen in the event of a double yes (that is, a majority of yeses to both the first and second questions)? According to the Scottish Government, a yes to both questions would have empowered it to negotiate independence.[935] Nevertheless, this would have been questionable if the majority in favour of full devolution had been significantly higher than that in favour of light independence.

This problem arose in Catalonia on 9 November 2014 when the population was asked:[936]

> "Do you want Catalonia to become a State? In case of an affirmative response, do you want this State to be independent?"

These chained questions put at risk the objectives of *conciseness, simplicity and straightforwardness*. Moreover, to refer to a State without any adjectives moves too far away from the requirement of *intelligibility*, since it introduces ambiguity and

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[932] See *Referendum on independence for Scotland. Advice of the Electoral Commission on the proposed referendum question.*
[933] See *Your Scotland, Your Referendum*. 2012.
[934] See KEATING, M. "Rethinking sovereignty", pp. 9-28.
[935] See *Scotland's Future: Draft Referendum (Scotland) Bill Consultation Paper*. 2010, ch. 1.
[936] The wording of the consultation was agreed at the end of 2013 by the leaders of four sovereigntist political parties represented in the Parliament of Catalonia at the time. For more on this consultation, see BOSSACOMA, P.; LÓPEZ, H. "The Secession of Catalonia".

fails to minimize vagueness. State without any adjectives could mean independent, confederate or federate State. What is more, it is inappropriate to force pro-secession electors to vote in favour of the first question if they wish to vote yes to the second.[937] Forcing them to vote yes to the first raises question marks over the *neutrality* of the consultation because it is excessively biased towards an affirmative answer to the first question. This apparently minor issue can create a significant problem of political legitimacy. Since there would necessarily be more supporters of the first question than of the second, bearing in mind the rise of more consensual forms of democracy, the option in favour of an independent State comes off badly.[938]

Some scholars defend referendums with multiple options in order fully to satisfy the principle of self-determination of peoples.[939] In Catalonia, a multi-option referendum could propose: (1) an independent State, (2) a confederate State, (3) a federate State, (4) an autonomous community and (5) a non-self-governing territory. However, multi-option referendums are problematic, since the most voted option might easily be below half plus one of the electorate. If so, another referendum (second round) should be held between the two most voted options only.[940] Without this second round, the final result would be closer to an opinion poll than to a

[937] It is likely and reasonable that a convinced pro-independence voter would not wish to be counted in the group of supporters of a State without any adjectives.

[938] Let us analyse the following hypothetical case: what should the Government and Parliament of Catalonia do if 75% of Catalans voted yes to the first question and 55% to the second? In this hypothetical, but possible scenario (in a legal consultation in which parties and voters opposed to independence would have taken part), would the Catalan political representatives have to opt for an *independent State* if this option clearly secured less support than a *State*? A quick answer could be: yes, they should opt for an independent State since the other paths are closed. The reply would be: and if the representatives know that the other ways are closed, why do they ask? Why do they make citizens waste their time or why do they deceive citizens with questions that are out of their control or that they know are unfeasible? If, despite all that, the Catalan representatives still ask the question, they must bear the consequences and keep on trying to convince Madrid for many more years (or legislative terms). Despite compromise being difficult to achieve, the penchant for consensus is a Catalan, Spanish and European growing conviction. In recent years, western democracies have been tending to identify themselves more and more with consensual democracies at the expense of simple majoritarian democracy. On fundamental (constitutional and constituent) decisions in particular, a broad consensus is usually needed. For instance, a majority of two-thirds of the Parliament of Catalonia to approve a proposal to amend the Statute of Autonomy.

[939] Among others, CASSESE, A. *Self-Determination of Peoples*, p. 263.

[940] Puerto Rico case proves that multi-option referendums raise problems. Newfoundland and Labrador referendums of 1948 and 1949 point out that a second round may work. See CASTELLÀ ANDREU, J.M. "Democracia, reforma constitucional y referéndum…", p. 182. SERRANO, I.; LÓPEZ, J.; VERGÉS, J. *Who is entitled to vote?*, pp. 11-4.

referendum.[941] Although successive or chained options referendums are presented as solutions to this problem of multi-option referendums, their success is not certain and they too engender relevant problems.

British and Canadian unionists alike believe that the radicalism of the question comes at the expense of support for the Scottish and Quebec sovereignty options respectively. It might not be desirable, however, to require western secessionist movements to support full sovereignty and independence at a time when these ideas are increasingly more relative because of federalism, supranational integration and globalization.[942] In the 21st century, sovereignty and independence may not require a complete break of relations, but could lean more towards a peer-to-peer relationship between the parent State and its minority nations, and grant the latter certain international status in particular within larger political unions such as the EU.[943] Sovereigntist demands in Western Europe and North America are often about some sort of shared sovereignty, such as partnership (in Quebec), independence-lite and devolution max (in Scotland), free association (in the Basque Country) and confederation (in Catalonia). In this light, some reject the need to limit secession by referendum to either radical independence or continuation of the parent State. Instead, a question that would allow a political agreement beyond full sovereignty and independence could give a better reflection of the will of these minority nations and, more generally, of the current trend to distribute political authority and powers.[944]

The terms *sovereignty* and *independence* are not crystal clear. Bodin, Blackstone, Hobbes, Rousseau and Dicey, amongst other classic legal and political theorists, understood sovereignty as absolute, independent and indivisible power. In this regard, Rousseau wrote that "the sovereign authority is one and simple, and cannot be divided without being destroyed".[945] If sovereignty as such ever really existed at

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[941] VIVER, C. *et al*. "The consultation…", § 6.1.2.
[942] See BOSSACOMA, P. *Sovereignty in Europe*, §§ 1-3.
[943] KEATING, M. "Rethinking sovereignty", pp. 9-28.
[944] CONNOLLY, C. "Independence in Europe …", p. 102.
[945] ROUSSEAU *The Social Contract*, book III, ch. XIII. Beyond the common ground mentioned, it must be added that the sovereign and sovereignty of these authors differ. For example, Blackstone assigned full sovereignty to the monarch, whereas Dicey to the Crown in Parliament. See DICEY, A.V. *Introduction to… the Law of the Constitution*, pp. 1-35. According to Hobbes, sovereignty could lie in the hands of an individual or an assembly. See HOBBES *Leviathan*, ch. XXVI.

some time in history; in the 21st century it is more qualified, relative, diffuse, divisible, shareable and transferable.[946] Terms using the prefix *post* have been proposed to grasp the present-day nature of sovereignty, such as post-sovereignty, post-Westphalian sovereignty, post-modern sovereignty and post-national sovereignty. Adjectives such as *soft*, *liquid* and *light* have also been linked to the terms sovereignty and independence. Similarly, *interdependence* or *mutual dependence* have been used to object to or to nuance (full) independence. In this vein, some denied the existence of substantial differences between the Scottish terms of *independence-lite* and *devolution max.*[947] In contrast, the British Government connected independence with sovereignty and devolution with autonomy.[948]

From a more practical point of view, the Scottish technique of the dual question is ingenious because it avoids the confusion between clarity and radicalism. It is a way of finding out whether the majority of citizens really prefer independence under international law or greater political autonomy under British law. It differentiates clarity from radicalism while it gives a wider margin of choice for voters. However, this technique is also open to some objections: would a duty to negotiate arise for the parent State if a majority of citizens come out in favour of greater autonomy or devolution? What kind of duty would this be? Here a distinction must be drawn between external and internal self-determination. As argued in a later chapter, the moral right to secede can be invoked and exercised more unilaterally than the moral right to autonomy.[949] In other words, internal self-determination requires greater consensus and compromise among the relevant parties than external self-determination. Therefore, it seems reasonable to recognize a minimum duty to negotiate if a majority of the citizens of Quebec or Scotland answer affirmatively to a question on greater sovereignty or devolution, but this duty would be neither powerful enough nor a proper popular mandate to negotiate secession. If such

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[946] See BOSSACOMA, P. *Sovereignty in Europe*, § 1. On the historical evolution of the idea of sovereignty, see HINSLEY, F.H. *Sovereignty.* FOSSAS, E. (dir.) *Les transformacions de la sobirania….*

[947] KEATING, M. "Rethinking sovereignty", pp. 11-4.

[948] *Scotland analysis: Devolution and the implications of Scottish independence*, 2013, par. 2.31 *et seq*. Beyond sovereignty under constitutional law, sovereignty under international law is important, the latter being closely attached to independent statehood, international subjectivity and status to represent the Scottish territory and population.

[949] See ch. 3.6 below.

negotiation fails, another clear mandate from the people would be required to legitimize secession, especially unilateral secession.

This leads us to the tension between clarity and agreement on the question. Agreeing the question between opposing factions could be a good reason to sacrifice a certain degree of clarity, especially when the agreement is between secessionists and unionists. In general, negotiating and agreeing issues regarding secession should ease many of the debates and controversies raised in this book. That is to say, unilateral decisions, such as the wording of the referendum question, make problems much more serious. In a certain context, a *prima facie* unclear question can be clarified thanks to the agreement between opposing factions. For example, expressions such as "partnership" or "light independence" could be clarified in a political or legal agreement by specifying the meaning and content of such terms. With this sort of agreement, voters can then make more informed and meaningful choices. Therefore, the lack of a radical or straightforward question on secession can and should be addressed by prior and subsequent negotiation and agreement.

Basque statute 9/2008 provided for a consultative referendum on the following questions:[950]

> "a) Do you agree to supporting a process of dialogued end to the violence, if ETA declares unmistakably their will to end it once and for all?
> b) Do you agree that the Basque parties, without exceptions, start a process of negotiation to reach a democratic agreement about the right to decide of the Basque People, and that the aforementioned agreement will be submitted to referendum before the end of the year 2010?"

In this case, the dual question technique is opposed to clarity. This double-question is not clear in the sense of being concise and simple. What is more, the first question about an end to the violence of the Basque terrorist group ETA clouds democratic public deliberation about the Basque *demos* and the territorial organization it desires and clashes with the objective of neutrality. In addition, the reference to the "right to decide" in the second question fails to fulfil the clarity requirements of intelligibility and straightforwardness. This notion seems to be a way of avoiding the classical

[950] This statute was framed within the so-called Ibarretxe Plans, which will be discussed in ch. 3.5.

debate about self-determination of peoples. The idea of "right to decide" can be criticized for being: (1) etymologically *redundant*, since the right to self-determination means the right to decide for oneself; (2) *insincere*, since the Basque, like the Catalan, pro-independence movement did not seem to invoke a general right to secede for any political subject, but claimed it by virtue of its status as a national community; (3) *opportunistic*, since it is not submitted to a public and frank debate against the normative theories which are more restrictive about self-determination of peoples; (4) *superfluous*, since even if it managed to convince local public opinion, it would hardly succeed in convincing circles of power and of thought in Spain and abroad.[951]

One of the reasons for this lack of clarity was to avoid the constitutional provisions and principles that could impede the consultation. Nevertheless, Constitutional Court Judgement 103/2008 considered it an unconstitutional referendum on competence, material and procedural grounds. The Court ruled against consulting the citizens (by referendums called either by the central State or by the autonomous communities) on questions on the possibility of starting a constitutional amending process or on which a yes vote would require an amendment of the Constitution. The reasoning behind Judgement 103/2008 seems to be that, since the constitutional reform procedure requires a ratification referendum at the end, holding a referendum before starting the procedure could affect the final result.[952] In other words, the order of the factors may change the product in the case of revising the Constitution. Even if one accepts this as a general doctrine, a secession referendum should be accepted as a reasonable exception. It could be absurd to start a very rigid

[951] See §§ 1.2.6 and 3.3.2 above. On the evolution from the more traditional claim to national self-determination to a quite ambiguous democratic self-determination based on the so-called "right to decide", see BOSSACOMA, P.; LÓPEZ, H. "The Secession of Catalonia".

[952] Judgement 103/2008 argues as follows: "The question proposed to be put to a consultation of the citizens of the autonomous community of the Basque Country affects (…) the basis of the current constitutional order (insofar as it involves reconsideration of the identity and unity of the sovereign subject or, at the very least, of the relation which only its will can establish between the State and the autonomous communities) and therefore can be put to popular consultation only via a referendum on constitutional reform. It is a matter reserved for the institutional procedure under Article 168 of the Spanish Constitution. The issue which concerns us here cannot be raised as a question based merely on the non-binding opinion of the electorate of the Basque Country, since it affects fundamental matters resolved by the constituent process and are therefore removed from the decision of the constituted powers. Respect for the Constitution requires that proposals for revision of the constituted order, especially those affecting the foundation of the identity of the sole holder of sovereignty, be materialized openly and directly in the way that the Constitution has provided for such purposes."

constitutional reform to constitutionalize a secession (or a right to secede) without having previously consulted whether a majority of the citizens concentrated in part of the State want to become independent.[953]

The Law on the Referendum on the State Legal Status of the Republic of Montenegro set the question:

> "Do you want the Republic of Montenegro to be an independent state with full international and legal personality?"

According to the Venice Commission, this was a clear question, since it was not ambiguous, obscure or misleading.[954] For the OSCE Referendum Observation Mission too, it was a clear question which allowed all the voters to express their choice without ambiguity.[955] However, in the Catalan and Basque cases, the dialectical relationship between *intelligibility*, *conciseness*, *simplicity*, *vernacularity*, *straightforwardness*, *neutrality* and *legal correctness* is tragic, since it is almost impossible to find a wording that would comply with the abovementioned case law. Beyond *legal correctness*, let us now focus on a question that fulfils the rest of the requirements:

> "Do you want Catalonia to be an independent State (from Spain)?"[956]

The term State is preferred to country (as *país*), since the former is a more technical term to refer to a legal and political structure, while the latter is less formal and, at least in some parts of Europe, much vaguer as it is used to refer to regions or even smaller geographic areas as well as to cultural and historical realities (as *Països Catalans*). Still, even the term State needs to be qualified as "independent" to avoid referring to a federate or confederate State.[957] Independence may be preferred to the more technical concept of secession and to the vaguer notion of sovereignty. The

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[953] See ch. 3.5 below.
[954] See *Opinion on the Compatibility of the Existing Legislation in Montenegro Concerning the Organization of Referendums with Applicable International Standards*, 2005, par. 15.
[955] See *Republic of Montenegro. Referendum on State-Status*. 21 May 2006. Final Report, § IV-B.
[956] This question is similar to the one in the unconstitutional referendum of 1 October 2017, which was: "Do you want Catalonia to be an independent State in the form of a republic?" (Art. 4.2 of the 2017 Self-Determination Referendum Act). Asking about the form of this State introduced another topic that should not have been asked in the same question (perhaps not even in the same referendum). It was, however, a political strategy to encourage non-monarchist electors (basically leftists) to vote for independence.
[957] See VIVER, C. *et al.* "The consultation…", §§ 6.1.2, 7.4.

parenthesis “(from Spain)”, even if dispensable, may be added to draw a distinction between independence from Spain and independence from supranational or international organizations. However, the wording “Do you want...” also raises certain objections: “Do you want...” might appeal excessively to personal interests, instead of subjective convictions thinking in reasonable terms of the general interest. An additional problem with “Do you want ...” is whether it appeals excessively to a utopian desire in a similar way to “Do you wish…”. Another option could be to follow the Scottish referendum:

> “Should Catalonia be an independent State (from Spain)?”
> “Do you agree that Catalonia should be an independent State (from Spain)?”

This set of questions appeals less to private interests, but gives priority to a public conception of what is correct. Yet, maybe the answer sought from citizens is not what is correct, but what suits them best? True cosmopolitans might consider it (more) correct that States become *non-national*. They could answer affirmatively the question “Do you want...” but negatively “Should/Do you agree...”. To complicate matters further, while some might want (or prefer) an independent Catalonia, they could also believe (or consider) that both an independent Catalonia and an autonomous Catalonia, whether federal or confederate, are all correct options. In this regard, it would seem more appropriate to ask Catalans what they want (“Do you want...”). However, could the democratically best option or the option preferred by Catalans not be the correct one? The correct option (“Should...”) would entail taking greater account of the legitimate interests of Spanish citizens as a whole than the preferred option (“Do you want...). “Should...” might introduce excessive vagueness compared with “Do you want...”. Some may believe that Catalonia should be an independent State if Spanish law allowed it, if it were consensual, if Catalonia remained in the EU, etc. For these reasons, the question “Should Catalonia...” would probably be taken less seriously by Spanish and international players than “Do you want...”.

In sum, all the options just discussed are problematic. Hence, in addition to seeking less vagueness in favour of greater clarity, a balance should be struck between excessive appeals to: (1) personal interests, (2) conceptions of what is correct and

(3) non-realistic utopia.[958] Therefore, the wording chosen should appeal to *(minimally) realistic subjective preferences based on public reasons*.

In addition to the tension between clarity and radicalism, the question formulated will often suffer from another tension difficult to overcome: if it is direct, brief and simple, it will often be vaguer, will hardly capture the complexity of the issue and, in the case of the Spanish order, will easily fall into unconstitutionality. A more elaborate, sophisticated and technical question would not be on the same level as the citizens' debate, while at the same time clouding the clarity of the question. In this respect, since the Statute of Autonomy of Catalonia limits the consultation powers of the Catalan Government to the "scope of its competences" and the Spanish Constitution empowers the autonomous communities to submit proposals for constitutional reform, a question along the following lines might be formulated:

> "Do you want the Government and Parliament of Catalonia to take the necessary initiatives for Catalonia to become an independent State (from Spain)?"
>
> "Should the Government and Parliament of Catalonia take the necessary initiatives for Catalonia to become an independent State (from Spain)?"

In general, it seems acceptable to sacrifice a certain degree of clarity in order to word a question in conformity with internal law. In particular, a question referring to "the necessary initiatives" would lead the Catalan Government and Parliament to channel the secession process via constitutional reform. Nonetheless, if in response to a yes majority a reasonable agreement on constitutional reform turned out to be unreachable, this could be considered a failure to principled negotiation and then open the door to alternative roads. The obligation to "take the necessary initiatives" seems broad enough to do without amending the constitution if the minority nation patiently negotiates and the parent State refuses to do so in good faith.

The positive or negative direction of the question is another issue worth mentioning. In all the questions discussed up until now, the independence option gives a yes

[958] Although some could argue that we should not worry about voters answering non-realistically, the question should put the citizens in a position to make a choice as if the political course of the country were in their hands. The wording ought to make them answer as if they were the democratic representatives who have to choose which path is the most correct and appropriate for Catalonia in the short to medium term as things stand. They are not to be asked about their ideal or utopian solution, but about how they would respond here and now if the country's decision were left to them.

answer. It seems counter-intuitive to formulate a question to which the independence option has to answer *no*. For example:

> "Do you want Catalonia to continue to be part of Spain?"

There are several ways of defending the intuition that the affirmative answer should correspond to the independence option, beyond the fact that compared experiences show that the pro-independence answer tends to be *yes* and rarely, if ever, has been *no*. The option that involves a change usually equals *yes*. Thus, a question about continuing to be part of Spain makes little sense, not only because the affirmative answer would mean inaction, but also because it would not exactly correspond to the new political proposal defended by the Government and Parliament of Catalonia. In line with the idea that a constituent and constitutional matter such as the creation of a new State needs a harmonious combination of consultation and representation, democratic representatives would ask for people's support for their pro-secession choice. If a secession referendum is relevant for the establishment of a new sovereign people, the question should ask them if they want to become a new independent State.[959]

Despite all this, if the parent State reasonably complains about the unionist option corresponding to *no* (which might affect the requirement of neutrality), there is a consultation strategy which avoids one of the options corresponding to *yes* and the other to *no*. In the 2011 referendum on independence for South Sudan, the ballot-paper offered two options: "unity" or "secession".[960] In the 2016 Brexit referendum, the alternative answers were to "remain" or "leave" the European Union.[961] Exported to other secession contexts, the ballot-paper could offer "independence" or "unity".[962] This kind of answer seems unlikely to be opposed on grounds of clarity such as *intelligibility*, *conciseness*, *simplicity*, *straightforwardness* and *neutrality*.

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[959] See TIERNEY, S. *Constitutional Referendums*, ch. 3.

[960] See Section 6 of the Southern Sudan Referendum Act 2009. In the ballot-paper, the word "Unity" was represented by a picture showing two joined hands and the word "Secession" by a picture showing the palm of a single hand. The illiteracy of many voters may explain why the options were accompanied by pictures.

[961] Section 1(5) of the European Union Referendum Act 2015.

[962] Words such as "independence" could be preferable to more technical terms like "secession". Drawing inspiration from the method of the UK Electoral Commission, empirical studies putting the question to citizens around the country from diverse economic, social and cultural backgrounds can find out what the words mean to the people.

3.4.3. The clarity of the majority

According to the Supreme Court of Canada, a clear majority of Quebecers in favour of secession, in answer to a clear question, would give birth to a duty of the Federation to negotiate with the province seeking independence.[963] Yet, there is no consensus on the majority necessary to trigger a secession process.[964] The Canadian Clarity Act makes no attempt to define what would be a clear majority in favour of secession and stipulates that the federal Parliament will decide this once the referendum has taken place. In contrast, the Clarity Act does regulate what a clear question would be and establishes that this Parliament will take a position on the clarity of the question before the referendum is held. Thus, the clarity of the majority is left to an excessively broad discretion of central legislature. Instead of bringing light, the Clarity Act obscured the majority needed by subjecting it to *ex post facto* political criteria with no pre-defined legislative parameters.

Stéphane Dion, architect of the Clarity Act, argued that it is inadvisable to regulate the clear majority *ex ante facto* because the circumstances of the specific referendum must be taken into account. To illustrate this, he once asked two questions: What would happen if the federal Parliament decided that a clear majority would be 60% and 59% of Quebecers voted in favour of secession? What would happen if, on the day of the referendum, it snowed heavily and, consequently, the turn-out was low?[965] Dion's position seems to point to a contextual interpretation of a clear majority. Indeed, the geographic, ethnic, linguistic and social distribution of the voting can tell something about the clarity of the majority. Also the statements and opinions of the main actors involved in the referendum can help with interpreting whether the results are clear enough. In fact, although

[963] *Reference re Secession of Quebec*, par. 87.
[964] The provincial government of Quebec has already held two referendums on sovereignty. In 1980, the vote was 40.44% in favour and 59.56% against (turn-out of 85.61%). In 1995, the result was tighter: 49.42% in favour and 50.58% against (turn-out of 93.52%). LÉVESQUE, M.; PELLETIER M. *Les Référendums au Québec*. GUÉNETTE, D.; GAGNON, A. "Del referéndum a la secesión", pp. 14-5.
[965] DION, S. Lecture at the *Il·lustre Col·legi d'Advocats* of Barcelona, 11 April 2013.

contextual interpretations may have some advantages, the disadvantages seem to be higher.[966]

There are good reasons for agreeing on a legislative framework before holding a secession referendum: (1) Deciding the majority before the referendum is held allows calmer and more reasonable public deliberation than the tense and biased debate that would follow the referendum. After the referendum, positions would be too influenced by the result. (2) The principle of rule of law places the emphasis on precommitment to the law. Such a commitment before the event is usually fairer and morally stronger than a legal solution after the event. (3) To obtain a fair solution *ex post facto*, it is necessary to go before an impartial and independent body – usually better a court than the legislature of one of the parties involved in the dispute. (4) Perhaps a pre-agreed regulation can cover some of the contextual caveats mentioned in the previous paragraphs. (5) Last but not least, regulation before the referendum is held favours reaching consensus between the Federation and the province seeking secession on what would be a clear majority.[967]

As a rational reaction to this federal Act rejecting any commitment to a specific majority, one should expect that the province seeking secession would unilaterally set what it considers to be a sufficient majority to trigger a secession process. In this regard, the Act respecting the exercise of the fundamental rights and prerogatives of the Quebec people and the Quebec State, of 13 December 2000, stipulates that the Quebec people has the right to freely decide the political regime and the legal status of Quebec (§ 2); and, in particular, this people, acting through its own political institutions, shall determine alone the mode of exercise of this right (§ 3). According to this Act, the winning option of a referendum will be the one that obtains a majority of the valid votes cast, namely 50% of the valid votes cast plus one (§ 4). Although the Act was challenged before the Quebec Superior Court, the Act in general was not found unconstitutional and the determination of a clear majority

[966] See TAILLON, P. *Le référendum…*, pp. 232-1.
[967] In similar vein, see MONAHAN, P.J.; BRYANT, M.J. *Coming to Terms…*, pp. 19-28.

was considered, following the Quebec Secession Reference, a rather political question.[968]

The Canadian Clarity Act has been criticized by Quebec federalists themselves. Taylor, who campaigned for *No* in both the 1980 and 1995 referendums, coincides with the Supreme Court of Canada that if a provincial government obtains a legitimate, clear mandate in favour of secession, the other parts of the Federation are forced to sit at the negotiating table. "As the Supreme Court made clear, if we agree that Canada must be held together by motivating its people to stay together, and not by force, then there is no other path." Considering that the Clarity Act does not satisfactorily clarify the secession process, Taylor proposes that it is necessary for both sides to agree on a clear question and "with a clear question, 50 per cent plus one becomes the unambiguous and democratic expression of the electorate".[969] For Monahan and Bryant, "a majority of 50 percent plus one in favor of sovereignty in a referendum conducted in accordance with Principle 4 (*i.e.* on a clear question and with a fair procedure) should be sufficient to trigger secession negotiations".[970] Note, however, that it is quite different to trigger secession negotiations than to secede unilaterally. Therefore, a more robust democratic legitimacy is needed for the latter.

In contrast, for Norman, the Quebec Secession Reference points strongly towards a super-majority because it includes phrases such as "strong majority", "demonstrated majority", "enhanced majority", "substantial consensus" and "clear repudiation of the existing constitutional order".[971] In this respect, the Supreme Court expressly states that "Canadians have never accepted that ours is a system of simple majority rule".[972] This sentence may encapsulate the argument behind the requirement of a "clear majority" in the Canadian system. Yet, the argument can be exported to the extent that contemporary liberal democracies neither tend to be nor ought to be

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[968] See *Keith Owen Henderson and Equality Party v. Attorney General of Quebec*, 16 August 2002, and *Henderson v. Procureure générale du Québec*, 18 April 2018.
[969] TAYLOR, C. *The Globe and Mail*, 6 February 2013. In similar vein, see GUÉNETTE, D.; GAGNON, A. "Del referéndum a la secesión", pp. 23-4.
[970] MONAHAN, P.J.; BRYANT, M.J. *Coming to Terms…*, p. 19 (see also pp. 29-30).
[971] NORMAN, W. *Negotiating Nationalism*, p. 202. NORMAN, W. "From quid pro quo to modus vivendi...", p. 202.
[972] *Reference re Secession of Quebec*, par. 76.

democracies based purely and simply on majority rule.[973] From an ideal normative perspective, in order to secede a national community needs a qualified majority reflecting deep, lasting beliefs (and not a passing popularity) and fitting the hardly reversibility of the decision.[974]

Further examples and debates on the clear majority can be sought elsewhere. The Montenegro independence referendum consisted of a minimum turn-out of 50% of the electoral census with 55% of the voters answering yes. The 2003 Constitution of the State Union of Serbia and Montenegro established that any decision on future secession from the Union would be taken following a referendum (Art. 60). A 2005 agreement amending this Constitution specified that the referendum in Article 60 must be based on the internationally recognized democratic standards and that the parties would cooperate with the EU in order to meet them. Following this agreement, Javier Solana, as High Representative of the EU at the time, appointed a special envoy, Miroslav Lajčák, to lead a group of experts – among them, representatives of the Venice Commission and of the OSCE Mission to Serbia and Montenegro – who would give advice on how to conduct the process in line with these democratic standards. The central document produced by Miroslav Lajčák's group recommended a minimum turn-out of 50% of all registered voters and a minimum of 55% of all valid votes cast in favour.[975] The Law on the Referendum on the State Legal Status of the Republic of Montenegro accordingly included these rules.[976]

In Montenegro, the Law on Referendums established that, in order to be valid, all kinds of referendums required a turn-out of 50% of citizens with voting rights (Art. 37). According to the Venice Commission, although this did not follow the general recommendations which will be referred to later, the specific circumstances made this requirement consistent with international standards. The Commission added that, if this was a general requirement for referendums in Montenegro, "it would not be justified for a referendum on independence to require a lower level of

[973] See BOSSACOMA, P. "Constitutionalism and Democracy".
[974] MARGALIT, A.; RAZ, J. "National Self-Determination", p. 458.
[975] See *Key principles of a democratic referendum process in the Republic of Montenegro*.
[976] Article 6 of this Law established: "The decision in favour of independence shall be considered as valid if 55% of the valid votes are cast for the option 'yes', provided that the majority of the total number of registered voters has voted on the referendum."

participation than a referendum on any other subject". The Commission considered that this minimum turn-out seemed appropriate to adopt a decision on a matter such as independence.[977] In contrast, the Parliamentary Assembly of the Council of Europe criticized the pressure from the European Union to set the requirement of a 55% threshold in the referendum to maintain the State Union of Serbia and Montenegro. Accordingly, the Assembly expressed that "this threshold should not be considered as a precedent for future referendums".[978] The 2005 report of the Venice Commission on Referendums in Europe found that most of the European regulations on referendums require no quorums, neither of turn-out nor of approval, for the results of the referendum to be considered valid.[979] Furthermore, according to the same report, an approval quorum is preferable to a turn-out quorum, since the latter poses more serious problems.[980] In this regard, the 2011 South Sudan independence referendum, under close international supervision, required no approval quorum but did require a minimum turn-out of 60% of the registered voters.[981]

Some of the problems of these two kinds of quorum will now be discussed. Turn-out quorums pose the following technical problems: (1) they add an arbitrary significance to abstention and (2) they can discourage turn-out. On the first point, abstention often has no political significance in favour of any specific option, but the minimum turn-out arbitrarily gives it a meaning that it may not really have. In the *Code of Good Practice on Referendums* (§ III.7), the Venice Commission advises against setting "a turn-out quorum (threshold, minimum percentage), because it assimilates voters who abstain to those who vote no". As regards the second point, supporters of participatory and deliberative democracy have

[977] See *Opinion on the Compatibility of the Existing Legislation in Montenegro Concerning the Organization of Referendums with Applicable International Standards*, 2005, pars. 20-6.
[978] Resolution of the Parliamentary Assembly of the Council of Europe 1514 of 2006, par. 12.
[979] *Referendums in Europe – An Analysis of the Legal Rules in European States*, 2005, par. 109.
[980] *Ibid*. par. 111.
[981] See Section 41(2-3) of the Southern Sudan Referendum Act 2009. Subsection (2).b runs as follows: "If the threshold was not reached, the referendum shall be repeated under the same conditions within sixty days from the declaration of the final results". As the Final Report of the Carter Center explains, "According to the Referendum Act, the referendum would be considered legal and valid if at least 60 percent of registered voters cast their votes in the referendum. If turnout did not reach the required threshold, the referendum was to be repeated within 60 days of the final vote declaration. A simple majority of 50 percent plus one of the total votes was necessary for either unity or secession to be certified as the expression of the will of the Southern Sudanese." *Observing the 2011 Referendum on the Self-Determination of Southern Sudan. Final Report*, p. 11.

sometimes defended turn-out quorums because (higher) public participation matters. However, this benevolent intention must be nuanced from a technical point of view. Supporters of a specific option can campaign in favour of abstention with the objective of boycotting the referendum process. In other words, the unionist strategy may consist of asking its followers not to go to the polls so that the referendum does not reach the turn-out quorum it needs in order to be valid or binding.

There are three main types of approval quorum – also known as affirmative vote quorums: (1) a quorum of the electorate – either of the registered voters or of everybody on the electoral census; (2) a quorum of those who voted – or of the valid ballots; (3) a double majority quorum, where the referendum must be approved by two or more *demoi* or different cultural or social groups.[982] The approval quorum in relation to the electorate will normally be lower (between 35% and 50%) than the percentage of those who voted (between 55% and 65%).[983] There are few compared examples of approval quorums in Europe.[984]

Approval quorums may raise the following problems: (1) they lend greater political and legal weight to some votes than to others, (2) they generate an unstable, complex political situation if a simple majority of votes is surpassed but the approval quorum is not achieved, (3) they act as a disincentive for the community seeking secession to conduct a legal, peaceful, negotiated and agreed process.[985] As regards the first point, such a quorum would attach greater political and legal value to supporters of the *status quo* than to pro-independence supporters. That is, the simple majority rule would preserve the political equality of citizens better, since it would give the same value to each of the various opinions of the citizens.[986] Yet, the principle of equality tends to admit differential treatment when there is a reasonable justification. This principle would be likely to forbid giving different value of votes

[982] See TIERNEY, S. *Constitutional Referendums*, pp. 249-9, 279.
[983] VENICE COMMISSION, *Opinion on the Compatibility of the Existing Legislation in Montenegro Concerning the Organization of Referendums with Applicable International Standards*, 2005, pars. 29-31.
[984] VENICE COMMISSION, *Referendums in Europe – An Analysis of the Legal Rules in European States*, 2005, pars. 109-15.
[985] Along similar lines, see MONAHAN, P.J.; BRYANT, M.J. *Coming to Terms…*, p. 30.
[986] In this vein, see LÓPEZ BOFILL, H. *La independència i la realitat*, pp. 58-9. Professor M. SAWARD, in SELECT COMMITTEE ON THE CONSTITUTION, *Referendums in the United Kingdom*, par. 184, Q38. TAILLON, P. *Le référendum…*, p. 246.

if it endorses humiliation, inferiority or other sorts of discrimination against certain groups, whereas it may tolerate lending different weights to votes based on the requirement of qualified majorities regarding significant constitutional changes. In general, many legal orders tend to make constitutional change more difficult than constitutional continuity. Therefore, only if the approval quorum were unreasonable or excessively high, could it breach equal suffrage.

Concerning the second point, an approval quorum may generate a difficult political situation if a simple majority is surpassed but the set quorum is not achieved.[987] If we imagine that, contrary to the facts of the case, the referendum in Montenegro had achieved 54.5% of ballots in favour of independence, the continuation of the Union with Serbia might have been controversial and potentially conflictive.[988] As for the third point, the disintegration of the USSR can serve as an example to illustrate the argument. The 1990 Soviet legislation on secession linked the constitutional right to secede of the Soviet Republics with requirements very hard to reach. Among other conditions, it established that the approval quorum in favour of secession had to be two-thirds of the population permanently residing in the republic seeking secession. What is more, one-tenth of the voters in the seceding territory had the right to force a new referendum, requiring the same quorum, within five years.[989] This and other reasons explain why this federal statute was never applied, despite being one of the first examples in the world of thorough, detailed internal legislation on the right to secede. The secessions of Soviet republics therefore looked for other sources of legitimacy beyond this legislation.[990]

The Scottish independence referendum of 2014 was assumed to be grounded on the simple majority rule (with no approval or turn-out quorums).[991] Some may believe

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[987] In similar vein, see *Code of Good Practice on Referendums* (§ III.7).

[988] Note that combination of a turn-out quorum with an approval quorum in relation to the electorate is potentially controversial, since the lower the turn-out, the higher the majority will have to be. TIERNEY, S. *Constitutional Referendums*, pp. 276-7.

[989] See Law on Procedure for Resolving Questions Connected with a Union Republic's Secession from the USSR (April 3, 1990).

[990] See § 3.1.1 above. CASSESE, A. *Self-Determination of Peoples*, pp. 265-6.

[991] According to the joint statement issued by the Scottish and UK Governments: "If more people vote 'Yes' than vote 'No' in the referendum, Scotland would become an independent country." (p. 10) "If more people vote 'No' than 'Yes' in the referendum, Scotland would remain a part of the United Kingdom." (p. 11). ELECTORAL COMMISSION, *The 2014 Scottish Independence Referendum: Voting Guide*. See also BBC. "Scottish independence: Post-referendum agreement

that the Government in Downing Street and the Parliament in Westminster required no more than a simple majority because they saw themselves as the winners (the polls almost always showed a unionist majority). Still, in a 2010 report on referendums, the House of Lords Select Committee on the Constitution recommended "that there should be a general presumption against the use of voter turnout thresholds and supermajorities".[992] The Scottish Government based its argument on British referendum precedents and comparative referendum law.[993] The referendum was presented as not legally but politically binding, triggering a legal effect in the form of a need to negotiate to satisfy the democratic demand. In general, if the parent State requires a qualified majority, the results of this referendum will become more binding politically and the central authorities may end up having less leeway in its implementation. The central government would be bound by the principle of good faith and the doctrine of estoppel (as *venire contra factum proprium non valet*).

Despite all that, it is rational and intuitive enough to require a higher degree of democratic legitimacy than a simple majority to proceed with such a significant change to the *status quo*. The main argument is that we cannot be seceding and uniting with the tide of the simple majority of citizens' votes. The values of legal and political stability and security are important enough to require more than a simple majority in a single referendum. That is to say, the easiness of taking the decision to secede in future and the pre-eminently irreversible nature of secession make it reasonable to require a qualified majority. Another warning would be that holding a secession referendum is not innocuous: it can exacerbate tensions between communities both inside the territory seeking secession and throughout the whole of

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reached", 18 June 2014. TIERNEY, S. "The Scottish Independence Referendum", in McHARG, A.; *et al*. (ed.) *The Scottish Independence Referendum*, p. 55.

[992] *Referendums in the United Kingdom*, par. 189.

[993] A simple majority of voters seems to be the usual rule in most of the British referendums held over the last decades (on remaining in the European Community in 1975, on Scottish and Welsh devolution in 1997, on the Greater London Authority in 1998, on the Belfast Agreement in 1998, on the regional assembly of North-East England in 2004, on European Union membership in 2016). The exception was the 1979 devolution referendum, which required an affirmative vote of at least 40% of the general electorate. Although most Scots voted for devolution, this majority fell short of 40% of the total electorate and the devolution of powers did not materialize. The bitter memory of this referendum led to this requirement being dropped. KEATING, M. *The Independence of Scotland*, pp. 83-4. See SCOTTISH GOVERNMENT, *Policy Memorandum of Scottish Independence Referendum Bill*, pars. 37-8. *Your Scotland, Your Referendum*, 2012, par. 1.21 *Scotland's Future: Draft Referendum (Scotland) Bill Consultation Paper*, 2010, pars. 1.30-2.

the multinational State. Thus, a secession referendum ought to be held only when there is a real chance of the secession option gaining a majority. Before opening this Pandora's box, a broad enough majority of representatives is needed. Not only because vain secession referendums should be avoided, but also because they should be preceded by intensive, extensive and quality public deliberation. Under Justice as multinational fairness, the more just the State treatment of minority nations is, the more qualified and solid the pro-secession majority should be.

How can the argument of stability (internal and international), the difficulty of reunification after secession and the tensions engendered between communities by a referendum be reconciled with good practice on referendums which advises against turn-out and approval quorums? A *first proposal* could be based on the idea that greater democratic legitimacy should be given by a qualified majority of representatives instead of a qualified majority in a referendum. The core idea that the democratic supermajority ought to be provided by representative democracy could be achieved by the following steps: (1) A qualified majority of the democratic representatives of the territory seeking secession would agree to hold the independence referendum, with the aim of preventing vain secession referendums. (2) A simple majority in favour of the secession option in the referendum would be enough, avoiding the problems associated with turn-out and approval quorums. (3) If the secession option were voted for by a majority of citizens, a qualified majority of the democratic representatives would then be needed to endorse the result and to take the secession route.

This option seems especially consistent with those constitutional orders which, instead of requiring turn-out and approval quorums in referendums, require qualified majorities of representatives to approve the most significant legislation. The Spanish legal order, for instance, points towards qualified majorities in Parliament and simple majority in referendums. In particular, despite the rigidity of the Spanish Constitution, referendums on constitutional approval and reform require approval by referendum with a simple majority (as well as most referendums on approval and reform of Statutes of Autonomy). On the other hand, except in the case of ratification of constitutional norms already agreed by the representatives, referendums in Spain are generally consultative (non-legally-binding). If the

secession referendum is legally non-binding, it is more difficult to defend the requirement of referendum majorities above a simple majority.[994]

A *second proposal*, alternative to the previous one, could be to require a qualified majority in the first referendum and, if only a simple majority were obtained, then require simple majorities in two or more successive referendums at separate times (in two successive legislative terms, for instance).[995] This solution would respect the principle of stability, would address the difficulty of reunification after secession and would follow good practice on referendums which advises against turn-out and approval quorums. However, it would excessively ignore democratic representatives.[996] Moreover, this procedure would be costly, scarcely pragmatic and quite rare in comparative law. This way requires a simple majority over a prolonged time, whereas the other requires a qualified majority for a more limited time. This alternative way would thus have the virtue of leaving prudent time for a hypothetical "silent majority" supporting the constitutional regime to mobilize. This would be in tune with the Ackermanian requirement of allowing the people to speak out and deliberate at length on constitutional transformations.[997]

A *third proposal*, alternative or complementary to the previous two, could make the approval quorum conditional on the turn-out. Specifically, the rules regulating the referendum could establish that if the turn-out is X, the approval quorum will be Y, but as the turn-out goes down, the approval quorum will rise. For instance, if the turn-out falls below 50%, the approval quorum should increase accordingly. This rule ought to be agreed politically and specified through a sophisticated mathematic formula. In principle, this technique could mitigate many of the problems mentioned: (1) it can neutralize partisan strategic behaviour to boycott the result; (2) it starts from an initial situation of equal value of each vote that decreases gradually

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[994] In a similar vein, see MONAHAN, P.J.; BRYANT, M.J. *Coming to Terms…*, pp. 26-7.

[995] Several authors propose similar paths towards secession. See POGGE, T.W. "Cosmopolitanism and Sovereignty", p. 71. WELLMAN, C.H. *A Theory of Secession*, pp. 63, 158. VAUBEL, R. "Secession in the European Union". MONAHAN, P.J.; BRYANT, M.J. *Coming to Terms…*, pp. 30-5. However, the second referendum would be problematic if it turned into a consultation on the secession agreement and not on the will for secession. For the various theoretical and practical reasons set out in chs. 3.3 and 3.4 above, people should speak out about their will for secession only and the secession agreement would have to be left in the hands of the democratic representatives.

[996] See § 3.3.1 above.

[997] See ch. 3.7 below. ACKERMAN, B. *We the People (2)*, pp. 409-14. ACKERMAN, B. "The New Separation of Powers", pp. 664-7.

as it departs from a more ideal turn-out; (3) it can make secession a more difficult target without discouraging the secessionists from conducting the process through democratic, agreed and pacific means.

The importance of the principle of stability of territorial borders cannot be underestimated. Some objectors to the right to secede are partly right when they underline the need to make sure that exercising this right will not engender excessive chaos, both internally and externally. Connected to this, critics of the right to secede also argue the need for turn-out and approval quorums beyond a simple majority because of the irreversibility of the secession decision. There is a connection between the argument of stability and the argument of irreversibility since, beyond the difficulty of future reunification, the possibility of reunification as a short- or medium-term option must also be rejected. Since these problems must be taken seriously, the need for qualified or solid democratic majorities should be defended.

To complete this section, these arguments can be explored in conjunction with cooling periods before holding further independence referendums. By virtue of the principle of stability, it can be argued that if the secession option loses the referendum, a further referendum ought to be excluded for a reasonable lapse of time. By virtue of the principle of irreversibility, it can be defended, by analogy, that if the secession option wins the referendum, the possibility of holding a reunification referendum should also be excluded for some time. Cooling periods must take account of a number of variables: (1) the turn-out and approval quorums, (2) the results of the last referendums, (3) the parliamentary majorities in favour of secession, (4) internal instability and conflicts, (5) a significant change of circumstances, and so on.[998] Let us develop the first of these criteria. The higher the turn-out and approval quorums for the secession referendum are set, the less legitimate it will be to impose extended cooling periods for holding another secession referendum and the more legitimate to set limits for a reunification referendum. The higher the pro-secession majority obtained in the last referendum

[998] For instance, the Scottish First Minister is pressing for another referendum on independence by 2021 if the UK withdraws from the EU. Although some may criticize that a second referendum should wait, others could argue the significant change of circumstances that Brexit entails.

and the higher the present parliamentary majorities in favour of secession, the less legitimate it will be to set longer cooling periods for holding another referendum on secession and the more legitimate to set higher limits for a referendum on reunification.

3.4.4. The individual right to vote on secession

Part 1 defended that minority nations should hold a primary moral right to secede subject to multiple requisites. These requisites might change in nonideal contexts where the parent State has committed or is committing injustices and grievances against the territory seeking secession. The question now, from a constitutional perspective consistent with this philosophical position, is who ought to be granted an individual right to vote on secession.

Secession processes in line with liberal nationalism should be governed by three ideal rules. The *first rule* stipulates that whoever has the right to vote in the elections and referendum on secession should become – or be able to become – a citizen of the new State. This ideal rule follows the test of interest and the principles of coherence and congruence. That is, the ones that ought to decide are those who are to be subsequently bound by the rights and obligations of the new State. The *second rule* is that citizens of the parent State who live on the territory seeking secession should have the right to vote in the elections and referendum on independence and also to become citizens of the new State. In other words, the right to vote and the future citizenship would be defined by a combination of citizenship – referring to the parent State – and of residence – referring to the territory seeking independence. The *third rule* establishes that, in cases where the territory seeking secession has a democratic parliament, citizens who have a right to vote in the parliamentary elections should hold it too in the secession referendum. This would ensure consistency between the electoral franchise and the referendum franchise.

The principles of coherence and congruence support these ideal rules and their implementation. Since under the first rule voters in the referendum are to become founding citizens of the new State, this constituent choice should also condition the

future laws and decision with regard to acquisition and loss of citizenship of the new State. Although some may argue for distinguishing between transitory citizenship during the emergence of the new State and permanent citizenship once the new State is consolidated, in general citizenship should not be temporary nor removed according to the shifting will and political convenience of the moment. States cannot freely grant or deprive the right to citizenship whenever they wish and whatever the reason. Loss of citizenship must be linked with the acquisition or maintenance of another, since international law prevents natural persons becoming stateless. Among several reasons for avoiding statelessness, an essential one is that citizens hold a human right to reside permanently somewhere in the world.[999]

History and present times show cases in which the three ideal rules can be nuanced: deviation from the ideal rules can be justified when the regulation on citizenship of the parent State is ethnically restricted, when there have been colonization processes, military invasions, genocides or forced displacements and when the parent State is totalitarian or authoritarian.[1000] The first rule can be nuanced by opening participation in the secession referendum to people who, after the new State has been constituted, will find it difficult to acquire citizenship (*e.g.* the cases of Estonia and Latvia).[1001] The second rule can be modulated in many different ways, such as by expanding the electorate to non-residents who have suffered forced displacement (*e.g.* the referendums in Schleswig in 1920 because of the German expulsion) or by restricting the right to vote of invaders or colonizers in order to favour the aboriginal community (*e.g.* the 2018 referendum on full sovereignty and independence for New Caledonia).[1002] As regards decolonization referendums, some

[999] See BOSSACOMA, P. "Who Would the Citizens… Be?".

[1000] For example, some may say that the Soviet colonizers of Lithuania and Latvia, and their descendants, should not have a voice in the decision on secession. BUCHANAN, A. *Secession*, p. 159. In fact, "the biggest surprise, given the large proportion of non-Balts in Estonia and Latvia (38 percent and 48 percent of the population, respectively), was that about half of the non-Baltic population voted in favour of independence". COMMISSION ON SECURITY AND COOPERATION IN EUROPE, *Report on the Estonian Referendum and the Latvian Public Opinion Poll on Independence*.

[1001] See TAMIR, Y. *Liberal Nationalism*, p. 159. SAURA, J. *Nacionalidad y nuevas fronteras en Europa*, pp. 97-102. However, excessive obstacles preventing the Russian minority from obtaining Estonian or Latvian citizenship have been criticized by European institutions.

[1002] Under the Noumea Agreement of 1998, Article 77 of the French Constitution and Title 9 of the organic statute 209 of 19 March 1999 on New Caledonia, the 2018 referendum to attain full sovereignty and independence was held in New Caledonia, with a limited franchise and special enrolling rules in favour of the native people of the archipelago (the Kanaks). See TIERNEY, S. *Constitutional Referendums*, pp. 75-97. UN General Assembly Resolution 2189 (XXI) of 1966

legal scholars put the emphasis on a positivist criterion stating that the colonizers ought to have the right to vote if they settled on the territory at a time when colonization was legal under the international law of the day; conversely, new colonizers who settled on the territory after the colonial situation had become illegal should have no right to vote.[1003] The third rule can be amended in States where universal suffrage and equal votes are not recognized. There is no need for consistency in relation to a non-democratic assembly. Besides, it makes no sense to force the territory seeking secession to be exquisitely liberal and democratic when the parent State is not.

When the parent State is a liberal democracy, there is one last argument in favour of following the three ideal rules mentioned. If in liberal-democratic terms it is hard to criticize the reasons why and ways in which citizenship of the parent State is or was acquired, it is also hard legitimately to deny the vote to citizens living on the seceding territory. The nation seeking secession would bear a moral burden of proof of a compelling reason to question the vote of citizens of the parent State who live on the seceding entity. If the *onus probandi* were not put here, the seceding territory could try to alter the electoral and referendum franchise in tune with its pro-independence interests.

If the seceding entity did change the electoral and referendum census, the result could be interpreted to the advantage of unionism, regardless of the specific result: if the independence option won, unionists could refuse to recognize the result because of fraudulent – or insufficiently justified – alteration of the census; if independence was refused, unionists could willingly accept the result and ignore the modification of the census. Therefore, changing the electoral and referendum franchise for deciding on secession seems a bad strategic move for secessionism. As long as there is no just cause to deviate from these three ideal rules, the principle of good faith would deny the possibility of artificially altering the electoral franchise in order to achieve fictitious democratic results. On the other hand, the same principle could allow freezing the electoral census for the referendum on independence (at the

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condemns colonial policies that promote systematic influx of foreign immigrants to the colonies while displacing, deporting and transferring the indigenous inhabitants to other areas.

[1003] REMIRO, A *et al. Derecho Internacional*, pp. 173-4.

time of calling the referendum or an earlier point) in order to avoid any fraudulent manipulation to swing the vote. Freezing the franchise is not changing it, and is easier to defend.

3.4.5. A secession strategy in adverse liberal-democratic contexts

A referendum is an instrument for direct participation by citizens which can be based on the principle of democracy, the principle of popular participation, the right of citizens to participate in public affairs and the right to promote popular consultations.[1004] If the constitutional framework includes those principles and rights, it may allow the development of a model of participatory democracy, construed as a *sub-model* of representative liberal democracy with mechanisms that favour direct participation by citizens.[1005] However, when the Constitution establishes a representative form of government, this can be exploited to restrict the mechanisms for and the exercise of direct participation by citizens. For instance, the Spanish Constitutional Court considers that direct participation shall be exceptional in a regime of representative democracy.[1006]

Let us then analyse Spain as an adverse liberal-democratic context for a secession strategy to be developed. The Spanish legal order has strong provisions and doctrines to restrict a referendum on secession: (1) The central power to authorize referendums.[1007] (2) The reservation for the State of regulation of referendums.[1008] (3) The jurisprudence that prevents citizens from speaking out through a referendum on any issue that needs a constitutional reform to be implemented.[1009] (4) The obligation that regional referendums must be within the scope of competences of the

[1004] See Articles 1.1, 9.2 and 23.1 of the Spanish Constitution and Articles 4, 29 and 43 of the Statute of Autonomy of Catalonia.
[1005] BOSSACOMA, P. "Competències…", p. 245. LUCIANI, M. "Il referendum...".
[1006] See Judgements 76/1994, 119/1995, 103/2008 and 31/2015.
[1007] See Article 149.1.32 of the Constitution. The Constitutional Court considers State authorization of regional referendums as necessary in all cases, prior to the calling of a referendum and granted following criteria based on political expediency.
[1008] While the Constitution expressly reserves for the State the regulation of certain referendums (Article 92.3), the Constitutional Court has extended this reservation to all sorts of referendum. See Judgements 103/2008, 31/2010, 31/2015 and 114/2017.
[1009] See ch. 3.5 below. In fact, this jurisprudence is not unusual in comparative constitutional law.

self-governing unit.[1010] There are also several enforcing and coercive mechanisms: (1) The Constitutional Court powers to enforce its own rulings.[1011] (2) Central coercion against autonomous communities that fail to fulfil their legal obligations or that impair the general interest of the State.[1012] (3) The declaration of exceptional states.[1013] (4) The use of criminal law against representatives, governors, public employees and even private persons.[1014]

Having briefly mentioned all these legal instruments and doctrines available to stop a referendum on secession, it is time to test some academic statements. According to Norman, "in most federations, you would not be able to prevent regional or provincial governments from holding consultative referendums." "Surely a division of powers that prevented provincial governments from holding consultative referendums would be unfairly tilted in favour of majority nation-builders".[1015] Yet, in the 2006 *Scott Kohlhaas v. State of Alaska* case, the Supreme Court of Alaska concluded that secession of Alaska is unconstitutional under *Texas v. White* case law and therefore an improper subject for a popular initiative requiring the State of

[1010] Although a broad interpretation of these competences could include the legal faculty of the Catalan Parliament to initiate constitutional changes under Articles 87 and 166 of the Constitution, the Constitutional Court upholds a narrower interpretation. See Judgements 31/2010 and 31/2015.
[1011] The Constitutional Court Organic Act was reformed in 2015 to increase the powers of this Court to confront the Catalan secessionist challenge. This was admitted by Justice Xiol in his dissenting opinion on the Constitutional Court Judgement regarding the reform. The majority opinion upheld the constitutionality of the reform with several restrictions on the use of its new enforcing powers (see Judgements 185/2016 and 215/2016). While the Court showed that is eager to use its *powers of word*, it seems unwilling to use its *powers of sword*. BOSSACOMA, P. "La espada del Tribunal Constitucional". See also VENICE COMMISSION, *Opinion on the Law of 16 October 2015 Amending the Organic Law No. 2/1979 on the Constitutional Court*, 2017.
[1012] In October 2017, under Article 155 of the Constitution, the Spanish Government adopted the following measures to block the process of independence of Catalonia: dismissing the President of Catalonia and the rest of the members of the Catalan Executive; giving instructions to all Catalan public administrations and their officials; and dissolving the Parliament of Catalonia in order to hold new elections in December 2017.
[1013] See Article 116 of the Spanish Constitution and Organic Act 4/1981. While declaration of a state of siege requires a sort of insurrection or other significant acts of force, declaration of a state of exception takes greater account of the outcomes than of the means used.
[1014] The former President of Catalonia and three other members of his Government were condemned for criminal contempt regarding the consultation held on 9 November 2014. In relation to the unilateral referendum and declaration of independence of October 2017, several members of the Catalan Government and two pro-secession leaders of civil associations were sent to prison awaiting trial. The then President of Catalonia together with other members of his Government crossed the Spanish borders to avoid being imprisoned. The criminal charges include, among others, the serious crimes of rebellion and of sedition.
[1015] NORMAN, W. *Negotiating Nationalism*, p. 195.

Alaska to hold an independence referendum.[1016] In Germany, in a case regarding a Bavarian referendum on independence, the Federal Constitutional Court denied the possibility of holding a secession referendum in any *Land* ruling that there is no room in the Constitution for any secessionist aspirations (Decision 2 BvR 349/16).[1017]

According to Stephen Tierney, when there is a strong body of opinion that the constitution is legitimate, there is a political will on the part of the sub-State nations to "play by the rules of the game", with a referendum fitting within existing constitutional structures.[1018] For Tierney, any constitution – federal, decentralized or unitary – is vulnerable to sophisticated constitutional arguments from the sub-State nations. Unfortunately, there are adverse constitutional orders, even in liberal-democratic contexts, for pro-secession arguments, especially for holding a referendum on independence. In Italy, for instance, the Constitutional Court not only considered regional consultative referendums to start processes to amend constitutional illegal, but also stated that "the unity of the Republic is one of those elements of the constitutional order that it is so essential it ought to be even subtracted from the power of constitutional reform" (Judgement 118 of 2015).[1019]

[1016] In the 2010 *Scott Kohlhaas v. State of Alaska* case, the same Court considered that nor is it possible to proceed with an initiative to vote about seeking statutory and constitutional reforms to authorize the independence of Alaska. According to the Court, "the Alaska Constitution ... is inextricably tied to the United States". Thus, it would be necessary to amend the Constitution first. However, since the sole reform processes allowed are by a constitutional convention and through the House of Representatives, popular initiatives are not an admissible procedure to promote a reform of this Constitution. In the words of the Court, "if the people of Alaska wish to effect lawful constitutional change, they must do so in the modes outlined by the Alaska Constitution itself. As we have long held, the initiative process is an inappropriate forum through which to pursue constitutional change. Even if Kohlhaas's revised initiative does not seek secession, it proposes constitutional change to permit secession and is therefore an improper subject for the initiative process." See § 3.1.1 above.

[1017] It is a very brief decision of only three judges rejecting to grant admission to a constitutional complaint, but expressed in a remarkably categorical way. According to this ruling, the *Länder* are not "Masters of the Constitution" (*Herren des Grundgesetzes*). In similar vein, see the Bavarian Constitutional Court ruling, of 16 July 1991, *Verbindlichkeit des Grundgesetzes für Bayern*. LINDNER, J.F. "'Austritt' des Freistaates Bayern…", pp. 97-102. DOERFERT, C. "Sezession im Bundesstaat", pp. 711-3. Despite a strong State identity in Bavaria, the majority of Bavarian nationalists are not demanding independence. NAGEL, K.J.; HOLESCH, A. "Bavaria", pp. 9-19. This may explain the shortage of jurisprudence.

[1018] TIERNEY, S. *Constitutional Referendums*, p. 140.

[1019] See 1146/1988, 256/1989, 470/1992 and 496/2000. These Judgements declare regional consultative referendums to start processes to amend constitutional or ordinary State laws illegitimate under the Constitution. Judgement 496/2000 reads: "Two main statements can be pointed out: the first one is that the people voting in a referendum is not considered by the Constitution as the driving force of constitutional change. The second is intervention by this people does not follow a free scheme, since the expression of its will must stick to typical forms and procedures (...)" Over the

Nonetheless, despite the many legal mechanisms and doctrines to prevent such referendums, the openings left ajar by constitutional provisions and interpretations should be exhausted first.

While other works have already mapped out the various legal ways to consult the citizens of Catalonia on independence, this section will offer a few general considerations.[1020] The independence movement should prove credibly that it had sought, in good faith, to negotiate many legal routes with the parent State or to proceed along several paths in ways respectful of the legal order. This will to negotiate must be real and sincere, not fictitious or feigned. It is also good and prudent that the pro-secession authorities and representatives have endeavoured to negotiate with central governments of various political hues and central representatives of various parliamentary groups. To do so takes political patience in order to prove, in the end, that the parent State (and not only one of its political forces) systematically refuses to negotiate and agree on any way to hold an independence referendum. In short, a kind of order should be followed that goes from more to less constitutionality and from more negotiation and compromise to more unilateralism.

One of the first steps to open a process of consultation on secession is for political parties clearly to express their desire for independence and their will to hold an independence referendum in their manifestos and election campaigns. Since referendums on secession are not part of ordinary politics and should not be banalized, the parent State may reasonably require a majority of regional representatives in favour of secession before such a referendum is agreed and held. Once these representatives perceive a majority in favour of secession and the central institutions refuse to negotiate, they should demonstrate that there are legal and constitutional ways to hold that referendum, but a lack of political will on the part of the parent State to negotiate and authorize a referendum on secession. If various ways to consult the citizens are proposed, but they all fail because the parent State

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years, the Constitutional Court have tempered its jurisprudence but not in the case of regional referendums on independence (Judgement 118/2015). This Judgement seems to rule an implicit eternity clause to protect the unity of Italy. See FERRAIUOLO, G. *Costituzione, Federalismo, Secessione*, pp. 25-8. LUCIANI, M. "I referendum regionali (...)". MODUGNO, F. "Unità-indivisibilità…".

[1020] BOSSACOMA, P.; LÓPEZ, H. "The Secession of Catalonia".

argues that they are illegal or unconstitutional, a constitutional reform to legalize a referendum on independence could be initiated. It would be difficult for the central institutions to reject this way on legal grounds: the reasons for the rejection would need to be much more political.[1021]

If it is considered so indispensable to consult the citizens, the last attempt could be to adopt a statute or parliamentary act that would regulate and directly call a referendum on secession without constitutional grounds.[1022] However, regarding the principle of the rule of law, the *Code of Good Practice on Referendums* reads: "the use of referendums must be permitted only where it is provided for by the Constitution or a statute in conformity with the latter".[1023] Hence, this call could be the last democratic effort, beyond the constitutional legality, to show once again that the parent State does not tolerate a referendum on secession, but with no need to end up holding it. Holding an unconstitutional, unilateral referendum has potential deficits, notably the lack of participation (of the unionist factions), of deliberation (among factions), of legal guarantees and of recognition (either internal or external). In addition, these deficits may increase the presence and intensity of State coercion.[1024]

Even if every effort must be made to hold a referendum to back up initiation or consolidation of a secession process, it is more appropriate to consider a unilateral break with the Constitution through a UDI following elections in which the key issue would be the will for secession, instead of an unconstitutional, unilateral referendum. This is not meant to make secession an easy target. The will for secession ought to be expressed clearly either by a substantial majority or by long-lasting majorities. Indeed, any eventual unilateral rupture ought to be after a clear democratic expression, not before. If it were internationally questioned why no referendum had been held on secession, an answer could that many ways had been

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[1021] VIVER, C. *et al.* "The consultation…", § 4.2.5. However, constitutionalization of a secession referendum following the ordinary amending process of Article 167 of the Spanish Constitution might not be sufficient, since it may not overcome the case law requiring a rigid reform under Article 168. See ch. 3.5 below.

[1022] See the Self-determination Referendum Act 19/2017, passed by the Parliament of Catalonia.

[1023] The Venice Commission has applied its own general recommendation to specific cases such as the Crimean Referendum on separation from Ukraine: "Holding a referendum which is unconstitutional in any case contradicts European standards". Opinion 762/2014, par. 24.

[1024] See BOSSACOMA, P. "El referéndum de autodeterminación de Cataluña".

tried (consensual and unilateral, constitutional and not so constitutional).[1025] In liberal-democratic contexts, a referendum with numerous legal or material problems and without full democratic guarantees better be substituted by the will of the lawful democratic representatives.

If it proves impossible to hold a referendum, the secessionist authorities should activate the secession process with the representatives' own democratic legitimacy (which may have been amplified by the multiplier effect of the successive prohibitions and obstacles to put the question to the citizens). Throughout this book it has been stressed the importance of holding a referendum in order to secede, establish a new sovereign people and recognize a new constituent power. At the same time, it has been underlined the need to follow a strategy starting from lawfulness and agreement and moving towards a less-constitutional and more-unilateral democratic legitimacy. It would make no sense to exclude the central authorities and representatives from their role in the process of self-determination (and, if this is the case, of secession) from the very beginning or too fast. However, if the central institutions repeatedly refuse to allow direct consultation of the citizens, it cannot be ruled out that the secession process could find democratic expression via their representatives. An eventual unilateral break must be delayed until the final step of the process and taken with the seriousness it deserves.

Only if the central authorities have recurrently refused to allow a referendum will the secession process be able to move forward with the democratic legitimacy of the elected representatives. At that point, the clarity of the election manifestos and campaigns of the political forces leading the secession process will take on special relevance. The clarity required of the referendum on secession would now be demanded of the election manifestos and campaigns of the political forces claiming an independent State. In conclusion, the successive prohibitions or obstacles imposed by the parent State against holding the secession referendum may act as drivers of democratic legitimization for the regional authorities and representatives to embark on a unilateral process of independence and break with the Constitution.

[1025] Some international players could put pressure on central institutions to hold a referendum on secession and, at the same time, on regional authorities not to move forward unilaterally until the results of it were known.

3.5. Consensual secession

Consensual secessions are basically those negotiated and agreed with the parent State (and maybe with other relevant parties). Remember that this book has adopted a broad definition of secession that includes achieving this objective by both consensual and unilateral means (following the majority criterion in the legal, political and philosophical literature on this issue). Therefore, this book does not share a restrictive definition of secession as a predominantly unilateral separation with use or threat of force, because this confuses means and ends. Instead, a broad definition of secession is proposed which covers both the desirable means (peace, negotiation and agreement amongst the relevant parties) and the undesirable ones (unilateralism and use or threat of force). Presumably, the former tend to combine with the latter over time, making it difficult to separate them.[1026]

Outside colonial contexts, there are no precedents for peaceful unilateral secessions in consolidated liberal democracies. Certainly, Justice as multinational fairness does not describe secession and the creation of new States in the contemporary times. In fact, apart from decolonization cases, since 1945 no State which has been created by unilateral secession has been admitted to the United Nations with the opposition of the parent State.[1027] In the days of the United Nations, very few non-colonial territories have achieved secession without the consent of their parent State – arguably Bangladesh, Eritrea and Kosovo.[1028] Bangladesh in 1974 and Eritrea in 1993 became members of the UN, whereas Kosovo is still not a member.

Unlike Montenegro, Kosovo is not yet a member of the UN because it has not been expressly recognized by Serbia.[1029] According to Crawford, even in cases that could be classified as unilateral secessions such as Bangladesh, Eritrea and the Baltic Republics, the consent of the relevant parties was given prior to the international

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[1026] See ch. 1.1 above.
[1027] CRAWFORD, J. *The Creation of States…*, p. 390. MEDINA, M. *El derecho de secesión…*, p. 157.
[1028] CONNOLLY, C. "Independence in Europe…", pp. 70-2.
[1029] Although some thought that Serbia recognized Kosovo *de facto* by virtue of the agreement of 19 April 2013 (see PRAVDA, "Serbia loses the fight for Kosovo", 23 April 2013), recognition could be linked to an agreed "land swap" between both countries (see PAVKOVIĆ, A. "How likely – and dangerous – is a Kosovo/Serbia 'Land Swap'?". *Verfassungsblog*, 14 September 2018).

recognition of their independence. Moreover, most non-colonial attempts at secession have failed (among others, Tibet–China, Katanga–Congo, Biafra–Nigeria, Kashmir–India, East Punjab–India, the States of Karen and Shan–Burma, the Tamil State–Sri Lanka, Kurdistan–Iraq and Turkey, Republika Srpska–Bosnia and Herzegovina, Chechnya–Russian Federation, Catalonia–Spain).[1030] Although some successful cases of non-colonial unilateral secession can be argued, all in all this shows that some element of agreement (even if as a last resort) is crucial to creation of new States in non-colonial contexts.[1031] After this preamble, this chapter will comment on a few historical examples of predominantly peaceful separations in non-colonial contexts. In the creation of these new States agreed ways played an important role at the expense of unilateralism.

The independence of Norway from Sweden in 1905 is the first relevant case. Norway and Sweden were united through the Act of Union of 1815, which constituted a personal union of the two kingdoms in a composite monarchy.[1032] In June 1905, the Norwegian Parliament declared the break of the Union. Independence had broad parliamentary and popular support. The referendum was quickly organized by the Norwegian Government and there was an overwhelming support for independence.[1033] After the referendum and the negotiations, the Swedish Government accepted "amicably" to dissolve the Union.[1034] Although to some extent it can be deemed as a relevant precedent, the fact that Sweden accepted and negotiated the independence of Norway turns this into an example of a finally consensual secession. Moreover, it is a special type of secession since, before 1905, Norway and Sweden were already two clearly distinct political entities that essentially ran their international affairs in common: they had two legal orders, two

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[1030] See CRAWFORD, J. *The Creation of States…*, p. 390 *et seq*.

[1031] As discussed, the disintegrations of both the Russian and Yugoslav federations *initially* occurred through unilateral non-agreed secessions. Efforts were made, nevertheless, to treat the disintegration of Yugoslavia as a dissolution in order to avoid the precedent for secession. In the Soviet disintegration, the Russian Federation recognized the statehood of the former republics in exchange for them recognizing it as the continuator State. See ch. 2.3 above.

[1032] *Personal union* refers to a union between kingdoms that keep their separate legal orders but within a union in the person of the monarch. In this context, throughout the 19th century, Norway kept its own Parliament, Government and judiciary. According to Article 1 of the Act of Union, the Kingdom of Norway formed a free, independent, indivisible and inalienable Kingdom united with Sweden under the same King. BUCHHEIT, L.C. *Secession*, p. 98.

[1033] According to several sources, about 99.9% voted in favour of secession. In particular, out of a turn-out of 85.4% of the male voters, 368,208 voted in favour of secession and only 186 against. PAVKOVIĆ, A.; RADAN, P. *Creating New States*, p. 73.

[1034] BUCHHEIT, L.C. *Secession*, pp. 98-9.

governments with no hierarchical relation between them, two armies, two citizenries and no Swedish population living in Norway.[1035] Consequently, it was secession from a *personal union* (under the same monarch) more than a *real union* of laws, institutions and citizens. This last remark also seems to apply to the next case.[1036]

The secession of Iceland from Denmark can also be mentioned. In the second half of the 19th century, Iceland claimed and obtained greater autonomy from Denmark. Under the Act of Union of Denmark and Iceland, in 1918 the full sovereignty of Iceland was recognized but a kind of personal union between the two sovereignties was to be kept for twenty-five years under the Danish monarchy. After this term, Iceland could exit the union unilaterally. In 1940, Germany invaded Denmark and, in response, the UK occupied Iceland (and later handed over control of it to the USA). In 1943, during the Allied occupation, the Act of Union expired and, in May 1944, the independence referendum was held to decide whether to continue or terminate the union between the two kingdoms. The turn-out and the majorities of Icelanders voting in the referendum in favour of terminating the Union and approving the new republican constitution were surprisingly hegemonic.[1037] Because of the Act of Union, this was an example of constitutional and consensual secession more than unilateral secession. In addition, the context of World War II clouds the stability element and makes this case quite unique. *De facto*, it seems that Denmark had already lost all sovereignty over Iceland as a consequence of the German invasion of Denmark and subsequent allied occupation of Iceland.[1038] Even if the terms of the Act of Union show that dissolution was relatively independent of

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[1035] DION, S. "Why is Secession Difficult…?", p. 270.

[1036] In similar vein, see BIRCH. A.H. "Another Liberal Theory of Secession", p. 598.

[1037] The sources consulted give figures of over 95%. More specifically, turn-out was 98%, 97% voted in favour of terminating the Union and 95% in favour of the republic. Results announced on 1 June 1944 by Thor Thors, on behalf of the Minister of Foreign Affairs of Iceland: http://images.library.wisc.edu/FRUS/EFacs/1944v03/reference/frus.frus1944v03.i0021.pdf

[1038] The USA was one of the first States, if not the first, officially to recognize Iceland as an independent Republic in June 1944. EMBASSY OF ICELAND WASHINGTON D.C. "Iceland and the US". http://www.iceland.is/iceland-abroad/us/wdc/iceland-and-the-us/. In the words of the concurrent resolution of the Senate and the House of Representatives of the USA in June 1944: "Whereas the people of Iceland in a free plebiscite on May 20 to 23, 1944, overwhelmingly approved the constitutional bill passed by the Althing providing for the establishment of a republican form of government; and whereas the Republic of Iceland will be formally established on June 17, 1944: now, therefore, be it resolved by the Senate (the House of Representatives concurring), that the Congress hereby expresses to the Icelandic Althing, the oldest parliamentary body in the world, its congratulations on the establishment of the Republic of Iceland and its welcome to the Republic of Iceland as the newest republic in the family of free nations."

the Nazi occupation, many Danes reproached Iceland for splitting away during the occupation.[1039] Finally, islands have usually been treated as special cases in comparative politics and law.

The separation of Singapore from Malaysia in 1965 can be considered another case of consensual secession.[1040] According to Mokhtar, "the separation was affected by the amendment of the Malaysian Constitution consequent to the passing of the Malaysia (Singapore Amendment) Act 1965. The amendment Act was preceded by the Separation of Singapore Agreement, 1965 which was entered into by the Federal Government and the State Government of Singapore".[1041] Even if it could be considered a finally peaceful separation, it was preceded by conflicts between communities, civil unrest and fears of an escalation of violence. Some even consider that the Parliament of Malaysia expelled Singapore.[1042] On 9 August 1965, in the absence of the Singapore delegates, the Malaysian parliament passed the bill favouring separation by 126 to 0. That afternoon, in a televised press conference, the Prime Minister of Singapore Lee Kuan Yew declared Singapore a sovereign, democratic and independent State. In this conference, Lee emphasized he had always believed in the unity of the two territories and that there were other ways of reducing tensions between the communities apart from separation of Singapore, such as a federation with looser ties. Lee admitted that the Prime Minister of Malaysia, Tunku Abdul Rahman, had convinced him of the real danger posed if Singapore stayed in. Moreover, Lee acknowledged the difficulty of accepting a Malaysia other than "Malaysian Malaysia". Nevertheless, because of the geographical, economic and kinship ties between Singapore and Malaysia, Lee advocated continuing the economic cooperation. In fact, Lee said that he desired as few changes as possible in most issues. In the final analysis, the separation of

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[1039] NIELSEN, K. "Liberal Nationalism and Secession", p. 116.

[1040] For Buchheit, it was an amicable secession. BUCHHEIT, L.C. *Secession*, p. 99.

[1041] MOKHTAR, K.A. "Confusion, Coercion and Compromise in Malaysian Federalism", in HARDIN, A.J.; CHIN, J. (ed.) *50 Years of Malaysia*, p. 243.

[1042] On 16 September 1963, "Singapore, Sabah and Sarawak were officially federated with the existing states of Malaya, thereafter known as the Federation of Malaysia (Malaysia). However, this new federation showed the first sign of trouble less than 23 month later when it expelled Singapore on 9 August 1965 due to significant and profoundly different political and economic perspectives between the sub-national government of Singapore and the central government." SALLEH, A. *et al.* "Constitutional Asymmetry in Malaysia" in POPELIER, P.; SAHADŽIĆ, M. (ed.) *Constitutional Asymmetry in Multinational Federalism*, p. 317. See also LEITCH LEPOER, B. "Road to Independence", in LEITCH LEPOER, B. (ed.) *Singapore*.

Singapore from Malaysia may raise doubts whether it was a case of secession or of expulsion (or a mixture of the two) and even whether Singapore had ever been really integrated into the political system of Malaysia.

The case of Czechoslovakia is an example of consensual dissolution more than secession. There are various reasons for this: (1) The separation was decided by a parliamentary agreement – based on the Constitutional Act of 1992.[1043] (2) This agreement provided for dissolution of the Federation on 1 January 1993 with neither of the republics claiming the status of continuator State. (3) Thus, the Czech Republic and the Slovak Republic became successor States, and the international society recognized this agreement by acquiescence.[1044] Even if this were to be considered an example of secession, it would not be unilateral but consensual.[1045] The democraticness of this separation has been questioned because no referendum was held, even though it was provided for by Czechoslovakian constitutional law and many representatives demanded one.[1046] One reason for avoiding a referendum could be that the majority of Czechs and Slovaks desired neither dissolution nor secession.[1047] Nevertheless, dissolution could be the favourite option once the preferences of Czechs and Slovaks had been harmonized.[1048] Czechs preferred a unitary State to a confederation, whereas Slovaks preferred a confederation to a unitary State. For Czechs and Slovaks alike, dissolution was their second best. Hence, as their favourite options pointed in opposite directions, dissolution seemed a rational choice. Nevertheless, some criticized that "the two premiers decided on secession almost conspiratorially, while surveys showed that two thirds of the population in both regions wanted to keep the country united".[1049] Although the Slovak political coalition led the dissolution process with no express popular

[1043] However, prior to the agreement on dissolution of the Federation on 31 December 1992, the Slovak Parliament – unlike the Czech – had issued a declaration of sovereignty on 17 July 1992. PAVKOVIĆ, A.; RADAN, P. *Creating New States*, p. 77. PICAZO, S. "First sovereignty. And then what?" *Presència*, 28 April 2013, pp. 7, 55.
[1044] CRAWFORD, J.; BOYLE, A. *Referendum on the Independence…*, pars. 74-8.
[1045] This is considered a case of secession by: SUNSTEIN, C.R. "Constitutionalism and Secession", p. 644. PAVKOVIĆ, A.; RADAN, P. *Creating New States*, p. 77. The latter point out that the secession of Slovakia and the dissolution of the Federation were coordinated to take effect on the same day.
[1046] CRAWFORD, J. *The Creation of States…*, p. 402. SAIZ ARNAIZ, A. "Constitución y secesión", p. 3.
[1047] See PAVKOVIĆ, A.; RADAN, P. *Creating New States*, p. 77. SUNSTEIN, C.R. "Constitutionalism and Secession", p. 644. WELLMAN, C.H. *A Theory of Secession*, p. 78.
[1048] PAVKOVIĆ, A.; RADAN, P. *Creating New States*, p. 77.
[1049] DION, S. "Why is Secession Difficult…?", p. 270.

mandate (neither from a referendum nor from an election campaign), Slovaks accepted, or at least were not bothered by, their leaders' decision and did not punish them electorally. According to Pavković and Radan, if this could be considered secession, it would be a rare case since a significant part of the population proved indifferent to or ambivalent on separation.[1050]

Unlike other Yugoslav secessions, in the secession of Montenegro from the State Union of Serbia and Montenegro, Serbia claimed the status of continuator State and this claim was accepted by the international society.[1051] More importantly, the secession of Montenegro was peaceful and followed the provisions of the 2003 Constitution of the Union.[1052] If the constitution of the parent State recognizes a right to secede and the seceding entity follows these provisions, such secession can be considered consensual (because at the time when the provision was included in the constitution there was presumably a legitimate agreement or consent). As seen earlier, the secession of Montenegro took place with European intervention and observation (EU, Council of Europe and OSCE), among other reasons because a constitutional settlement specified that the referendum on independence had to be based on the internationally recognized democratic standards and because any possibility of a new warlike conflict in the Balkan Peninsula and other related atrocities had to be prevented or removed. With this recent history, the former State Union of Serbia and Montenegro could hardly be considered a consolidated liberal democracy.

Aware that peaceful unilateral secession is an unusual event in consolidated liberal democracies and having seen these precedents of rather consensual separations, we can now take a deeper look at the *Principle of agreement and negotiation*. In the Quebec Secession Reference, the Supreme Court of Canada articulated that, if a clear question is formulated and a clear majority of Quebecers answer in favour of secession, the Federation and the other provinces have a duty to negotiate on this will for secession. According to the Court, this obligation to negotiate stems from balancing four fundamental principles of the Canadian constitutional system,

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[1050] PAVKOVIĆ, A.; RADAN, P. *Creating New States*, p. 78.
[1051] CRAWFORD, J.; BOYLE, A. *Referendum on the Independence…*, pars 59, 79-92.
[1052] See §§ 3.4.2 and 3.4.3 above.

namely democracy, constitutionalism and rule of law, federalism and protection of minorities. But the function of those principles does not end when the obligation to negotiate emerges, but ought to inspire and guide the negotiations as well. This duty to negotiate does not entail an obligation of result, but an obligation of conduct. Although any such duty to negotiate does not necessarily have to lead to secession, negotiation of secession is not to be avoided or removed from the political agenda. Secession is a legitimate expectation, but negotiation is not necessarily limited to discussing and agreeing the material and technical aspects of secession.[1053]

Under a sort of deliberative conception of democracy and federalism, the Supreme Court of Canada develops an interesting duty to negotiate in accordance with underlying constitutional principles. The same principles that engender a duty to negotiate on the wishes for secession should inspire and guide the negotiations, according to the Court. This entails principled negotiation based not on the selfish, strategic or electoral motives of each party, but on reflective and sincere talks, bearing in mind the legitimate interests of the other party. These legitimate interests are manifested, defined and harmonized through balancing the principles of democracy, constitutionalism and rule of law, federalism and protection of minorities. Under Justice as multinational fairness, the duty to negotiate ought to be inspired and guided also by the rest of the principles of the hypothetical multinational contract.

Scholars are divided over whether or not this advisory opinion recognizes a constitutional right to secede for Quebec (which would have to be exercised in a negotiated an agreed way). Certainly, whether upholding or not a right to secede *stricto sensu*, it does recognize a principle of self-determination for Quebec in that it

[1053] The Supreme Court is not completely clear about this. In some places, it refers to the duty to negotiate to respond to the clearly expressed desire for secession ("to negotiate constitutional changes to respond to that desire"). In others it expressly mentions the duty to negotiate secession ("A right and a corresponding duty to negotiate secession cannot be built on an alleged expression of democratic will if the expression of democratic will is itself fraught with ambiguities." "In the event secession negotiations are initiated, our Constitution, no less than our history, would call on the participants to work to reconcile the rights, obligations and legitimate aspirations of all Canadians within a framework that emphasizes constitutional responsibilities as much as it does constitutional rights."). And in others it seems to minimize or play down the duty to negotiate ("No negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement based upon an obligation to give effect to that act of secession in the Constitution. Such a foregone conclusion would actually undermine the obligation to negotiate and render it hollow."). See *Reference re Secession of Quebec*.

does not question holding a sovereignty referendum and links the obligation to negotiate to victory in a secession referendum that meets the clarity requirements. What kind of theory of secession does the Reference follow? The Canadian Supreme Court understands that international law operates in a remedial logic, finding no injustice serious enough to justify the right to external self-determination of Quebec. Conversely, when the Court interprets internal law, it adopts a moderate primary approach, since it does not require previous injustices. Even if rejecting a unilateral right to secede for Quebec, it lends greater weight to the democratic claims of Quebecers expressed through a referendum and recognizes an obligation to negotiate stemming from clear expression of a will for secession.[1054]

The Reference raises some important points: (1) This advisory opinion was issued in an atmosphere in which many Quebecers felt alienated because they considered that the repatriation of the Canadian Constitution had not recognized – and had occurred at the expense of – the singularity of Quebec. Through the Reference, the Canadian Supreme Court aims to come to terms with Quebec nationalism, somehow recognizes the distinctive character of Quebec, considers Quebec and the rest of Canada as two equally legitimate democratic majorities and generally reinforces a multinational vision of Canada.[1055] (2) Even if the Court does not recognize a unilateral right to secede, it does recognize a duty to negotiate. This duty is both a requirement and a condition resulting from a democratic majority of Quebecers expressing themselves in favour of secession in a referendum. The duty to negotiate in good faith implies considering and respecting the interests of Quebec and of the rest of Canada, including the other provinces and minorities.[1056] (3) The Supreme Court takes the secession referendum seriously and gives it strong normative power. Although the written constitution makes no mention of a secession referendum, the Court gives it a role of constituent driver, by virtue of the principle of democracy and, implicitly, of the principle of national self-determination. According to

[1054] In similar vein, see MANCINI, S. "Secession and Self-Determination", p. 499.
[1055] TIERNEY, S. *Constitutional Law and National Pluralism*, pp. 256-71. TIERNEY, S. *Constitutional Referendums*, pp. 144-5.
[1056] Section 3(2) of the Clarity Act establishes that: "No Minister of the Crown shall propose a constitutional amendment to effect the secession of a province from Canada unless the Government of Canada has addressed, in its negotiations, the terms of secession that are relevant in the circumstances, including the division of assets and liabilities, any changes to the borders of the province, the rights, interests and territorial claims of the Aboriginal peoples of Canada, and the protection of minority rights."

Tierney, the Reference recognizes that a positive result in a secession referendum in Quebec would generate a *prima facie* constitutional right to secede.[1057]

The federal Government of Canada requested the opinion of the Supreme Court in response to the 1995 Quebec referendum. Since Quebec government refused to take part in the process, the Court designated an *amicus curiae* to defend the arguments of the sovereigntist side. The opinion expressed in the Reference ended up surprising both federal and provincial governments. Yet, there is an organizational argument that could partly explain this opinion: out of the nine magistrates of the Supreme Court, by constitutional convention, three are French-speaking (from Quebec) and six English-speaking (three from Ontario, two from the western provinces and one from the Atlantic provinces).[1058] If some of the judges are drawn from minority nations, constitutional jurisprudence is more likely to evolve in the direction of Justice as multinational fairness.[1059]

Another lesson that the Quebec-Canada case seems to teach is the importance of the summits of constitutional justice in the secession debate.[1060] Generally, the highest

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[1057] According to Tierney, "in defining 'unilateral' secession in the way that it does, *i.e.* as a right to effectuate secession without prior negotiations, the court seems to be recognizing that Quebec, while not having a unilateral right, does have a *prima facie* right to secede which the rest of Canada may not frustrate provided Quebec negotiates the details of secession in good faith. (…). In other words, if the people of Quebec clearly repudiate the existing constitutional order, and if Quebec is prepared to negotiate the practicalities of secession in good faith, then the rest of Canada has no right to deny the principle of secession or to frustrate negotiations; all that the rest of Canada can do is negotiate the details of that secession". "In short, therefore, Quebec seems to have a constitutional right to secede, albeit following negotiations (which Quebec, the other provinces and the federal government have a duty to enter into in good faith) if a clear answer to a clear question is achieved in a referendum." TIERNEY, S. *Constitutional Law and National Pluralism*, pp. 263-5. Similarly, NORMAN, W. *Negotiating Nationalism*, p. 200. NORMAN, W. "From quid pro quo to modus vivendi...", p. 189.

[1058] A technical reason to appoint three judges from Quebec is to ensure sufficient knowledge of civil law. HOGG, PW. *Constitutional Law of Canada*, p. 205. WOEHRLING, J. in ARGULLOL, E.; VELASCO, C. (dir.) *Institutions and Powers in Decentralized Countries*, § IV (3). That said, there is a certain belief amongst Quebec citizens and constitutionalists that the British case law of the Judicial Committee of the Privy Council (the summit of Canadian justice until 1949 located in London) was more favourable to the interests of Quebec than the current Supreme Court of Canada.

[1059] Beyond Canada, the composition of the Belgian Constitutional Court based on language parity seems to ensure acceptance by the Dutch- and the French-speaking communities. The Court also helped to secure institutional balances by interpreting sub-State autonomy broadly and legitimizing compromises of institutional engineering. POPELIER, P. "Asymmetry and Complexity as a Device for Multinational Conflict Management" in POPELIER, P.; SAHADŽIĆ, M. (ed.) *Constitutional Asymmetry in Multinational Federalism*, pp. 33-4. POPELIER, P. "The Disintegration of Belgium as the Chronicle of a Death Foretold?" in BELSER, E.M.; *et al*. (ed.) *States Falling Apart?*, p. 226-7.

[1060] When recommending to refer the issue of Quebec's secession to the Supreme Court, Monahan and Bryant started their proposal with the words: "The truism that courts are safety valve, without

courts are expected to play a fundamental role in the future evolution of self-determination and secession. There are theoretical and practical reasons to argue that secession disputes can find a reasonable accommodation in the judicial branch. Theoretical reasoning could emphasize the important role of constitutionalism and of the judiciary regarding protection and accommodation of minorities, including those national minorities that are a majority within a given part of the State and that want to become a majority in a new State. In a way, the counter-majoritarian aspect of judicial decisions would be at stake. In some contexts, practical reasoning could highlight the advantage of Courts not being so accountable to the whole voting population of the parent State and having some degree of independence from mundane party politics. In this respect, although Courts are not isolated from public and partisan approval and disapproval, their rulings are not generally the results of electoral cost-benefit analysis. In addition, even though the judiciary is rarely neutral towards secession and self-determination disputes, it tends to value and seek impartiality of judgement and be more committed to reason-giving than political branches.[1061]

The next paragraphs will explore three possible effects of the obligation of principled negotiation. The *first effect* could be to prevent or to reduce coercion or repression of peaceful democratic secession processes of minority nations. While in Quebec and Scotland there have been no personal punishment and collective coercion against holding a referendum on secession, in the Basque Country and Catalonia criminal prosecutions, institutional coercion and use of force have been very much present. In Spain, all too often threats and sanctions to curb the aspiration for independence have prevailed over principled deliberation and negotiation.[1062] In general, criminal prosecution plus other tough coercive measures make negotiation and compromise even more difficult.

The *second effect* of the doctrine of principled negotiation could be to allow unilateral secession if the parent State fails to negotiate properly. In other words, negotiation in good faith presupposes a duty on the part of the parent State to

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which no democratic society can survive, is tested in times of national crisis". MONAHAN, P.J.; BRYANT, M.J. *Coming to Terms…*, p. 42.

[1061] In similar vein, see TIERNEY, S. *Constitutional Law and National Pluralism*, ch. 7.

[1062] See § 3.4.5 above.

negotiate a reasonable exit for the nationality that clearly desires to secede. If the talks are a mere facade and there is no real will to negotiate, or if negotiations systematically fail to produce an agreement, this would strongly legitimize unilateral secession. In line with this effect of non-compliance with this obligation to negotiate, the ICJ Advisory Opinion on Kosovo put certain emphasis on the failure of the attempts at negotiation between Kosovo and Serbia. To some extent, Article 50 of the Treaty on European Union reflects a similar thesis. This provision places an obligation on any Member State wishing to exit from the EU to negotiate and seek agreed ways for a period of two years. If no agreement is reached after these two years of negotiation, the withdrawing Member State will be able to leave the Union unilaterally.[1063] In this respect, Article 50 could be considered a significant legal implementation of the *Principle of agreement and negotiation* derived from the hypothetical multinational contract defended in Part 1.

The Scottish Government, while accepting that Scotland would not be independent immediately after a yes result in the 2014 independence referendum, envisaged that negotiation in good faith should lead to independence by around March 2016.[1064] In the context of the 1991 Conference on Yugoslavia, the Netherlands Minister of Foreign Affairs Van den Broek (when the Netherlands held the presidency of the Council of Ministers of the European Community) stated that if the parties could not reach agreement within two months, the Member States were ready to recognize the statehood of the former republics after that period.[1065] In general, European experience with the dismemberment of Yugoslavia signals that agreement is not essential if the parent State is not prepared to negotiate in good faith.

The *third effect* of principled negotiation could be to force the parent State to seek appropriate ways to make the agreement legally acceptable and viable. In particular, if amending the constitution is unfitting in theory and doomed to failure in practice, principled negotiation could imply that the central State might neither require nor

[1063] See § 3.1.1 above.
[1064] *Scotland's Future*, p. xv, 20. By contrast, the UK Government said that the duration of the negotiations was impossible to predict. *Scotland analysis: Devolution and the implications of Scottish independence*, par. 2.41.
[1065] Although this statement was not expressly supported by the successive declarations, the lack of good faith and subsequent failure of the negotiations led, in the end, to recognition of the former Yugoslav republics as States. CAPLAN, R. *Europe and the Recognition…*, pp. 20-1.

promote constitutional reform.[1066] In particular, a negotiation in good faith was followed by the UK and Scottish authorities to agree on and implement the independence referendum in 2014.[1067] The whole process showed that: (1) the legal sovereignty of the Westminster Parliament was accepted by the Scottish Government; (2) the UK Government temporarily devolved the powers to hold and regulate the secession referendum; (3) secession would have been negotiated with the UK Government and the resulting agreement would have been incorporated in an Act of the UK Parliament.[1068] These points were closely connected, since the sovereignty of Westminster was accepted partly because it was believed that the British authorities would have taken the legal and political action reasonable and necessary to negotiate and recognize the birth of a new independent Scottish State.[1069] Negotiation and agreement in good faith had already started before the secession referendum was held. On top of that, deliberation during the referendum campaign was notably principled, public, practical and dispassionate enough.[1070]

Turning the spotlight onto the Spanish scene, Xabier Arzoz considers that the obligation to negotiate is upheld by Constitutional Court Judgement 42/2014, and applies not only after the referendum (Canadian doctrine) but also before (British doctrine).[1071] Let us go back to the Ibarretxe plans.[1072] In October 2003, the Basque Government, under the then President J.J. Ibarretxe, drafted a proposal to reform the 1979 Statute of Autonomy of the Basque Country (*Propuesta de reforma del Estatuto Político de la Comunidad de Euskadi*). In November 2003, the Bureau of the Basque Parliament agreed to admit the proposal for debate. As a reaction, the Spanish Parliament created criminal offences regarding the illegal calling of referendums and the Spanish Government referred the Basque initiative to the

[1066] For instance, if the amending procedure requires giving voice to all citizens of the parent State through referendum and this would condemn secession to failure, it could be, bearing in mind the circumstances and context, contrary to the obligation to negotiate in good faith.
[1067] See UK GOVERNMENT, *Scotland analysis: Devolution and the implications of Scottish independence*, 2013, par. 2.30.
[1068] In similar vein, TIERNEY, S. *Constitutional Referendums*, pp. 147-8.
[1069] See § 3.1.2 above.
[1070] See TIERNEY, S. "The Scottish Independence Referendum", in McHARG, A.; *et al*. (ed.) *The Scottish Independence Referendum*, pp. 53-73. One possible criticism could be that the economic aspects predominated (excessively) most of the public debates about the referendum. The national and identity elements were minimized and hidden as if they could not or should not form part of a public, reasonable deliberation on independence.
[1071] ARZOZ, X. "Nación minoritaria, principio democrático y reforma constitucional", p. 1932.
[1072] See LASAGABASTER, I. *Consulta o Referéndum*. CORCUERA ATIENZA, J. "Soberanía y Autonomía". LÓPEZ BASAGUREN, A. "Sobre referéndum y comunidades autónomas".

Constitutional Court.[1073] The Court rejected this appeal as premature and, in December 2004, the Basque Parliament adopted by overall majority the proposed reform of the Statute of Autonomy. In February 2005, the Spanish Parliament rejected the proposal outright in a single plenary session, closing the possibility to negotiate the proposal.

The second Ibarretxe plan had the joined objectives of ending the violence by ETA and recognizing the right to decide of the Basque people. These objectives were to be achieved through the political agreement offered in 2007 by the Basque Government to the Spanish Government (and subsequent agreement and ratification by the Basque representatives and Basque citizens). This offer of a political agreement was rejected by the central Government, paving the way for the next step: the adoption by the Basque Parliament of Statute 9/2008. This statute had a single article in which the Basque Parliament authorized the Basque president to submit to a consultative referendum of all Basque citizens the questions about the end of ETA and the right to decide quoted and commented on earlier.[1074] This referendum was meant to be non-legally-binding with the objective that the Basque political parties negotiate an agreement on the right to decide, thereby urging the Spanish Government and Parliament to negotiate a change in the political status of the Basque Country. The plan was to submit the agreement between the Basque parties to a binding referendum of the Basque voters by around 2010.

The referendum under Basque Statute 9/2008 was blocked by the Spanish Constitutional Court. In Judgement 103/2008, the Court declared the statute unconstitutional for competence, procedural and material reasons. This Judgement established the contemporary Spanish doctrine on referendums on self-determination, sovereignty and secession. The Court based the competence reasons for the unconstitutionality of Statute 9/2008 on the breach of the exclusive power of

[1073] Organic Act 20/2003 introduced Articles 506 bis and 521 bis in the Criminal Code, which were, under the premiership of Rodríguez Zapatero, repealed by Organic Act 2/2005.

[1074] See § 3.4.2 above. There was an ambiguity about whether this was an authorization given by the Basque Parliament to the Basque president to call the referendum or a direct calling of it by the Parliament since Statute 9/2008 already included the questions, the date and the procedure for the consultation. Various reasons could explain this ambiguity: (1) to leave the referendum pending on the results of the dialogue, (2) to conceive the consultation as a mechanism to exert pressure to negotiate, and (3) to concentrate the constitutional dispute under the jurisdiction of the Constitutional Court.

the State to authorize the calling of a referendum under Article 149.1.32 of the Constitution. The procedural unconstitutionality was based on having adopted the Statute by a single-reading parliamentary procedure. Regarding the material reasons, the Court ruled it unconstitutional to hold a referendum on self-determination, sovereignty or secession, since this kind of referendum cannot be left in the hands of the Basque voters, but must be open to all Spanish voters within the framework of the constitutional amending procedure of Article 168.

In particular, the Court argued that Basque Statute 9/2008 violates Articles 1 and 2 in conjunction with Article 168 of the Spanish Constitution. Article 1.2 stipulates that national sovereignty is vested in the Spanish people. Article 2 establishes the indissoluble unity of the Spanish nation. According to the Court, the strict need to follow the procedural order in Article 168 precludes holding a self-determination, sovereignty or secession referendum before having amended the Constitution. Under this case law, this sort of question can be addressed to the people only by means of a referendum to ratify a constitutional amendment or after a constitutional reform which makes them legal. Actually, this constitutional jurisprudence is not unusual in comparative law.[1075]

This case law has been criticized, among other reasons, because it would be absurd to start an amendment process as complex as the one provided for by Article 168 without having consulted the citizens first.[1076] However, as a general doctrine, it is not so absurd if moving the referendum forward in time could condition or alter the result of the process of constitutional reform. After upholding this general doctrine, Víctor Ferreres admits that a non-binding referendum prior to the constitutional reform to test the support for independence on the seceding territory can be considered a reasonable exception. Indeed, it could be absurd to try to amend the Spanish Constitution to constitutionalize secession of the Basque Country or Catalonia if the local majorities in favour of the independence option are not known in advance.[1077]

[1075] See § 3.4.5 above.
[1076] See BOSSACOMA, P. "Competències…", pp. 277-8. BOSSACOMA, P.; LÓPEZ, H. "The Secession of Catalonia", pp. 112-3.
[1077] FERRERES, V. "The Secessionist Challenge In Spain".

As long as this nuance is not added to the general rule, it is practically impossible to formulate a secession question compatible with this case law. This nuance might be added if one considers that both Judgement 103/2008 and the follow-up Judgements 31/2015, 32/2015, 138/2015 and 114/2017 are the result of the adjudication of regulations and calls for referendums and popular consultations (Basque and Catalan) intended to avoid the constitutionally required authorization by the State. In general, a negotiated and agreed referendum under adequate State legislation could relax this case law or make the Court turn a blind eye to it. In particular, this could be so if the State were to agree or authorize a consultation and this were backed up by an explicit commitment by the secessionist representatives to channel an eventual result in favour of independence through a constitutional reform initiative.

According to Ruiz Soroa, imposing an obligation to reform the Spanish Constitution before knowing and confirming the will for secession is practically tantamount to denying the possibility of secession. Instead of "putting the cart before the horse", it is more prudent and sounder to conceive constitutional amendment as the final stage of a legally regulated secession process. To this end, Ruiz proposed a "Statute on the prior procedures necessary to start an initiative for constitutional amendment on cases that affect national unity". Its procedural content could be summed up as follows: (1) a super-majority in the Parliament of the autonomous community to initiate the process, (2) expression of a clear desire for secession of the autonomous community via a referendum under Article 92 of the Constitution, (3) an obligation to negotiate in good faith, (4) submission of the negotiated agreement to the Spanish Parliament and (5) initiation of the formal procedure for constitutional amendment.[1078]

Since even in liberal-democratic contexts there are parent States unwilling to negotiate and allow reasonable ways to achieve secession, the following chapters will explore unilateral self-determination.

[1078] RUIZ SOROA, J.M. "Regular la secesión", pp. 197-201.

3.6. Internal self-determination

3.6.1. Illegitimacy of unilateral internal self-determination

According to the hypothetical multinational contract, the *Principle of internal self-determination* would be included in the *Principle of constitutionality*, unlike the *Principle of external self-determination*.[1079] This is no coincidence, but is rooted in the normative intuition that internal self-determination of minority nations is more limited by the principle of constitutionalism than external self-determination. The principle of internal national self-determination could also be more constrained by the principle of federalism.[1080] In other words, sub-State nations have a more intense duty of political morality to the principles of constitutionalism and federalism if it wants to exercise its right to internal self-determination than if it wants to secede from the parent State. This is because it is not morally acceptable for a part to decide the configuration of the whole (even if it can, of course, condition it). By contrast, it is open to a minority nation to stop being a part of the whole.

Under Justice as multinational fairness, the moral right to secede exerts moral pressure to re-write or re-interpret the principle of constitutionalism in order to constitutionalize the right to secede. The difference between unilateral secession, as a form of external self-determination, and unilateral internal self-determination can be illustrated by analogy with marriage: either spouse can decide unilaterally to split or divorce, whereas the economic and marital cohabitation arrangements are negotiated and agreed decisions. Something similar happens in many sorts of association, in which joining or withdrawing are unilateral rights of every member, but there is no individual right to determine unilaterally the status within the association. Minority nations may have a unilateral right to secede but they cannot decide how and on which terms they form part of the parent State. In general, entering and exiting are acts of a different class than how to be in.[1081]

[1079] See § 1.2.3 above.
[1080] In the hypothetical multinational contract, the principle of federalism would, to a large extent, be included in the *Principle of constitutionality* since the constitutional pact would include the federal agreement.
[1081] RUIZ SOROA, J.M. "El derecho a decidir como idea borrosa", *El País*, 29 October 2012.

Marital union, analogously to multinational State union, should be based on a sort of ongoing consensus between the parties. This analogy with separation and divorce is recurrent when talking about secession, which is considered a kind of political divorce.[1082] In both marital and political divorces, "knowing how something comes apart, or is allowed to come apart, tells us much about how or why it is put together".[1083] Nowadays, the civil law of most European (and western) liberal democracies makes marriage conditional on the mutual consent of both spouses, unlike separation and divorce which, generally, require no mutual consent. Moreover, in these liberal democracies, unilateral divorce is generally not tied to causes regarded as a remedy to an unfair grievance suffered by one of the spouses.[1084] Thus the civil law of most liberal democracies considers marriage not as a form of indissoluble union, but as a type of agreement that requires the implicit continuing consent of both spouses. In contrast, public law usually allows the husband sovereign State to prevent the wife nation from leaving him, even when the bonds of mutual affection are being substituted by different forms of coercion. Moreover, while women have long been allowed to choose if they want to get married and with whom, many minority nations could not.[1085]

Despite defending that minority nations may secede only by consent of the parent State or to remedy an injustice, Buchanan realizes that today morality and legality usually recognize a unilateral right to dissolve a marriage even if one spouse does not treat the other unfairly. "If we view political association, like marriage, not as an unalterable natural fact but as a human creation designed (at least in part!) to satisfy the needs of those who live within it, then it is far from obvious that injustice provides the only justification for dissolution."[1086] In divorces between spouses

[1082] Among others, SUNSTEIN, C.R. "Constitutionalism and Secession", p. 649. SUNSTEIN, C.R. *Designing Democracy*, p. 103. BUCHANAN, A. *Secession*, p. 7. NORMAN, W. *Negotiating Nationalism*, p. 171. NORMAN, W. "From quid pro quo to modus vivendi...", pp. 186, 192. Critics of the analogy between secession and divorce: ARONOVITCH, H. "Why Secession Is Unlike Divorce", pp. 27-37. MILLER, D. *Citizenship and National Identity*, p. 116.

[1083] NORMAN, W. *Negotiating Nationalism*, pp. 170-1. NORMAN, W. "From quid pro quo to modus vivendi...", p. 186.

[1084] Legal orders often require marital separation for a certain period before permitting unilateral divorce. Even if many liberal democracies still maintain a formal obligation to allege causes labelled as "irretrievable breakdown of marriage", most of them require no unjust grievance suffered by one of the spouses. See ÖRÜCÜ, E.; MAIR, J. *Juxtaposing Legal Systems… on Divorce and Maintenance*.

[1085] See NORMAN, W. *Negotiating Nationalism*, p. 171.

[1086] BUCHANAN, A. *Secession*, p. 7.

there is an over-riding public interest, which is to protect minor children. Analogously, protection of minorities can be understood as an over-riding public interest in a political divorce. Similarly, to protect minorities, certain conditions could be imposed on separation, like those imposed in marital dissolutions as regards alimony and custody of the children.[1087] The analogy with marital divorce encourages conceiving the right to secede as unilateral but not unconditional.

3.6.2. Institutional disobedience and unilateral self-determination

This section will consider whether any moral appeal to institutional disobedience can legitimize some exercises of unilateral self-determination. But before exploring institutional disobedience, civil disobedience should be introduced.

Civil disobedience in *nearly just societies* is, according to Rawls, subject to the following requirements: (1) Civil disobedience applies to citizens who recognize and accept the legitimacy of the Constitution, of the political and legal order of a society. (2) Consequently, such disobedience is not based on any religious doctrines or specific morality upheld by the person disobeying but invokes the sense of justice of the majority of the society to demonstrate that, in some specific way, a *clear and substantial* injustice is being perpetrated. This is the difference from conscientious refusal or objection, which invokes particular conceptions of the good. (3) Civil disobedience is a public act; it is not covert or secretive. It takes place in the public forum and the reasons are stated publicly, often by a minority invoking the public's sense of justice with the aim of bringing about legal or political change. (4) To prove loyalty to the existing law, disobedience must be peaceful, should come after having tried most legal means of reform or revision and must be willing to accept the punishment laid down. (5) Since civil disobedience has no intention of destroying the system, but wants to redirect it towards the common principles of justice, actions of civil disobedience can be committed as long as they do not lead to a general collapse of the system – whether on their own or because others are likely to follow the example or the precedent endangers the survival of the political and

[1087] In particular, *secession taxation* can work as a kind of alimony in favour of the spouse prejudiced or adversely affected by the separation.See § 1.3.4 above.

legal order as a whole. In conclusion, Rawlsian civil disobedience is not revolutionary but reformist.[1088]

Some have tried to apply this civil disobedience theory to institutional disobedience in systems of vertical division of powers, more precisely to the relation between the European Union law and the constitutional law of its Member States. Institutional disobedience, however, ought to be subject to even stronger constraints than civil disobedience. In particular, according to Julio Baquero, institutional disobedience could only occur when (1) a higher principle should be in grave, actual and imminent danger; (2) the ordinary mechanisms to prompt change did not or would not work; (3) the legal and political order can tolerate such a conflict under a prudential test; (4) the dispute is made public and explicit. Institutional disobedience can thus be seen as a possible but risky political or juridical voice that ought to remain exceptional and mostly silent. If used "sparingly, properly and intelligently", it can be a stabilizing device, a sort of escape valve when in extreme cases the usual channels of change are blocked.[1089]

Let us now try to extrapolate all this to three instances of institutional disobedience – one regarding external, another internal self-determination and a third in between them. As institutional disobedience, mirroring civil disobedience, would apply to institutions that recognize and accept the Constitution and existing law, a unilateral declaration of independence and the emergence of a new constituent power would not seem to fulfil this requirement well, nor would they be within the limits of loyalty to law. In addition, issuing and materializing a UDI would be active disobedience, which seems less tolerable than passive disobedience. What is more, the institutions of the new State claiming and seizing the monopoly of force over its territory and population would make the requirement of peaceful disobedience more disputable. Last but not least, a UDI appeals to some extent to a *demotic revolution.*[1090]

[1088] RAWLS, J. *A Theory of Justice*, ch. VI. In similar vein, "civil disobedience is one thing, revolutionary activity quite another, and the difference between them is told not only by their manner but also by their objectives". BICKEL, A.M. *The Morality of Consent*, p. 118.
[1089] BAQUERO CRUZ, J. "An Area of Darkness", in WALKER, N.; SHAW, J.; TIERNEY, S. (ed.) *Europe's Constitutional Mosaic*, pp. 65-71.
[1090] See § 3.7.1 below.

As long as the parent State is a nearly just constitutional democracy, internal self-determination through institutional disobedience is hardly legitimate, for instance setting up a regional Treasury unilaterally to collect and manage most taxes. Although the *Principle of multinational solidarity* forbids discriminatory schemes against national minorities, it is difficult to prove objectively any *clear and substantial* injustice in the inter-territorial system of solidarity, given the lack of moral consensus on the limits of distributive justice and solidarity.[1091] In similar vein, Rawls warns about the difficulty of identifying infractions of his difference principle, for there are a wide variety of conflicting opinions, theories, speculative beliefs, statistics and other complex data. Consequently, there should be a presumption in favour of restricting civil disobedience to *serious infringements* of the principle of equal liberty and to *blatant violations* of the principle of fair equality of opportunity.[1092] Likewise, under Justice as multinational fairness, there would be a presumption restricting disobedience to serious infringements of the *Principle of non-discrimination* and to blatant violations of the *Principle of equal opportunities and equal recognition*.

If a sub-State unit is allowed to disobey its fiscal obligations, what argument will be used to prevent extending this to other public institutions? And, worse still, how will physical and legal persons be stopped from disobeying their fiscal obligations? Much as the system can tolerate some civil disobedience and conscientious objection, if fiscal disobedience were allowed it could easily lead to chaos and collapse of the welfare State. Since noncompliance is contagious, institutional disobedience of fiscal duties might easily become epidemic. Bickel warned that: "Like law itself, civil disobedience is habit-forming, and the habit it forms is destructive of the legal order. Disobedience, even if legitimate in every other way, must not be allowed to become epidemic. (…) For disobedience is attended by the overhanging threat of anarchy".[1093] In this regard, the familiar argument against the unilateral right to secede based on the risk of chaos (which could lead to anarchy and tyranny alike) becomes all the more acute with institutional disobedience and

[1091] See §§ 1.2.3, 1.3.4 and 1.4.4 above.
[1092] RAWLS, J. *A Theory of Justice*, pp. 326-7.
[1093] BICKEL, A.M. *The Morality of Consent*, p. 119.

with proposals for internal self-determination such as the unilateral establishment of a fiscal scheme.

Holding an illegal independence referendum could be a form of institutional disobedience in between internal and external unilateral self-determination. An illegal referendum runs into the typical risk of the slippery slope of other forms of institutional disobedience for internal self-determination. The range of action of public institutions, unlike citizens, is bound by what the legal order allows them. Although a secession referendum and a UDI can be close, the latter should come after securing a sufficient democratic support for independence, whereas the former is presumed to be held when that support is not yet sufficiently clear. First legitimacy and then break is a more compelling sequence. Another significant difference between an illegal independence referendum and a UDI is that the former accepts only the parts of the legal order which suit it. Conversely, issuing a UDI, after repeated refusal by the parent State to allow an independence referendum to be held legally, understands that the legal order cannot be fulfilled partially. The legal order is a whole, above all for public institutions. In this respect, the strategy of an illegal independence referendum runs into a sort of free riding, since it keeps the current legal order insofar as it suits the secessionists, but ignores the parts which do not.[1094]

In the end, civil disobedience carries an obligation to accept the punishment, but what sanction should disobedient minorities accept if they were unilaterally to declare independence, to establish a fully autonomous tax authority or to hold an illegal referendum on secession? While setting up an independent State and an independent Treasury seems hardly compatible with acceptance of any punishment, promoters of an illegal referendum could accept to be punished according to the law. Beyond penalizing individuals, most States have means of coercing self-government institutions. One final argument for tolerating and, morally, preferring unilateral external self-determination to unilateral internal self-determination would

[1094] Some may, however, argue several caveats: (1) *pouvoirs constitués* in a constitutional State continuously strive to impose their interpretation of the Constitution; (2) the intrinsic link between independence referendum and UDI recommends not reaching very different conclusions between the two options; (3) if the parent State repeatedly refuses to agree, negotiate or authorize a referendum on secession, calling the consultation unilaterally may be legitimized by the principle of democracy.

be the intrinsic link between liberty and responsibility. Secession is an exercise of freedom that goes together with an equally intense, consistent responsibility. Once you gain independence, you can no longer enjoy the advantages offered by the parent State (for example, a bigger State market). Conversely, unilateral internal self-determination is an excessively broad exercise of liberty with no coherent assumption of responsibilities.

3.6.3. Internal secession as the creation of new States within a federation

As discussed at the beginning of this part, most democratic federations do not recognize any constitutional right to *external secession*. This section will focus on *internal secession*, namely the creation of a new State that does not secede from its federation, but only from the federated unit of which it formed part. *Secession* was defined earlier in this book as separation of part of the territory and population of a State with attributes of sovereignty to create another State with similar attributes of sovereignty. This definition includes both external and internal secession. The former involves the creation of a new sovereign State independent of the parent State from which it separates, whereas the latter implies the creation of a new State that becomes a member of the same federation. Since under federal theories sovereignty can be shared between different layers of government, the separation of a territory from a federated State could be conceived as internal secession.[1095] That said, internal secession could be considered a form of internal self-determination or, at least, relevant analogies could be drawn between the two.

A previous section argued that unilateral internal self-determination of sub-State nations is more constrained by the principles of constitutionalism and federalism than unilateral external self-determination.[1096] Similarly, it could be defended that internal secession is more bound by the principles of constitutionalism and federalism than external secession. Since internal secession would not be an exit accepting all the consequences, but a change of the federal pact and balance, it seems logical that majority acceptance within the federation and the other member

[1095] See ch. 1.1 above.
[1096] See § 3.6.1 above.

States would be necessary, differently from external secession.[1097] In cases where internal secession proves impossible for lack of agreement, the national community seeking secession could ultimately resort to external secession.

To illustrate some of the arguments, this section will explore the case of the creation of the new Swiss Canton of Jura as a result of secession from the Canton of Bern. The Cantonal division of the Swiss Federation is not a mere administrative division, but a territorial organization reflecting historical, political, religious and linguistic features. The Cantons can be considered federated States in comparative terms.[1098] In 1959, Jurassian separatists asked for a secession referendum through a popular initiative, but this was rejected by cantonal referendum. In 1970, an amendment to the Constitution of Bern, this time accepted by cantonal referendum, granted a right to self-determination of Jura to be exercised through a chain of three successive referendums: (1) across the whole territory of Jura, (2) in any districts that spoke out against the majority in the first referendum, (3) in the bordering municipalities. The result of the referendum across the whole region of Jura was tight: while 52% voted in favour of a new canton, several southern districts voted against. These districts ratified by further referendums their will to remain in Bern. Referendums in the bordering municipalities were triggered and held as the last link in this democratic chain, provided that the geographic unity of the two cantons could be maintained.[1099]

In February 1977, the Constituent Assembly of Jura approved the "Constitution of the Republic and Canton of Jura". In September of the same year, the Federal Assembly accepted the new Constitution of Jura on condition that "the Republic and Canton of Jura can include any part of the territory of Jura (...) if it duly separates in conformity with federal law and with the law of the Canton affected". The result of this secession process forced an amendment of the 1874 Swiss Federal Constitution.

[1097] See GILLILAND, A. "Secession within federations…", pp. 39-49.
[1098] See Preamble and Articles 1, 3, 150 of the Swiss Federal Constitution of 1999. THALMANN, U. in ARGULLOL, E.; VELASCO, C. (dir.) *Institutions and Powers in Decentralized Countries*, §§ I (5-6) and III (1).
[1099] See MAGGETTI-WASER, M.; FANG-BÄR, A. "The Birth of a New Canton" in BELSER, E.M.; *et al*. (ed.) *States Falling Apart?*, pp. 347-52. BILBAO UBILLOS, J.M. "El proceso de gestación de un nuevo canton…", pp. 299-303. MONAHAN, P.J.; BRYANT, M.J. *Coming to Terms…*, pp. 16-7.

Specifically, Article 1 of the Constitution was amended (to add Jura to the list of Cantons forming the Helvetic Confederation) along with Article 80 (which establishes the number of representatives of the Cantons in the Council of State). These amendments were accepted by the Swiss people and by all Cantons. With the entry into force of this constitutional amendment, on 1 January 1979, the Canton of Jura was recognized as a member of the Confederation.[1100]

The principles of respect for and protection of Cantons' territorial integrity, sovereignty and constitutions were relevant arguments against the internal secession of Jura.[1101] Yet, these were not unsurmountable obstacles to this internal secession. Based on this experience, the Swiss Federal Constitution of 1999 established a constitutional process of internal enlargement which demands consent of the Canton, of the people concerned and of the Federation. The new Constitution thus harmonizes these principles of unity, sovereignty and constitutionalism with self-determination. However, the process of internal secession is complex, since it requires the consent not only of the Canton affected but of all the Swiss Cantons and citizens as well.[1102]

In 1994, thanks to the mediation of the Federal Council, the Cantons of Bern and Jura agreed to establish the Inter-Jurassian Assembly as an inter-cantonal forum. In 2000, this Assembly adopted a resolution to give south Jura greater autonomy and establish an association with the Canton of Jura, which could end up with fusion or reunification if so decided by the citizens of south Jura. In 2002, the cantonal government of Bern agreed on an autonomy arrangement for south Jura and established the Council of Bernese Jura. At the end of 2013, a referendum to unite Jura was held in both parts of Jura: in the Canton of Jura 76.6% voted in favour of

[1100] MATAS, J.; *et al*. *The internal enlargement…*, p. 45: "It is possible to wonder what would have happened if the federal referendum had rejected the incorporation of the Jura. What is clear, however, is that after the constitution of the new canton, the Jurassians continued to be Swiss and the Jura remained in Switzerland, a victory for the no in the federal referendum of 1978 would have forced the procedure of secession of the Jura from Switzerland to begin, which would not have been automatic, or the constitutional reform to be reformulated and therefore the way in which the Jura fitted into the Confederation."
[1101] See Articles 5 and 6 of the Swiss Federal Constitution of 1874.
[1102] See Article 53 of the Swiss Federal Constitution of 1999.

incorporating Bernese Jura, whereas in the latter 71.8% voted against integration. What is more, the vote against incorporation won in 47 of the 49 municipalities.[1103]

The case of the secession of Jura offers many exemplary virtues, amongst which: (1) The principle of democracy is a source of legitimacy to exercise the right to secede and is, therefore, a driving force for interpretation and amendment of the Constitution. In this regard, the principle of constitutionalism should try to accommodate it. (2) Negotiation and agreement allowed sound adaptation of cantonal and federal constitutional law to democratic desires for territorial independence. Compromise and accommodation even continued after the statehood of Jura was recognized. (3) A cascading series of referendums were held in districts and bordering municipalities to let them decide which Canton they wanted to belong to. As defended earlier, this can be an appropriate legal and political procedure to avoid over-rigid application of the *uti possidetis juris* principle.[1104] In other words, it is a good democratic technique for redrawing the territorial borders with the functional purpose of building viable States concentrated in a specific territory that would include as many secessionists and as few unionists as possible. The ensuing problems are not as important as its democratic, fair and stabilizing virtues. (4) Decentralizing the exercise of self-determination through cascading referendums may lessen the need for qualified majorities and for turn-out or approval quorums. (5) An internal secession within a federation should not necessarily imply being left outside the union. Instead of opposing and detracting the democratic will of the people of Jura, the federal institutions played a conciliatory role. Similar virtues could perhaps be extrapolated to the EU if it is considered or if it becomes a sort of (con)federal Union.[1105]

3.7. Unilateral secession

3.7.1. The awakening of a constituent people

[1103] See MAGGETTI-WASER, M.; FANG-BÄR, A. "The Birth of a New Canton" in BELSER, E.M.; *et al*. (ed.) *States Falling Apart?*, pp. 354-62. MEDINA, M. *El derecho de secesión…*, p. 193.
[1104] See § 1.2.5 above.
[1105] See BOSSACOMA, P. *Secesión e integración*, § 10. REQUEJO, F.; NAGEL, K.J. "Democracy and Borders", in JORDANA, J. *et al*. (ed.) *Changing Borders in Europe*, pp. 146-62.

If both civil and institutional disobedience require recognition and acceptance of the legitimacy of the existing Constitution and the political and legal order in general, an appeal to a new constituent power by means of a unilateral declaration of independence would not fulfil this requirement. As observed, institutional disobedience mirroring civil disobedience should not be revolutionary but reformist.[1106] In this respect, would unilateral secession be a political and legal reform or would it be closer to a revolution? While consensual secession can be deemed a significant political and legal reform, unilateral secession is not a reform in the strict sense for it entails a rupture with the current constitutional order and the beginning of a new constituent phase. Is it then a revolution? Two main types of revolution may be distinguished: one more social, identified with the French Revolution (more socialist), the other more political, associated with the American Revolution (more liberal).[1107] Starting with the Declaration of Independence in 1776, the American Revolution established a new independent people and polity. In this sense, unilateral secession can be considered a *demotic* revolution.

Let us now explore, following Bruce Ackerman, this American sense of revolution. The Ackermanian interpretation of US constitutional history appeals to the implicit existence of a constituent revolutionary right that emanates from ordinary citizens when they manage to mobilize and organize themselves politically with such quantitative and qualitative majorities that they can be considered *We the People*. When citizens succeed in expressing themselves for an extended period with sufficient clarity after intense public deliberation, they establish themselves as *We the People* with legitimacy to repeal and create constitutional law. According to Ackermanian *democratic dualism*, constitutional law is a technique to ensure that the choice of *We the People*, expressed in revolutionary times with extraordinary citizen participation, will continue to be respected in ordinary times of less mobilization and deliberation. In other words, constitutional law protects the genuine will of the people instead of opposing it.

Democratic dualism is based on the awareness that mass public participation in political life is variable, not constant. Unlike the *We the Politicians*, this *We the*

[1106] See § 3.6.2 above.
[1107] See ACKERMAN, B. *We the People (1)*, ch. 8. ARENDT, H. *On Revolution*, especially ch. 2.

People rarely speaks out since in ordinary political times they remain dormant, engrossed in their private matters. In normal political times, citizens are more apathetic and ignorant of the *res publica*. Thus, it is in exceptional revolutionary times that the *We the People* signals, proposes, deliberates on and (re)writes constitutional law. In short, since public virtue of citizens is limited, the mission of constitutional law is to economize it, not to chain it.[1108] Defending the constitutionalization of a qualified right to secede as a type of constitutional amending procedure, as done in previous sections, should not preclude justifying a theory of secession grounded on democratic dualism for cases where there is no constitutional right to secede or where this right is excessively qualified making secession close to impossible.

Following Ackerman's conception of constitutional law, this section proposes a constitutional theory of secession based on the awakening of a new constituent people. This theory holds that only after a long path seeking negotiated and constitutional ways could unilateral democratic routes, backed up by extensive, intense and sustained popular mobilization, legitimately overcome the constitutional barriers and raise the seceding nation as a constituent people. It has been stressed that unilateral secessions are rather revolutionary since they entail a break with and of the constitutional order. Because of the intrinsic and necessary relation between democracy and law, a break with a liberal-democratic constitution must be taken seriously and considered exceptional.

In liberal-democratic contexts, unilateral secession cannot be seen as a trivial or over-simple objective. In this regard, a constitutional theory of secession needs to be grave enough to reduce undue use of secession threats as well as prevent vain secessions. Even if the price to be paid for secession is usually high enough on its own, it is important to make sure or corroborate that there is sufficient initial popular will, cohesion, tenacity and force to take the unilateral path. *We the People* cannot rise, secede, constitute, reunify and rebuild every short period of time. Because there is always the option of reunion in the future, some argue that the right to secede should not require qualified democratic support. From an institutional and

[1108] See ACKERMAN, B. *We the People (1),* chs. 1, 9-11. For democratic dualism beyond the US Constitution, ACKERMAN, B. "The New Separation of Powers", pp. 664-9.

pragmatic point of view, however, this argument is not convincing. The reunification option should be envisaged only in the long term. Otherwise, States, nations, other communities and citizens would be plunged into (too much) vulnerability and uncertainty. Unity and territorial integrity must be taken seriously.

Democratic secession cannot be understood as a normal, everyday political objective. This book has no wish to formulate a liquid theory of secession, nor one that would unduly empower the pro-secession *elites* or the secessionist *mass*, but a theory that would require solidity and perseverance on the part of the seceding *people*. In Part 1 we saw that the ideal of long-term political union and, as a corollary, the principle of territorial integrity respond to the reasonable will to secure the stability of the spatial and personal frameworks of liberty, equality, loyalty, fraternity and solidarity. Secession, and above all unilateral secession, ought not to be an easy target because the territorial and subjective spheres of validity of the State are primary political and legal frameworks within which cooperation, deliberation, protection, redistribution and retribution take place.

If both unity and secession are taken seriously, renewed meanings can be given to constitutional barriers to secession. First, constitutional barriers to secession can prevent undue threats and vain secessions. If unilateral secession is not conceived as a grave target, the risk of both undue threats and vain secessions increases exponentially. Second, constitutional barriers can work as legal tests to ensure that there is a nation ready to constitute itself democratically as a sovereign, cohesive, enduring and long-lasting *We the People*. In this regard, constitutional barriers can stand (as a resistance) against a *secessionist mob* or a *secessionist leadership without the people*, by requiring a *genuine voice of the people* willing to create a new liberal-democratic order. Thus, constitutional barriers could end up being legal tests requiring fulfilment of the principles of Justice as multinational fairness.[1109] Last but not least, constitutional barriers can give the appropriate time for any potential hidden majority in favour of unity to be organized and heard. Moreover,

[1109] See §1.2.3 above.

this waiting period is appropriate to allow a meaningful debate among factions in times when strong polarization is likely.[1110]

The requirement that *We the People* must speak out and deliberate at length is necessary to give any hypothetical "silent majority" in favour of the current constitutional order time to mobilize with all its strength. Therefore, constitutional resistance to change (for instance, by means of judicial review) makes sense in the Ackermanian vision in that it gives a prudent time for any possible conservative majority to rally. Likewise, it is pertinent to give the conservative political elites enough time to convince the people, once again, of the virtues of the current Constitution.[1111] Applied to the secession challenge, it is important to allow the unionist political elites enough time to persuade the awakening *We the People* of the virtues and balances of the current constitutional order as well as of the ills and dangers of secession.

The authorities of the parent State, especially the highest Courts, can paralyze the secession process by applying the constitutional barriers to secession while: (1) there are enough grounds to believe in the existence of a hidden silent majority in favour of State unity, (2) there is reasonable doubt about the presence of a clear and sustained majority in favour of secession, (3) there is lack of evidence that the long path seeking negotiated and constitutional ways has already been walked. Only after long, deep and broad public deliberation, participation and mobilization can the secessionist claim be considered a constituent claim and should constitutional law then retreat. *Long* refers to the increase or maintenance of public involvement over time; *deep* to the quality and seriousness of public involvement; and *broad* to the quantity and intensity of public involvement. When the combination of length, depth and breadth is weighty enough, constituent times will emerge above constituted times.[1112]

[1110] The requirement of an extended period of mobilization and deliberation seems a good remedy against the ill warned by Sunstein: "Indeed secession movements are highly likely to reflect processes of group polarization, as like-minded people, speaking and listening mostly to one another, end up with increasingly extreme positions." SUNSTEIN, C.R. *Designing Democracy*, p. 96 (see also pp. 112-3).

[1111] See ACKERMAN, B. *We the People (1)*, pp. 278-88.

[1112] With no pretension of being exhaustive, the Catalan independence movement may be awakening as a *We the People*: (1) mass self-determinist and secessionist demonstrations on the Catalan national day ("*diada*") every year since 2012; (2) strong civil organizations pushing for secession; (3) about

This retreat of constitutional law can thus be regarded as an implicit *revolutionary reform* of the Constitution.[1113] If the retreat is accepted and internalized by the main legal or political authorities of the parent State, an initially unilateral secession can advance towards being considered a negotiated and consensual secession. This *switch in time* would recognize an implicit revolutionary reform of the Constitution, and negotiations on the terms of secession could and should then start between the government of the rump State and the seceding leadership. In *extraordinary democratic times*, it is of paramount importance to reject the dichotomy between legalistic perfection and lawless force.[1114] In the end, solid majorities make constitutional flexibility, acquiescence and change more likely and that, in turn, smoothens the secession process.

Ackerman also rejects the formal system of reforming the US Constitution by appealing to persistent changes in national consciousness. The amending procedure under Article 5 reserves an important ratifying role for the States because, back in the time of the Framers, Americans' identification with the State was equal to or

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800 of the approximately 1000 local governments in Catalonia are associated for independence; (4) several illegal referendums and informal consultations on independence from 2009 to 2017; (5) the intense and ongoing debate on the right to hold a legal and negotiated referendum on independence resulting in broad support in Catalonia for consulting Catalan citizens on independence; (6) the big increase in turn-out for the elections to the Parliament of Catalonia – 68% in 2012, 75% in 2015 and 79% in 2017. Although pro-secession parties obtained majorities in the Catalan Parliament that enabled them to form three secessionist governments (2012-5, 2015-7, 2017-ongoing), the results of these elections nevertheless show that there is no clear or qualified majority of voters supporting independence. Besides, pro-secession parties had worse results in the Spanish Parliament. All these elections could also be part of the Ackermanian "series of electoral tests" that should be passed to confirm the rise of a constituent people. ACKERMAN, B. *We the People (3)*, p. 43. ACKERMAN, B. "The New Separation of Powers", p. 665.

[1113] This *revolutionary reform* of the Constitution would be similar to those that Ackerman describes in his explanation of the evolution of the US Constitution. Arguably, applying an Ackermanian approach to a secessionist challenge can skip some of the problems with applying this approach to the same constituted polity. First, it is easier to argue against the need to follow the formal amending procedure when the theory is applied to the nascence of a new constituent *demos* which is a sort of permanent national minority in the country as a whole but a majority in a specific territory of it. Second, once the new *demos* performs as an independent State and is recognized as such, there is no more trouble to identify the constitutional change. Third, since a new constitutional beginning starts after independence, a new constitutional canon is supposed to inform the validity of the future legislation. Thus, it largely saves the dilemma of how to treat future ordinary statutes in conformity with the formal constitution but contrary to an informal constitutional reform. In this way, it avoids the need to develop a doctrine to distinguish between formal and informal constitutional amendments. Last but not least, legal certainty seems to be better preserved in a constitutional theory where informal constitutional reforms do not become normalized but are reserved for very particular issues such as the emergence of a new constituent people.

[1114] ACKERMAN, B. *We the People (2)*, p. 116.

greater than their identification with the (Con)Federation. On the assumption that over time citizens identified more with the Federation and less with their own States, the constituent power tended to centralize.[1115] This feeds the constitutional theory of secession defended here and, in general, fuels constitutionalization of the right to secede as a new type of constitutional reform.[1116] Indeed, it seems intuitive that constituent power ends up adapting to the long-standing changes of national identification. But neither change in national consciousness nor the emergence of a constituent people deserve an easy test.

Certainly, we should neither fall into the post-modern vice of removing the solemnity from things nor exclude the virtue of *gravitas.*[1117] Excessive solemnity, however, could turn this virtue into a vice. Whilst constitutional barriers to secession are relevant and can have interesting renewed meanings, they should not be too high nor too prolonged. Excessive barriers to secession might force citizens to waste too much of their energy on their public struggle. Excessive public mobilization can bring democratic, legal and socio-economic problems: (1) Democratic problems can arise in the form of a worrying increase in democratic distrust. The latter may feed non-democratic claims, associations and acts. In other words, forcing excessive mobilization of *We the People* might unleash violence and endanger social peace.[1118]

(2) Strong political pressure from the pro-secession side, whereas the defence of State unity is based mainly on pure and formal legal arguments, may nourish mistrust or even a crisis of public law among secessionist citizens. Public law may appear to be a tool solely in the hands of one of the parties involved in the dispute and not a social technique for protecting citizens and minorities, but only for perpetuating the unity and integrity of the present-day State. A crisis of public law might then also be triggered when pro-secession politicians start to look for legal interpretations that are far from acceptable legal reasoning. False, ambiguous and

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[1115] ACKERMAN, B. *We the People (3)*, p. 28. ACKERMAN, B. *We the People (2)*, pp. 405-16.
[1116] As defended in § 3.1.1 above.
[1117] See FERRERES, V.; SAIZ ARNAIZ, A. "Una gran conversación colectiva", *El País*, 5 February 2014.
[1118] As Norman points out concerning secessionist demands: "the possibility of political violence cannot be ruled out in even the most peaceful of political cultures". NORMAN, W. *Negotiating Nationalism*, p. 174. NORMAN, W. "From *quid pro quo* to *modus vivendi*...", p. 187.

weak doctrines, concepts and arguments come into the legal field and, without any chance of legally trumping actual rules and principles, sow the seeds of disobedience and anarchy. The perception of law as a weapon of domination encourages not only distortion of it, but also the belief that (public) law is just a matter of factual power.

(3) Socio-economic problems in the broad sense might appear because excessive public and private resources and efforts are put into the secession struggle. The (nascent) *We the People* cannot be asked to participate and mobilize too much or for too long, because it is good, in economic and social terms, that the citizenry can concentrate on their own businesses, enterprises and private affairs in general. While forcing secessionist citizens to perform and exhibit high public virtues could make sense in the conception of liberty of the Ancients, it does not make that much sense in the eyes of the Moderns.[1119] In ancient democracies, citizens could perpetually be assembled thanks to the mass of slaves, women and others without citizenship rights who ran the private sphere. The modern distinction between public and private spheres was blurred in those days. On top of that, requiring excessive mobilization may foster illiberal ideas and actions. That in turn may give rise to intimidation, violence and distress among factions. If social peace is endangered, the cleavage between secessionists and unionists can become a lasting social fracture.[1120]

3.7.2. The emergence of a new legal order

Having defended a constitutional theory of secession based on the awakening of a constituent people, it seems appropriate to analyse the emergence of a new legal order in the light of some of the teachings of Hans Kelsen and Herbert Hart. Kelsen draws a distinction between two kinds of constitution that co-exist in most States: the constitution in a *legal-logical* sense and the constitution in a *legal-positive* sense. According to him, the former is not a positive but a presupposed norm on

[1119] CONSTANT, B. "The Liberty of the Ancients Compared with that of the Moderns" in *Political Writings*.
[1120] BOSSACOMA, P.; LÓPEZ, H. "The Secession of Catalonia".

which any State legal order is grounded and which is the ultimate source of validity of the whole positive internal legal order. It could be said that it is the presupposed norm which sets up or recognizes the constituent power. From the *legal-logical constitution* is derived the *legal-positive constitution*, which is not presupposed but express and institutionalized. Consequently, the latter is a positive norm whose validity and force depend not on any other positive norm, but on a presupposed norm. From this positive constitution the other positive legal norms derive their validity and force.[1121]

Hart coined the concept of *rule of recognition* as a secondary norm that serves to identify the sources of the law in a specific legal order. The *rule of recognition* provides the ultimate criteria of validity of the legal norms within a legal system. Some parallels can be perceived between the Kelsenian *legal-logical constitution* and the Hartian *rule of recognition*. While for Kelsen the former is a presupposed norm, for Hart the existence of the latter can be demonstrated through the practice of the courts, officials and private persons in identifying the law by reference to certain criteria. Thus, the existence of the *rule of recognition* is, according to Hart, a matter of fact. Although from an external point of view the *rule of recognition* is an actual fact, internally the *rule of recognition* is a norm in that it serves to identify the criteria of legal validity and, thus, has some normative character.[1122] This internal point of view brings the theories of both authors closer together.

Some lessons from these positivist legal philosophers can be applied to the emergence of a new legal order through a unilateral declaration of independence. Inspired by the Kelsenian theory, can a UDI be understood as a democratic norm that, though not derived from any previous internal constitutional norm, identifies and seeks to give validity to the birth of a new *legal-logical constitution* by virtue of a democratic title? Indeed, the aim of such a declaration seems to establish or recognize democratically a new *legal-logical constitution* capable of giving legal validity to a new *formal-legal constitution.* This theoretical reasoning could therefore be followed to leave the parent Constitution with no validity on the sub-State territory and to avoid the juridical need to amend this Constitution. In short, a

[1121] KELSEN, H. *Teoría General del Estado*, § 36.
[1122] HART, H.L.A. *The Concept of Law*, pp. 100-23.

UDI could become a kind of democratic break with the current Constitution with the normative purpose of legitimizing the emergence of a new constituent power. This new *pouvoir constituant* could be the origin or the embodiment of an emerging *legal-logical constitution.* Anyway, the notions of constituent power and of legal-logical constitution are very close.

Under Hartian theory, a similar line of argument can be sketched. A unilateral declaration of independence would try to change the ultimate criteria of legal validity currently prevailing between the authorities and population on the sub-State territory (internal point of view of an emerging rule of recognition). At the same time, such a declaration would not forget that changing the *rule of recognition* is not just a legal issue but a matter of fact based on the actual practice of the courts, officials and private persons. Hart could say that this new or revised *rule of recognition* is due to the obedience on the part of the population and to the acceptance by the old or new authorities ("as critical common standards of official behaviour").[1123] This factual process of novation or renovation of the *rule of recognition* would be inspired largely by the positive democratic title represented by a UDI (similarly to what occurred in the USA with the Declaration of Independence of 1776).

The history of the British Commonwealth, according to Hart, is an admirable field of study of the embryology of new legal systems. Colonies formerly based on a *rule of recognition* which identified as the ultimate criteria of legal validity the enactments of the Westminster Parliament each gave themselves new *rules of recognition* with local roots. It is nevertheless possible, as the Commonwealth history indicates, that the new legal order of the colony becomes in fact independent of its parent system, even though the latter may not recognize this fact. As a matter of fact there can be two legal orders, whereas the parent State law will keep insisting that there is only one.[1124] This conflict can be decided in the end by reference to international law, as a superior legal order that determines when a new State emerges and the recognition of its existence then limits the territorial, personal and temporal spheres of validity of the State legal orders.

[1123] *Ibid*. p. 117.
[1124] *Ibid*. pp. 120-1.

This book has a certain preference for the Kelsenian theory since the *legal-logical constitution* is ultimately a (presupposed) norm and a norm always has a critical and ideal component. If more importance is given to what should be rather than what actually is, Justice as multinational fairness has more to say. Conversely, the factual perspective of the Hartian *rule of recognition* makes it more difficult to recognize the relevance and normative force of a UDI, if it is not accompanied by certain facts. One must unfortunately agree with Hart's view that, in the end, the emergence of a new legal order (and, thus, of any *rule of recognition* or *legal-logical constitution*) cannot escape facts. As the classic criteria for statehood under international law point out, *ex factis jus oritur.* In this respect, Kelsen also upholds the principle of effectiveness as the key to creation and recognition of new States in international law.[1125]

In contrast to State constitutional law, Kelsen warns that violation of the former constitution is not against international law. According to him, international law may see as a legal modification what internal law considers an illegal reform.[1126] Although the ICJ Advisory Opinion on Kosovo considered that UDIs, in general, are not contrary to international law, this does not mean they engender a legal right enforceable before the parent or any other international jurisdiction.[1127] In the final analysis, the emergence of a new legal order through the creation of a new State goes beyond purely legal criteria by encompassing many other sources of legitimacy such as democratic choices and procedures, moral principles and intuitions, habits of obedience, international recognition and support, regional stability and other interests of many kinds.

Although it is theoretically reasonable that UDIs may try to erect a new *rule of recognition* overnight (when the parent State is clearly not inclined to negotiate), the truth is that any unilateral change is likely to take time and to cause many problems. The stage at which it is right to say that the legal order of the parent State has ceased to be in force in the seceding territory is not easy to determine. Probably two rules

[1125] See ch. 2.3 above.
[1126] KELSEN, H. *Teoría General del Estado*, § 36.A. KELSEN, H. *Principles of International Law*, p. 264.
[1127] See ch. 2.2 above.

of recognition will compete for obedience by the citizens and acceptance by the authorities. If the latter are not keen to obey, probably new courts and officials will be appointed. Thus not only rules but also authorities will be competing against each other, and citizens willing to obey will be trapped in an unavoidable dilemma of disobeying laws and authorities. The change of the rule of recognition through unilateral secession cannot be expected to be a healthy transformation, but a rather pathological and unpredictable conversion. In the end, because of these legal pathologies and uncertainties, the emergence of a new legal order through unilateral secession is particularly difficult to theorize.

3.7.3. Unilateral declaration of independence beyond theory

Since a UDI proclaims political and legal independence without following the internal legal order in force, it should be an option of last resort after a long path seeking negotiated and constitutional ways. If prior attempts to consult the citizens directly through a referendum have been blocked repeatedly by the parent State, democratic representation could be sufficient to legitimize a UDI. However, if no legal and negotiated referendum could be held, the doctrine of a clear majority should directly apply to successive manifestations of representative democracy such as campaigns, manifestos and debates within and beyond legislative chambers. In liberal-democratic contexts with no blatant injustices, neither a simple nor an overall majority of representatives are enough to declare independence unilaterally. Even if the parent State has refused systematically to allow a referendum on secession, this ought not to make secession too easy. The effect of impeding a referendum on secession is to justify secession by clear expressions through democratic representatives.

In parliamentary democracies, a UDI may take the form of a declaration by Parliament. Nonetheless, issuing such a declaration in the name of the democratic representatives of the people, and not by the regional Parliament itself, could be more appropriate.[1128] In presidential democracies, the President should concur in the

[1128] The US Declaration of Independence of 1776 reads: "We, therefore, the Representatives of the United States of America, in General Congress, Assembled, appealing to the Supreme Judge of the

declaration, since the Presidency is also a branch of government with a direct mandate from the citizens (in fact, the President is often considered a major representative of the people). Regarding the legal instruments and procedures, parliamentary resolutions with light deliberation, weak effects and lack of solemnity are not suitable. Instead, it is reasonable to follow a parliamentary procedure as deliberative and participatory as possible. If no such instruments and procedures exist, they should be designed for the occasion or for generally passing political declarations of special significance. The moral, political and legal effects of the UDI must be strengthened by passing the declaration after intense and extensive deliberation and with internal and international solemnity.

In relation to the content of a UDI, it should not stick to one particular theory of secession. A declaration of independence does not need to look like an academic piece of work, even though its drafters should be familiar with the academic debate on secession. Regarding remedial theories, it could include a compendium of grievances recalling the main historical and present injustices and injuries that the seceding people have suffered. The US Declaration of Independence of 1776 offers an example in this respect that has been copied in many later UDIs world-wide.[1129] Regarding elective theories, a UDI could emphasize the democratic legitimacy stemming from people that, after peaceful but intense mobilization, have become constituent. It could recall previous attempts to find negotiated and consensual ways, while remaining open to negotiate the terms of secession. Regarding ascriptive theories, the UDI could point out objective and subjective national features, highlighting subjective elements such as common sympathies and feelings of horizontal comradeship that should help to care and provide welfare for all citizens. Besides referring more to national structure than national character, the declaration could explain why the seceding group is and will remain liberal ensuring, in particular, respect and protection of basic rights of individuals and minorities.

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world for the Rectitude of our Intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly Publish and Declare, That these United Colonies are, and of Right ought to be, Free and Independent States". Kosovo's Declaration of Independence of 2008 proclaims: "We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign State". On this aspect, see the ICJ Opinion, par. 102-9.

[1129] See ARMITAGE, D. *The Declaration of Independence*.

Another question would concern the *post-constituent legal value* of a UDI. President Lincoln gave a sort of constitutional value to the Declaration of Independence of 1776: "The assertion that 'all men are created equal' was of no practical use in effecting our separation from Great Britain; and it was placed in the Declaration, not for that, but for future use".[1130] In more recent times, point 2 of the Kosovar Declaration of Independence of 2008 established that Kosovo is "a democratic, secular, multi-ethnic republic guided by the principles of non-discrimination and equal protection under the law". What is more, point 12 expressly stipulated that Kosovo will be legally bound by the provisions contained in the Declaration.[1131] Indeed, principles expressed in the UDI ought to have certain political and legal effects when it comes to making and understanding the future constitution. Since the normative effects of a UDI could and should last after the new State is created, this underlines the nature and function of a UDI not simply as a resolution but as a norm. In short, even if the UDI performs a mainly constituent role, it can also have broader constitutional functions.

Nevertheless, the constituent principles of the UDI should be neither eternal nor intangible; instead, they may be nuanced, reformed and even rejected with due justification and over time. Notwithstanding this, the principles included in the declaration should influence the framing and interpretation of the future constitution, since the parent State as well as other States and international organizations might have recognized the new State legitimately trusting the provisions of the UDI. Coherence and good faith also point in a similar direction. Note that the term *principle*, understood as norm or normative value, is closely linked to the Latin word *principium*, meaning beginning or start.[1132] In politics, the beginning often explains and conditions the subsequent principles. This connection makes the legitimacy of the beginning even more important.

[1130] See § 3.1.1. ARMITAGE, D. *The Declaration of Independence*, p. 26. ARENDT, H. *On Revolution*, pp. 117-31.

[1131] "12. We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan. In all of these matters, we shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244 (1999). We declare publicly that all States are entitled to rely upon this declaration, and appeal to them to extend to us their support and friendship."

[1132] Many modern Latin languages still use the same word for *principium* and principles. Ancient Greek already had this identity. See ARENDT, H. *On Revolution*, pp. 205-6.

Turning to strategy, there are two main roads for a UDI to seek independence. The first, a declaration of independence with the aim of directly gaining effective control over the territory and population. The second, a declaration of independence with the aim of initiating the process of international recognition.[1133] The latter road is more normative, whereas the former one is more factual. Since these two roads are meant to work as models, real-world UDIs are expected to be somewhere in between.

The *declaration of independence with the aim of directly gaining effective control over the territory and population* is straighter and is based on the doctrine of *faits accomplis*. This road seeking effectiveness should immediately establish or express: (1) the procedures for adapting the law during the transition period between the UDI and approval of the new constitution; (2) provision for a constituent process to approve the new constitution;[1134] (3) the supremacy of the new legal order over previous laws, the latter remaining in force as long as they do not contravene the former;[1135] (4) creation and adaptation of the main authorities and bodies that were previously in the hands of the parent State;[1136] (5) the new citizenship;[1137] (6) the

[1133] This distinction is different from that between *declaration towards independence* and *declaration of independence*. See § 3.3.2 above.

[1134] After the issuing of a UDI, it might be better for ordinary elections and Parliament to continue in parallel to constituent elections and assembly. First, citizens might support one political force during the independence process, but then prefer another to write the constitution of the new State. Second, unilateral secession and creation of a new State would imply a large number of political affairs. In this respect, while the Constituent assembly could write the constitution in more ideal terms, the Parliament could deal with the many political troubles in more short-term nonideal ways. Finally, to isolate the Constituent assembly from the day to day partisan struggle, it can be wise to keep the function of selecting the high offices (both of the Executive and of the Judiciary) and the functions of controlling the Government in the hands of the Parliament. That is to say, a Parliament and a Constituent assembly could co-exist enabling the latter to give full attention to drafting of the constitution. See SIEYÈS, E. *Qu'est-ce que le Tiers état?*, ch. V. That said, a constituent assembly dealing with the ordinary parliamentary issues or a Parliament with a special constitution-making commission could be simpler and more practical ways.

[1135] There seems to be no general rule in international law providing that the law of the predecessor State remains in force until it is repealed by the new authorities of the successor State. The laws of the predecessor State remain in force if the successor State decides so, whether expressly or tacitly. See KELSEN, H. *Principles of International Law*, p. 297 footnote 66. Without prejudice to mechanisms allowing the necessary exceptions and adaptations, it would be advisable for the new legal order to keep most legal provisions in force. See BOSSACOMA, P. "Secession in Liberal-Democratic Contexts".

[1136] For instance, since in unilateral secession Courts would probably be a stronghold of the parent State and its constitutional order, the new State would probably wish to change, at least, the apex of the judiciary as happened in many revolutions. Internally, the case law of this renewed judicial top would not easily be followed by lower Courts. Externally, the renewal of the judicial branch could be seen as a danger for the rule of law, respect for human rights and protection of minorities.

ongoing will to negotiate secession with the parent State; (7) the commitment to observe general international law and to continue meeting the obligations stemming from the treaties signed by the parent State, with minor adjustments and adaptations; and, in particular, (8) the intention to remain within organizations of supranational integration, if this were the case, and to comply with and implement supranational law.[1138]

Practical difficulties with unilateral secession are manifold. A major problem is that natural and moral persons are forced to cohabit on a territory where, *de facto*, there would be two legal orders, both seeking legitimacy but with insurmountable contradictions between them. Which legality would citizens, companies, courts have to comply with? Where would citizens and companies pay their taxes? Which authorities would they obey? Which courts would they go to or be subject to? Would they choose the jurisdiction which suited their interests best? How could the *ne bis in idem* principle be applied, according to which nobody can be punished twice by law for the same cause of action, if two public administrations and two judiciaries co-exist? Would their respective decisions be respected by virtue of the principle of *res judicata*? How far would previous rights, decisions and rulings be preserved? What would happen with the State public officials working on the seceding territory? Would some kind of civil disobedience or conscientious objection be accepted? How long would it take to create and implement the administrative, judicial, diplomatic, police and military bodies the seceding entity lacks? How would they be paid and by whom? How or on which terms would an emerging State that is not internationally recognized have access to the credit market? Would private companies and capital leave? Which passport would people use?[1139]

In that scenario, Schmittian theory of sovereignty as the political power that is exercised and prevails over the others in existential conflicts and exceptional

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[1137] Provisional regulations on citizenship are more delicate than on some other matters since they could strongly condition the definitive solution. For moral, legal and political reasons, the definitive regulations could broaden rather than narrow who could be a citizen of the new State, compared with the provisional regulations. See § 3.4.4 above. BOSSACOMA, P. "Who Would the Citizens… Be?".
[1138] See BOSSACOMA, P. *Secesión e integración*, pp. 57-8.
[1139] See BOSSACOMA, P. "Secession in Liberal-Democratic Contexts". DION, S. *Straight Talk*, pp. 234-7.

moments might regain its explanatory virtue and normative force. "Considered juristically, what exists as *political* power has value because it exists", claims Schmitt.[1140] Nonetheless, as he admits, a weakness of the people as bearer of constituent power is that they should decide on the basic questions of their political form and organization without themselves being formed and organized. "This means their expressions of will are easily mistaken, misinterpreted, or falsified".[1141] Moreover, since a UDI would make *smooth transition to sovereignty* very difficult, this in turn might weaken the democratic support for independence.[1142] That is why, amongst other reasons, more solid democratic majorities are needed for unilateral than for consensual secessions. While in consensual secessions *extensive* support is basically needed, in unilateral secessions the support needs not only to be extensive but also *intense* in order to withstand the abovementioned difficulties and the high transitory costs. On top of that, a moral right to secede does not generate an automatic right to pursue secession whatever the means and costs.[1143] In minimally just democratic States, a legitimate aim to secede should not be executed at the expense of significant harm to people.[1144]

The strategy based on straightforward effectiveness is likely to lead to coercion, punishment and even repression by the State. Most States have constitutional or legal means to take the measures necessary to compel a seceding unit and population to fulfil the legal order. Beyond the collective consequences, there could also be individual legal consequences. Politicians, authorities, public officials and even ordinary citizens would be at constant risk of committing the criminal offences of contempt of courts, malfeasance, usurpation of powers and even sedition, rebellion, treason and other high crimes.[1145] Yet, excessive or disproportionate coercion by the parent State can act in favour of the secessionist demands, in that it invites third States and international organizations to intervene. In a democratic and

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[1140] SCHMITT, C. *Constitutional Theory*, p. 76. According to Schmitt, the political decision regarding the type and form of State existence, which constitutes the substance of the constitution, requires no justification via an ethical or juristic norm. Instead, it makes sense in terms of political existence (p. 136).
[1141] *Ibid*. p. 131.
[1142] MONAHAN, P.J.; BRYANT, M.J. *Coming to Terms…*, pp. 23-4.
[1143] PHILPOTT, D. "In Defense of Self-Determination", p. 381.
[1144] Although this could be framed as tension between justice and prudence, prudential reasons are part of moral and legal reasoning and so of justice. See WALZER, M. *Just and Unjust Wars*, pp. 92-5.
[1145] See § 3.4.5.

peaceful secession process based on prior unsuccessful attempts at agreement through negotiation, if the parent State overdoes use of force and repression against the seceding unit, the other States and international organizations can take steps towards recognition of the new State. In addition, disproportionate action by the parent State can even give birth to an international right to secede based on domination, serious violations of human rights or breach of internal self-determination.

The *declaration of independence with the aim of initiating the process of international recognition* is a more indirect and cautious strategy. This type of declaration is not contrary to current international law, according to academia and case law. In tune with the ICJ Opinion on Kosovo, an emerging statehood could request States and international organizations to recognize its independence. By extension, recognition of this new State does not seem to be against the international principles of territorial integrity and non-intervention, as long as the UDI is peaceful, democratic and agreed ways have been sought.[1146] Without fully fulfilling the doctrine of *faits accomplis*, international recognition can be pursued, under a constitutive conception, to work as a driving force of effectiveness.[1147] The goal of the UDI would, in Jeffersonian words, be "an appeal to the tribunal of the world".[1148]

This strategy could claim that international public law has supremacy over internal constitutional law for drawing the territorial borders of States. Yet, international law and politics are not eager to recognize as States seceding entities with no actual control of the territory and population. Hence, this path may well lead to neither international recognition nor *de facto* independence, as has been the case with the ineffectual unilateral declaration of independence of Catalonia of October 2017.[1149]

[1146] However, part of the academia considers premature recognition contrary to international law. See ch. 2.2 above.
[1147] See ch. 2.3 above.
[1148] Or, in the terms of the US Declaration of Independence: "To prove this, let Facts be submitted to a candid world" and "appealing to the Supreme Judge of the world for the rectitude of our intentions". See ARMITAGE, D. *The Declaration of Independence*, p. 21.
[1149] See *El País*, "Reacciones internacionales tras la declaración de independencia en Cataluña", 30 October 2017. There are two interesting non-academic books written by eminent Catalan jurists analysing the events of the fall of 2017: LUQUE, P. *La secesión en los dominios del lobo.*

In order to avoid that, politicians, public officials and experts should analyse the probability, promptitude and relevance of recognitions by States and international organizations. On the other hand, this moderate strategy seeking recognition (and refraining from directly imposing the principle of effectiveness) should make coercion and punishment less intense and extensive. Since most attempts to impose effectivity are likely to be considered a crime or a violation of the Constitution, refraining from imposing a new legal order straightaway seems safer for the seceding authorities, institutions and citizens.

No matter which road is taken, unilateral secession in liberal-democratic contexts needs a clear and ongoing majority of citizens to have spoken out democratically in favour of secession. This majority must be persistent, not merely circumstantial or contingent. This solid majority will serve to overcome the constitutional resistances to secession. During the tug-of-war with the parent State, the secessionists should display the virtues of perseverance, patience, prudence and self-restraint. Without a clear and persistent majority, and without practising these virtues, unilateral secession is unlikely to be internationally recognized, but likely to unleash State coercion and to fuel a spiral of disobedience within the secessionist nation.[1150] In liberal-democratic settings, even if unilateral secession is and must be a difficult political and legal target, stopping peaceful and democratic secession is and must be a hard challenge as well. Therefore, the parent State, in turn, ought to observe the virtues of tolerance, self-restraint, proportionality and compromise in its action to put the brakes on secessionism.

Even if the pro-secession group genuinely believes to possess a moral right to secede, politics is not only about rights and ends, but also about power, support, means, consequences, responsibility and proportion. Because "politics is an art of repetition", arguments such as nothing else is possible and all other available options have already been tried should not be asserted lightly.[1151] Especially in liberal-democratic contexts, this art should be based on convincing, negotiating, insisting and waiting for the momentum. In Max Weber's words: "Politics is a

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BAYONA, A. *No todo vale.* The first takes a sort of outer perspective, whereas the second a more inner one.

[1150] See BOSSACOMA, P. "Secesión, democracia y derecho".

[1151] See WALZER, M. *Arguing about War*, pp. xiv, 53.

strong and slow boring of hard boards. It takes both passion and perspective. Certainly all historical experience confirms the truth – that man would not have attained the possible unless time and time again he had reached out for the impossible." Politics ought to strike a balance between an "ethic of ultimate ends" and an "ethic of responsibility".[1152]

[1152] See WEBER, M. *Politics as a Vocation*, pp. 41-8.

Epilogue

Secession is neither a simple path in fact nor uncontroversial in norm. A host of problems and doubts will always remain, despite all intellectual efforts to moralize and juridify it. In many cases, it seems unlikely that moral argument, political compromise and legal certainty will guide the secession process. During unilateral secession processes in liberal-democratic contexts, the political and legal difficulties and uncertainties will inevitably create fear among a significant part of the society, even among convinced pro-secession leaders and voters. In the introduction to the *Federalist Papers*, Hamilton wondered "whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force". While many democracies have proven to be capable of establishing *cracies* from reflection and choice, the establishing of the *demos* still depends too much on accident and force and too little on reason, deliberation and vote.

The normative arguments set out in this book form a kind of *Gordian knot* that the effectiveness of Alexander's sword may eventually unravel. In secession disputes, all too often *realpolitik* will prevail over morality and law. Aware of this, the present book has no wish to underestimate the importance of interest, power and force in the birth and building of new States, but rather to minimize it in favour of fairness, agreement and order. This whole work has been inspired by the conviction that the moral and legal justifications play and ought to play an essential role in the issue of secession and in the creation of new States. It urges a leap from the marshy and dangerous ground of facts and expediency to the more peaceful, deliberative, reasonable and secure terrain of morality and law. To this end, it aims to be a call in favour of moral and legal norms as instruments to regulate political behaviour at the expense of the arbitrariness of *faits accomplis*, which tends to lead to the rule of the strongest and, ultimately, to violence. Like many other political issues that have gradually been moralized and juridified with the rise of liberal democracies, secession should not remain excluded from those normative processes.

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