

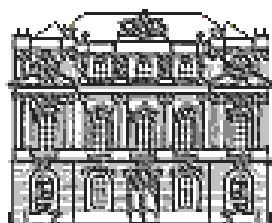


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Paradoxes of self-determination and the right to self-government

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# Paradoxes of self-determination and the right to self-government<sup>1</sup>

abstract:

*The paper examines paradoxes and inconsistencies of self-determination rights in international law and in political theory and concludes that these emerge from two sources: the question who is a people with the right of self-determination and the idea that such peoples have an inherent right to freely choose their political status. On the second issue, the paper defends restrictions on secession against libertarian and liberal nationalist approaches and argues for recognizing instead a primary right to self-government that can be sufficiently guaranteed by various federal arrangements for collective autonomy and representation. National minority self-government and the territorial integrity of a multinational state should be regarded as two sides of the same coin. Rather than viewing self-government as an internal application of a broader principle of self-determination, self-determination claims become legitimate only when self-government rights are persistently violated. This move leaves open the question which groups should be regarded as peoples with a right to self-government. The paper suggests that answering this question would lead to recognizing self-governing political communities below and above the level of independent states as subjects of international law.*

Three of the main international human rights document start with declaring the self-determination of peoples. While this notion is absent in the Universal Declaration of 1948, the first articles of the UN Charter and of the two Covenants of 1966 on Civil and Political Rights, and on Social, Economic and Cultural Rights assert a principle or right of self-determination. The idea that self-determination is a basic human right does not easily fit the general framework of human rights discourse. Traditional international law is basically about rights and duties of independent states. This narrow understanding has been extended by the human rights revolution after 1945, which has introduced individual rights and corresponding state duties. Yet the bearers of self-determination rights are neither states nor individuals, but ‘peoples’. This seems to open

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<sup>1</sup> This text was written for the project “Universalism and Local Knowledge in Human Rights”, organized by the Humanities Center of the Central European University Budapest. Draft versions were presented in a project seminar at CEU and at a conference organized by the Program in Law and Public Affairs at Princeton University in October 2003. I am grateful to Andras Sajó and Chris Eisgruber for inviting me to participate in both events.

international law for the idea of group rights that has been shunned by most international lawyers and liberal political philosophers.

Antonio Cassese, international lawyer and author of an authoritative book on self-determination, attempts to close this loophole: “Plainly self-determination is the summa or synthesis of individual human rights because a people really enjoys self-determination only when the rights and freedoms of all individuals making up that people are fully respected“ (Cassese 1995: 337). Yet this still does not answer the question how to define the peoples who are the bearers of this right. Since self-determination struggles are fought over contested definitions which groups are peoples entitled to independent statehood this question is not merely an academic one.

In current human rights there is also a remarkable gap between the importance given to the right of peoples to self-determination, on the one hand, and the extreme caution about cultural minority rights, on the other hand. In contrast with article 1, article 27 of the International Covenant on Civil and Political Rights does not establish any group right for ethnic, religious or linguistic minorities, but the freedom of “persons belonging to such minorities” ... “to enjoy their own culture, to profess and practice their own religion, or to use their own language.”

I want to argue in this paper, first, that dominant interpretations of self-determination in international law are fraught with inconsistencies and moral ambiguities and, second, that the wide gap between articles 1 and 27 ICCPR ought to be closed. I suggest that this could be achieved by reversing the relation between self-determination and self-government. Instead of regarding self-government as derivative from a more general principle of self-determination, we should consider self-determination as derivative from a more basic right to self-government.

### 1. Three waves of self-determination

The twentieth century has witnessed a dramatic increase in the number of independent states, from 74 in 1946 to 193 at the end of the century (The Economist 3 Jan 1998, quoted in Franck

1999: 5). The driving force behind this phenomenon, as well as the validating idea for the establishment of new states, is national self-determination. Political and military struggles for independence have been invariably waged in the name of this principle.

Today this is so much taken for granted that we rarely even consider other ideas that might be invoked to stake claims to territorial sovereignty. Some of these alternative principles, such as dynastic rule or the dictatorship of the proletariat, are still formally embraced by a few regimes as their political ideologies, but they have lost any force when it comes to territorial claims that would modify existing state borders. Other, once powerful, ideas have completely run out of use. Among these are, on the one hand, the claims of white settlers to a '*terra nullius*' whose indigenous inhabitants presumably did not make productive use of the land<sup>2</sup> or, on the other hand, various utopian movements, such as the British and American Owenites, which demanded independent territories where they could realize their social experiments. Even religious claims to some sacred territory or holy land must generally be disguised as national demands when they are argued in the international arena.<sup>3</sup> National self-determination seems to be the only remaining currency that can purchase international recognition. As Andrew Hurrell points out, "(national) self-determination has been implicated in almost all of the great redrawing of maps in the past 150 years – the four great waves of decolonization, the unification of Germany, the end of Yugoslavia, and so on" (Hurrell 2003: 282).

This does not mean that national self-determination is a well-defined principle of international law or a politically and morally attractive idea. It is neither. My concern in this paper is to refute normative theories that argue for a primary right to national self-determination. I will, however, start with a brief account of how this norm has been used in the arena of international law and

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<sup>2</sup> The terra nullius doctrine was finally rejected in Australia in 1991 by the High Court in *Mabo v Queensland* [No 2] (1992) 175 CLR 1. See Buchanan (2002) for a rebuttal of Lockean justifications for colonization based on productive use of land.

politics. It would be unwise to leave it to philosophers to define national self-determination. The meaning of this term cannot be fully disconnected from its actual uses in politics. Liberal political theorists are almost by definition moral universalists and egalitarians. When they want to defend a principle they generally state it as a universally valid proposition. (This is not only true for individualistic brands of liberalism but just as much for communitarian ones for whom moral ideas are universally rooted in specific ways of life.) And liberal theorists cannot consistently claim an inherent moral superiority of certain groups of people over others – although classic liberalism has certainly sinned in this respect by assuming a superiority of western civilization over non-western cultures. When liberal theorists defend a principle of national self-determination, they must therefore state it as a universalistic and egalitarian proposition. What they then come up with may be too far removed from how national self-determination operates in real political conflicts.

However, for a normative theory it would also be wrong to derive a principle of self-determination from analyzing its uses in domestic politics where demands for national self-determination are always made on behalf of one particular community and tend to ignore or dismiss rival claims of competing groups. Nationalism promotes a moral perspective that makes it legitimate to rank the interests of one's own group above those of all others, but this is not a promising starting point for an inquiry whether national self-determination is a defensible idea. If we want to bridge the gap between political demands and normative discourse we have to search in the international arena where the normative equality of sovereign states requires that such a principle be couched in more universalistic terms. My starting point will thus be the question: Are provisions of international law and practices of international recognition for new states guided by a consistent and attractive principle of national self-determination?

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<sup>3</sup> See Moore (1998: 145-50) for a normative rebuttal of territorial claims based on superior productivity or religious doctrine.

The 20<sup>th</sup> century has seen three waves of national self-determination: the Wilsonian wave after 1918, the decolonization wave after 1945 and the postcommunist wave after 1989.<sup>4</sup> In the first wave, the principle itself was not regarded as a universal one and its application was strongly constrained.<sup>5</sup> The first and most important constraint was a geographical one: national self-determination referred only to Europe and the Americas, not to the colonial world.<sup>6</sup> Within Europe, new states were created out of the territories of the defeated empires, while the victorious allied powers exempted themselves from applying the principle to their own heterogeneous populations. Second, even within this geographically restricted area the application of the principle was tempered by concerns for the viability of the new states and for a certain balance of power in the postwar European order. On the one hand, the implicit test for viability included geographic and demographic size, economic resources and defense capacities. Such criteria were used to deny independent statehood to most of the smaller and more dispersed national groups.<sup>7</sup> On the other hand, concerns about the balance of power were invoked to deny that national self-determination implied a right to unification (e.g. of Austria with Germany or of Transylvania with Hungary).<sup>8</sup> The selectivity and arbitrariness in the application of the principle explains probably why self-determination was at that time not codified in international law.

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<sup>4</sup> For authoritative accounts of the first and second waves see Buchheit (1978, chap. 2, 3) Hannum (1990, chap. 3), and Cassese (1995), for the third wave see Falk (1997).

<sup>5</sup> Woodrow Wilson's Fourteen Points for a postwar European order, which he presented to the US Congress on 18 January 1918, do not even contain the term 'self-determination'. Poland is the only case where they call explicitly for the establishment of an independent state. By contrast, the nationalities under Austro-Hungarian and Ottoman rule should only "be accorded the freest opportunity of autonomous development."

<sup>6</sup> Point 5 of Wilson's 14 points gave *equal* weight to the interests of colonial populations and of colonial powers.

<sup>7</sup> This limitation was later taken into account by a series of minority treaties that were imposed on the new nation-states but provoked a considerable backlash against the groups they were meant to protect.

<sup>8</sup> The Austrian case is particularly interesting as it combines all the inconsistencies of the first wave of national self-determination. After 1918 the Austrian political elite was overwhelmingly convinced that the new state lacked a proper national identity as well as the size and resources to be independent. All major political parties advocated unification with Germany. The principle of national self-determination was, however, applied only to settle border disputes with Yugoslavia in the South and with Hungary in the East in 1920-21 by holding plebiscites in the disputed areas. In contrast, the mostly German-speaking region of South Tyrol was incorporated into Italy without popular vote.

The second wave is very different in this respect: The twin principles of human rights and self-determination became the foundations of a new regime of international law and international organizations. The United Nations Charter invokes the principle of self-determination twice – in Art. 1(2) and Art. 55(1) – and both International Human Rights Covenants of 1966 open with the same Article 1, which states: “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 cultural development.” This is a very different and more literal interpretation of “self-determination” compared to the Wilsonian ideology of redrawing borders in order to create more homogeneous nation-states.

The principle was now considered to be a universal one (Brownlie 1988: 5), but it was implemented in a way that merely reversed the previous geographic limitation. The so-called ‘saltwater theory’ of self-determination applied the idea only to colonies that were geographically separated from European colonial powers. Claims for national self-determination in Europe or the Americas were thus even more thoroughly excluded than before. Moreover, the relevant international documents explicitly stated that the proclaimed right to self-determination did not authorize or encourage any action to dismember the territorial integrity of independent states.<sup>9</sup> The principle of *uti possidetis juris*, which entailed the prohibition of changing existing administrative borders in the establishment of new states, meant in practice that self-determination could only be exercised within the borders established by the colonial powers. In many cases – most obviously in Subsaharan Africa – such borders had been drawn in disrespect for ethnic identities or were even meant to divide ethnic groups so as to better rule them. Any interpretation of national self-determination which would have allowed to challenge these borders was seen as an immense threat to the stability of the new postcolonial regimes. This is why the

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<sup>9</sup> see UN Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Resolution 1514 (XV) (1960) and Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations of 1970, G.A. Resolution 2625 (XXV) (1970).



Organization of African Unity has strongly endorsed the inviolability of state borders inherited from colonialism (Buchheit 1978: 103-4). A few colonial territories, including British India and Rwanda-Urundi, were partitioned along lines of ethnic or religious difference when gaining independence, but successful secession from established states occurred only in two rather exceptional cases: the consensual separation of Singapore from Malaysia in 1965 and the 1971 secession of Bangladesh, which had anyway been geographically separated from West Pakistan since the partition of British India in 1947. The disasters of the interwar experience with national self-determination and minority treaties go a long way in explaining these constraints which in effect denied that self-determination could be exercised by nations defined in cultural or ethnic terms.

The third wave is of recent origin and not over yet so that it may be premature to attempt a general characterization. It has brought national self-determination back to Europe but has also seen the consensual separation of Eritrea from Ethiopia in 1993 after many years of struggle for independence. Starting with the independence movements in the three Baltic republics the third wave has led to the full disintegration of the Soviet Union, the consensual separation of Czechoslovakia, the reunification of Germany and to large scale ethnic violence in the breakup of Yugoslavia. One could also point out that some Western and Southern European states have become more responsive towards claims of their national minorities for autonomy. The evolution of the *estado de las autonomías* in Spain since 1978, the transformation of Belgium into a federation completed in 1993, and more recently devolution in Scotland and Wales and the Anglo-Irish agreement of 10 April 1998 may indicate such a trend. However, in these latter cases secessionist movements have been successfully contained within domestic borders and the question of international recognition for a right to self-determination has not arisen.

Recognition practices with regard to the new states in Central and Eastern Europe seem to have been shaped by a number of ad hoc criteria. The right of the Baltic states to secede was hardly

controversial because they had been independent republics until 1940 when they were forcefully annexed by the Soviet Union. In the case of German unification and Czechoslovak separation consent between the two parts involved rendered the possibility of withholding recognition obsolete. A more significant departure from the cautious approach of the previous era was signaled by the early recognition of independence for Slovenia and Croatia in January 1992, which was mainly advocated by the German and Austrian governments, and the subsequent recognition of Bosnia later in the same year. “Some requirements that had traditionally been regarded as minimal preconditions for recognizing new states were abandoned. Among them were the requirement for the state claiming independence to be in full control of its territory and the need for the new state to reach an agreement with the larger state about separation” (Kovács 2003: 434).

Yet so far the third wave still has retained a significant limitation on self-determination. All new states that have been established with the seal of approval of the international community had before been formally self-governing republics or provinces with their own titular nationalities. National independence struggles in other territories that had not previously been classified as constitutive units of a federation, such as Nagorno-Karabach, Chechnya and Abkhaziya could not hope for the same kind of support. In 1999 Kosovo became the test case for the international community. Western plans had aimed at restoring the autonomy the province had enjoyed until 1989 within the Serbian republic but failed to honor the 1991 referendum for independence. Even after military intervention to stop ethnic cleansing by Serbian armed forces and militias, the Western powers have so far refused to accept that Kosovo has gained a right to secession as a consequence of Serbian aggression. Just as the second wave had entrenched colonial borders, so the third wave seems to sanction the territorial divisions and formal federal powers established by the previous communist regimes. This has led to speculations about an emerging right to self-determination for autonomous republics or provinces within federal states. A more cautious interpretation suggests that the international norm that has been applied in these cases is *uti*

*possidetis* (Ratner 1996). A claim of federal provinces such as Quebec or Flanders to self-determination finds no support in contemporary international law.

## 2. A principle or a right?

While the constraints on self-determination have loosened from one wave to the next, the remaining limitations are significant. International law and recognition practices still fall short of a general right of every self-conceived nation to establish an independent state and they appear to be quite arbitrary and biased from a moral perspective. But this latter conclusion may be overly hasty. It could well be that self-determination, as spelled out in international law, is a consistent and universal principle but simply does not entail the right to secession in the way nationalists tend to believe. Let me consider two arguments along these lines.

The text of the UN Charter suggests that self-determination may be a goal or a principle rather than a right. While the Covenants of 1966 call self-determination a right, the Charter calls it a *principle* and speaks of *promoting* or *developing* the self-government of non-self-governing territories and international trusteeships.<sup>10</sup> A goal-based approach<sup>11</sup> could argue that an international order will be more stable or just if most nations enjoy self-determination<sup>12</sup> but that turning this into a right will unleash a free-for-all that undermines these very same goals. The international community should therefore apply a principle of self-determination cautiously and selectively in order to gradually move towards a world in which all nations can be self-determining. Ronald Beiner (1998) raises a similar concern from a domestic perspective. Using the language of self-determination rights may escalate conflicts. Permitting or recognizing

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<sup>10</sup> UN Charter, chap. XI, Art. 73 and chap. XII, Art. 76. See Buchheit (1978: 127-130) for an account of debates whether self-determination is a political principle or a right under international law.

<sup>11</sup> For the distinction between goal-based, duty-based and rights-based moralities see Dworkin (1978).

<sup>12</sup> Caney (1998: 153) suggests, but does not further explore, a distinction between goal-based and rights-based approaches to self-determination.

secession should be seen as a question of prudence rather than as an obligation corresponding to a right.

This interpretation removes the concept too far from common understanding. Self-determination implies that there is a self that determines something. It cannot possibly mean that *others* – a parent state, foreign powers or international organizations are free to *determine* whether or not they let those to whom the principle applies exercise self-determination. The demand for self-determination is almost by definition a rights claim. Moreover, different from rights to some benefit that others must provide, self-determination is semantically like a right to free speech or voluntary association. It is a liberty requiring others not to interfere with its exercise (Beran 1998: 34).<sup>13</sup> Even if maximizing self-determination in the world were seen as a *goal* for the international community, the concept would still confer a *right* to the particular nation or people. I am therefore not convinced by Michael Keating’s interpretation of self-determination as “the right to negotiate one’s position within the state and supranational order, without necessarily setting up a separate state” (Keating 2001: 10). While exercising self-determination certainly need not result in independent statehood, interpreting it merely as a right to negotiate the group’s status does not capture the force of claims made in the context of decolonization. Colonies needed to negotiate the conditions of transfer of power, but they had a unilateral and non-negotiable right to determine their future status. This kind of claim is generally not accepted in the context of multinational democracies such as Canada, Belgium, Spain or Britain.

Those who think that a universal right to self-determination threatens the goals of international peace and justice should either abandon the concept altogether or limit its application to particular circumstances. I am going to argue for the latter strategy.

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<sup>13</sup> More precisely, self-determination is a negative liberty with a corresponding claim for non-interference directed towards specific governments that might suppress the exercise of the right (the government of the state from which a

Just as a general right to individual self-defense need not subvert civil peace, so a right to self-determination can be general without implying a license to exercise it as a group chooses.<sup>14</sup> For both rights the moral constraint is that they are meant to prevent some serious threat, to respond to some grave injustice or to restore a more basic right. The right of secession is thus, as Allen Buchanan (1997a: 44; 1998: 15) has argued, strictly remedial. This conditional defense of self-determination implies that we will also have to abandon a goal of maximizing the exercise of this right. That would be just as absurd as to strive for a society in which individual self-defense is maximized. A *principle* of self-determination then cannot be anything else but an obligation of third parties not to interfere with, or maybe even to support others' *right* of self-determination.<sup>15</sup>

The character of self-determination as a right is also obvious from what it gives peoples a right to, i.e. to “freely determine their political status and freely pursue their economic, social and cultural development”. Yet there is an important difference between the two entitlements listed here. The latter is plainly formulated as a domestic affair and does not imply a claim to external assistance for development. It thus concerns the international community only in cases where the right is infringed by other states, e.g. through neo-colonial exploitation. A people's right to freely determine its political status, however, must concern the community not only when it is violated, but also when it is exercised. The formula of self-determination of political status conceals the potential for conflict inherent in the principle. It creates a misleading image of an already given set of distinct peoples who inhabit different territories and may opt freely for various kinds of

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group wants to secede as well as other governments that might intervene), but is a positive claim for recognition directed towards the international community.

<sup>14</sup> The analogy between secession and self-defense is suggested by Allen Buchanan (1991: 65).

<sup>15</sup> Anna Michalska argues along these lines that “[s]elf-determination is provided by norms of international law and this is a sufficient argument to say that it is a case of imposing legal obligations on a state. Whether they are rooted in the principle or in the right, is not important” (Michalska 1991: 77). Richard Falk similarly calls the distinction between principle and right an arguably inconsequential one (Falk 1997: 51).

political status.<sup>16</sup> In the real world, however, self-determination struggles are about contested claims of membership and territory. Self-determination is therefore not a choice that concerns only the choosers themselves. It challenges established definitions of who forms a distinct people and it challenges the political allocation of territory between or within independent states. Self-determination conflicts therefore directly with an equally important principle of international law: the territorial integrity of states.

### 3. A right of peoples or of nations?

A second attempt to salvage the consistency of international law in the face of the threat emerging from self-determination is to distinguish between people and nation. All major international documents appear to be consistent on this point: self-determination is a right of *peoples*. As long as we define the people as a community of ‘distinct character’ (Brownlie 1988: 5) and distinguish it sharply from the governing political institutions, the opposition between the principles of territorial integrity and of self-determination is irreconcilable. International documents that attribute equal weight to both lead to a ‘semantic blockage’ which makes it impossible to clarify the meanings of the operative terms involved (Makinson 1988: 75-6).

There is, however, another interpretation of ‘the people’ that avoids this inconsistency. According to Donald Horowitz “there remains a consensus that there is no general right of ethnic groups to secession... the emphasis has been on the need to ascertain the freely expressed will of peoples, particularly colonized peoples, and *peoples* include all those occupying a territory” (Horowitz

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<sup>16</sup> The Friendly Relations Declaration lists the options as follows: “the establishment of a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by the people” (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations of 1970, G.A. Resolution 2625 (XXV) (1970).

1997: 446, original emphasis). “Territory, not ‘nationhood’, was the determining factor” (Hannum 1990: 36).

The most explicit statement along these lines can be found in the 1993 UN Vienna Declaration on Human Rights: The right to self-determination ... “shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government *representing the whole people belonging to the territory without distinction of any kind*” (United Nations World Conference on Human Rights: Vienna Declaration and Action Program, 25 Jun 1993: part I, para.2, my emphasis).

In its opinion on the legitimacy of a potential secession of Quebec the Supreme Court of Canada has suggested that this provision might ground a remedial right to secession “when a people is blocked from the meaningful exercise of its right to self-determination internally” (Canadian Supreme Court: Reference re Secession of Quebec, File No. 25506, August 20, 1998, s. 134). Although I am going to defend this proposition on normative grounds, this seems an implausible interpretation of the text. A right to internal self-determination for a particular group within a larger state obviously presupposes some distinction of that group from “the whole people belonging to the territory”. The Court appears to regard ‘distinction’ as synonymous with ‘discrimination’. Indeed, the wording of the Vienna Declaration is taken from paragraph 7 of the 1960 UN Declaration on the Granting of Independence to Colonial Peoples, with the difference that the latter specifies that illegitimate distinctions refer to “race, creed and colour” (Buchheit 1978: 93). Assuming that the Vienna Declaration merely opened this list for other kinds of invidious discrimination still does not support the Court’s conclusions. For a distinct group within a state the absence of discrimination is not sufficient for a ‘meaningful exercise’ of internal self-determination. If internal self-determination is interpreted as a right to political

autonomy, then a positive identification of the group and of the territory within which the group enjoys self-government is needed.

We must therefore interpret the concept of ‘people’ in international law as generally synonymous with the whole population of the legitimate territory of an independent state (excluding illegitimately occupied territories, such as colonies). There are two ways how such a notion of the people could block a right to secession. One is to assume that governments of independent states are representatives of their peoples and exercise the right of self-determination on their behalf.<sup>17</sup> This is clearly flawed. *Self-determination* becomes meaningless unless the bearers of this right can exercise it themselves and this must include the possibility of exercising it against their present government (Crawford 1988: 59, Makinson 1988: 73, Michalska 1991: 74).

A more reasonable view would conceive of the people as a territorial community that is subjected to a common political authority. The right to self-determination is then only violated if this authority represents a foreign power rather than the territorial community itself. According to Antonio Cassese, “...the right to external self-determination, which entails the possibility of choosing (or restoring) independence, has only been bestowed upon two classes of peoples (those under colonial rule or foreign occupation), based upon the assumption that both classes make up entities that are inherently distinct from the colonialist Power and the occupant Power and that their ‘territorial integrity’, all but destroyed by the colonialist or occupying Power, should be fully restored...” (Cassese 1995: 334).<sup>18</sup> “Achieving independence for a territory which is not self-governed cannot be considered as a secession. Dependent territories, from the standpoint of

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<sup>17</sup> Hans Kelsen, for example, suggested in 1951 that self-determination of peoples normally refers to a domestic principle of democratic government, but in the context of the UN Charter means simply sovereignty of states (Buchheit 1978: 131).

<sup>18</sup> This still allows for a right of ‘internal self-determination’ for other classes of peoples who need not be identified with the whole population of a state territory. Indigenous groups have long fought for recognition as ‘peoples’ under international law with a corresponding right of self-determination that would, however, fall short of a right to form independent states.



international law, do not constitute an integral part of the territory of the state which is administering them” (Michalska 1991: 81). This is, in my view, the most plausible interpretation of international law. National minorities do not enjoy a general right to secession and colonial peoples ‘consume’ their right to self-determination by becoming independent (Michalska 1991: 82, Horowitz 1997: 437).

Those who defend a broader conception of self-determination for nations rather than merely for colonized peoples and occupied territories may still point out that international law does not exactly deny such a stronger right either. International law is primarily concerned with external territorial integrity, i.e. border violations by other states. Only irredentist movements, i.e. secessionism sponsored by another government that wants to acquire a part of another state’s territory inhabited by an ethnic kin-group, threaten the external integrity of states, while endogenous secession affects merely the internal integrity of the state concerned. In the absence of such foreign interference secession could be seen as of no concern for international law. Recognition practices during the third wave may then nourish expectations that a more generous reading of the principle could eventually become accepted.

Moreover, one can easily question that the current narrow interpretation is conceptually and morally sound. The self-determination of peoples is different from that of individuals because a ‘people’ is certainly a composite and divisible entity. If one part of it is oppressed by another part and desires to establish its own political authorities, why should the territorial integrity of the existing state always block this move? As mentioned above, the international community seems to have taken a step towards such a wider understanding when it recognized the federal republics of the Soviet Union and former Yugoslavia as independent states. But why shouldn’t this also apply to territories like Kosovo that had been denied federal status for quite arbitrary reasons? And why should a unitary state such as Turkey, which does not even acknowledge the existence of its Kurdish national minority, be more secure in its territorial integrity than federal states?

Apart from the worry about the implicit arbitrariness of this “recent emergent principle of international law that permits the disintegration of federations along the lines of their existing regional units” (O’Leary 2001: 284) there is also the concern that such a principle “is in some people’s eyes likely to strengthen the belief that federation should not be considered as a desirable form of multinational or multiethnic accommodation” (ibid.). A special right of constitutive units of a federation to freely choose their political status under international law would thus undermine territorial autonomy solutions for nationality conflicts.

#### 4. Political theories of self-determination

International law and state practice do not provide us with a coherent principle of national self-determination. This right is defined in the language of natural law, as an inherent entitlement of all peoples to freely choose their political status, but since there is no such thing in nature as a ‘people’ we seem to be left with a perfectly circular definition of the people as those subjects in international law who are entitled to self-determination. Resolving the puzzle by identifying ‘peoples’ with whole populations of existing states makes the right to self-determination redundant, since it would then no longer respond to any demands for changes of international borders and the emergence of new states. Taking the other route by opening up the definition to include entities such as autonomous federal units or stateless nations creates a conceptual conflict with the principle of territorial integrity of states. In real world applications this conflict can only be resolved at the price of arbitrariness in recognition policies and of perverse incentives for preventive oppression and coercive assimilation of those groups who might otherwise claim self-determination.

These inconsistencies of international law leave the field of debate wide open for political theorists to redefine this right as they see fit and to speculate about its moral grounds and political consequences. Although some of these theories are rather far removed from the ugly world of secession and nationality conflicts, such debates are not purely academic exercises. The present confusion about national self-determination in political theory reflects a wide discrepancy between popular conceptions and legal norms. And this discrepancy fosters a public attitude of moral passivity or even cynicism towards conflicts over political borders. There seems to be no

right way of dealing with them. Although it would be preposterous to think that political theorists could somehow miraculously resolve this impasse, they should at least attempt to provide answers that could eventually inform a more consistent approach in international law.

I want to suggest that the problem with self-determination in international law is not so much the lack of a clear conception of ‘peoples’, but rather the idea that self-determination is an inherent right of peoples, no matter how they are defined, to freely choose their political status. Instead of focusing on the question which groups may have a right to secede, we should ask first under which conditions such a claim can be recognized as well-founded or illegitimate.

My short answer is that legitimate self-determination claims are always derivative from prior claims to self-government. The right to self-government can generate a right to self-determination in two kinds of circumstances: First, in response to fundamental and persistent violations of this primary right. In these instances self-determination is a remedial right that aims at restoring the conditions for self-government. Second, self-determination can be the legitimate outcome of a joint exercise of self-government rights by several political communities that decide to unite or to separate. In these instances self-determination is consensual in the sense that the decision ought to be approved separately within each affected community.

This answer emerges from examining alternative responses. I will first show why a procedural conception of democratic decision-making on borders fails to resolve the paradoxes of self-determination. Next, I briefly examine two substantive conceptions of the ‘people’ entitled to self-determination – libertarian ones that regards the political community as a voluntary association and liberal nationalist accounts of self-determination for historic cultural communities. Finally, I endorse Allen Buchanan’s remedial theory of secession, but suggest that it fails to specify the grievances that are both necessary and sufficient to justify secession.

#### *4.1. Democratic procedures*

If we cannot resolve disputes between rival self-determination claims by asserting a basic right and then attributing to some claimants but not to others the status of rights-bearers, then it might be preferable to abandon the notion of a right to self-determination altogether and to search instead for procedural solutions that refrain from any presuppositions about the validity of claims. A decision rule generates procedural legitimacy if its outcome can be accepted as binding by all participants in the decision because the procedure itself treats all participants equally and has no substantive bias towards one of the options. Justifications for democratic majority decisions in matters where they do not affect basic rights of individuals or minorities rely on this notion of procedural legitimacy. So why should we not apply democratic decision-making to the territorial boundaries between states?

Suppose a state contains two territorially concentrated groups A and B. The decision to take is whether to split it up into two nation-states dominated by As and Bs respectively. Since a decision of this kind will affect both groups, it is plausible to assume that all citizens of the state should be involved or represented in the decision. This can be achieved through a plebiscite or through a decision taken by representatives whose votes roughly mirror citizens' preferences. I am assuming here that decisions on changes of external borders are different in kind from ordinary legislative decisions in which representatives exercise a free mandate in between elections. A decision that affects the size and continuity of the polity itself cannot be revised after the next election. Therefore direct democracy or 'mirror representation' (Pitkin 1967) seem to me reasonable requirements for this kind of decision.<sup>19</sup>

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<sup>19</sup> The democratic legitimacy of the law on the dissolution of the Czechoslovak Federal Republic adopted by the Federal Parliament on 25 November 1992 is questionable for this reason. "Virtually all public opinion polls conducted in the period leading up to the division of the country, and some conducted afterwards, showed that a majority of ordinary citizens – both Czech and Slovak – did not want two separate states. An even larger majority felt that a decision on this issue should be made by the people in a referendum, and not by politicians..." (Henderson 1999: 122).

There are three possible ways how to aggregate votes. The decision for separation may depend on a majority of votes in the country as a whole, in both territories or in only one of them. Let me call these the rules of overall, concurrent or alternative majorities. There are a number of arguments for and against each of these three options. But as long as we stick to the premise that all citizens of the existing state must have an equal vote on this issue I cannot think of any principle that would tell us which rule to choose. The difficulty is that all three rules fail to generate the kind of procedural legitimacy that is generally expected from democratic decisions.

Under the overall majority rule the outcome depends on the relative size of the two groups whenever preferences for union or separation are distributed unevenly between A and B (as they will be in all cases where such a decision is put on the agenda). If there is a strong preference for separation in B, but B is small compared to A, then B's aspirations will be defeated. This is unfair because, although *absolute* size may be relevant for the question whether A or B could form a viable independent state, *relative* size should not be relevant. An overall majority rule is therefore not acceptable as procedurally neutral.

While this first rule ignores the territorial concentration of As and Bs within the state, the second and third rule involve a two stage decision in which votes will first be counted separately within the two territories. These rules require therefore a prior demarcation of the territories and of enfranchised populations within the territories in which votes will be aggregated. The question of how to demarcate a constituency that will then decide about its own borders produces a vexing self-determination paradox that has been stated succinctly by Ivor Jennings in his critique of Wilsonian principles: Letting the people decide "was in fact ridiculous because the people cannot decide until someone decides who are the people" (Jennings 1956: 56). Making that prior decision by defining a territorial unit within which all citizens would participate in the plebiscite "largely pre-empted the outcome and was not necessarily acceptable to all the people called to decide" (Linz 1993: 366). As Robert Dahl points out, "[t]he majority principle itself depends on

prior assumptions about the unit: that the unit within which it is to operate is itself legitimate and that the matters on which it is employed properly fall within the jurisdiction of that unit... The justification of the unit lies beyond the reach of the majority principle and, for that matter, mostly beyond the reach of democratic theory itself” (Dahl 1989: 204).

This paradox of plebiscitary self-determination may, however, be set aside in many cases where all groups involved accept given borders as starting lines. Nationalist demands for self-determination are rarely claims for the largest possible territory within which a group can muster a majority, but refer more often to a particular and well-defined geographic area that the group regards as its historic homeland.<sup>20</sup> Quite often these borders coincide with existing internal territorial subdivisions of the larger state. Separatists in Slovakia, Quebec or Scotland have not demanded a geographic *relocation* of borders, but the *redefinition* of an already established provincial border as an international one.

Assuming further that all citizens of the state residing permanently within a territory will be enfranchised there,<sup>21</sup> the problem is then reduced to choosing between concurrent and alternative majorities. And here our search for a purely procedural solution for self-determination conflicts ends in a final impasse. Both rules cannot satisfy a test of procedural neutrality. The former is not procedurally neutral because it is biased towards maintaining unity, whereas the latter is biased towards separation. The alternative majority rule would, moreover, not only allow for unilateral

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<sup>20</sup> The partition of Ireland in 1920 might be seen as a counter-example. The six counties of Northern Ireland are smaller than the historic province of Ulster and include areas with a traditional Catholic majority. Protestant Unionists secured for themselves the largest territory in which they could muster a stable majority. A plebiscite in each of the nine Ulster counties would have led to a different outcome.

<sup>21</sup> This assumption is problematic in cases where a central government has engaged in resettlement policies in order to outnumber a local separatist population. The Western Sahara dispute illustrates the difficulties in determining who should be enfranchised in a referendum on independence after several decades of settlement policies by the occupying power.

secession, but would also permit a state-wide majority to engage in Apartheid policies by turning minority territories into independent Bantustans against the will of their inhabitants.

Although neither alternative nor concurrent majority decisions can serve as a general rule for democratic self-determination, the two rules are still relevant for providing democratic legitimacy for decisions that must be based on substantive rather than procedural considerations. Concurrent majorities for union or separation in two parts of a state should be regarded as a sufficient criterion for the democratic legitimacy of this decision, but not as a necessary one in all cases. The rule provides a test for consensual self-determination, but fails to settle conflicts. Consensual self-determination has several important implications. It entails not merely the permissibility of consensual separation but also a prohibition of partitioning a polity into independent units against the will of any of these units, as well as the permissibility of unification when all units of the prospective polity support it. Conversely, a majority for separation in only one part of a state is certainly a necessary condition for that territory to become independent, but it cannot be accepted as sufficient if democratic legitimacy requires taking into account the votes and interests of all who would be directly affected by the separation.

The conclusion is that determining the boundaries of democratic jurisdictions is also a boundary issue for the scope of democracy itself. This supports Buchanan's conjecture that a liberal theory of boundaries must "distinguish clearly between (1) jurisdictional authority (the right to make, adjudicate, and enforce legal rules within a domain), [and] (2) meta-jurisdictional authority (the right to create or alter jurisdictions, including geographical jurisdictions)" (Buchanan 2003: 233). Whereas jurisdictional authority can and ought to be legitimated through democratic participation and representation, the authority to change the jurisdiction's boundaries cannot be similarly located in the demos itself and conflicts about these boundaries cannot be settled by rules of democratic decision-making.

## 4.2. TERRITORIAL ASSOCIATION

Harry Beran (1984, 1998) and David Gauthier (1995) have suggested an alternative view. In their perspective a democratic state is a voluntary territorial association. Freedom of exit implies not merely the right to emigration, but also to secession. While secession may be constrained by conditions such as the geographic contiguity and viability of postsecession states or a fair sharing of assets and debts, majorities have no basic right to prevent the exit of those territories whose inhabitants no longer voluntarily belong to the larger polity. Beran proposes a series of reiterated plebiscites in which any group that wants to secede may define the territory within which the vote will be taken. The rest of the country has no say in this decision. But secessionists must grant a similar right to all minorities within their territory to initiate a new referendum on borders. The expectation is that this procedure will approximate consensual borders by “maximiz[ing] the number of individuals who live in mutually desired political association” (Beran 1998: 39, see also Gauthier 1994: 360).

This proposal avoids the difficulties generated by the democratic principle that what affects all should be decided by all. It effectively resolves Jennings’s paradox by giving secessionists the opportunity to determine the territorial borders of the unit within which votes will be counted. It bypasses the problem of the alternative majority rule to justify the overruling of a unionist majority in the rest of the country by simply not counting their preferences at all. And it avoids the possibility of casting out a territorial minority from the state by advocating a right of unilateral exit but not of expulsion.

Nevertheless, the idea should be rejected for several interconnected reasons. First, since it counts only votes within a constituency defined by secessionists, it is even more obviously biased towards separation than the alternative majorities rule. Apart from favoring secessionist preferences a plebiscite of this kind also polarizes the issue so that third preferences (such as for



maintaining unity but increasing territorial autonomy for the region) cannot be counted. Moreover, the procedure not only does not register unionist preferences outside the secessionist territory, it is also likely to transform them within this territory. After separation, a previously unionist minority has strong incentives to turn separatist and initiate a new plebiscite in those parts of the new state where they form a majority. Ultimately, unlike the three rules discussed above, Beran's procedure does not lead to decisions between conflicting preferences for a certain territorial shape of the polity. Borders are neither given nor democratically chosen but would instead emerge as a contingent result from individual choices to associate with other people of one's own kind and interests and to dissociate from others.

Second, a procedure that rewards unilateral secession undermines the integrity of the democratic process. As Allen Buchanan (1991: 100, 1997: 302, 1998: 21) has pointed out, separatist parties may use the secession threat as a minority veto against legitimate majority decisions. Easy unilateral secession is therefore attractive for libertarians. It would promote minimal states by undercutting efforts to develop more comprehensive notions of the public good based on cross-regional solidarity and redistribution.

Third, the proposal ignores the importance of territorial stability. Liberal democracy presupposes stable territorial boundaries for defining who is entitled to be a member in a self-governing political community. Democratic government involves a dual structure where legislation represents citizens as members of a political community, but where laws are valid for everybody within a territory. In an inclusive liberal democracy this territorial domain of laws becomes also the reference point for defining who is entitled to be a citizen.<sup>22</sup> This criterion for inclusion would be subverted if any regionally concentrated group of citizens could redefine the domain of territorial government by majority vote. A government established in this manner will in the end

be only government for themselves as members of an association and no longer territorial self-government of a wider society. The resulting patchwork of self-governing communities could resemble the multiethnic and multireligious empires of the past with their locally segregated communities except that in the libertarian model the overarching power would be comparatively weak.<sup>23</sup>

Fourth, the solution offered by Beran is only apparently a procedural one for reconciling conflicting claims over political territory. It ultimately relies on a substantive vision of political community as a voluntary association that is at odds with contemporary liberal democratic government. A political community is in several respects different from associations in civil society. It is imagined as a continuous intergenerational community, membership in which is generally acquired at birth. And it is a territorial community whose laws are binding for all residents.<sup>24</sup> By contrast, civil society associations are non-territorial, there is no constraint on multiple membership and no general requirement of long-term stability. In contemporary liberal democracies the boundary between civil society and democratic government has to some extent been blurred through the emergence of new forms of governance in task-specific, overlapping and competing jurisdictions. However, as Hooghe and Marks (2003) point out, these flexible jurisdictions remain embedded within the general-purpose jurisdictions of provinces and independent states, whose territorial borders are very stable. If independent states were restructured as voluntary associations with variable territorial jurisdictions they would become weak, unstable and internally hostile to pluralism and diversity.

### 4.3. Liberal nationalism

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<sup>22</sup> Although the exclusion of permanent resident aliens from access to citizenship is still widely practiced, it undermines the integrity of liberal democracy as a territorially inclusive form of government.

<sup>23</sup> Chandran Kukathas (2003) defends a libertarian version of political community along these lines.

<sup>24</sup> Renouncing one's citizenship therefore normally presupposes leaving the territory (Bauböck 1994: 122-37).

Concerns about stability, although not about pluralism, are taken seriously by liberal nationalist approaches to territorial self-determination. There are two core ideas that distinguish liberal nationalism from dominant illiberal varieties. First, national self-determination is not intrinsically valuable but only instrumentally because it contributes in important ways to individual autonomy and well-being or to the quality of democracy. Second, a right to national self-determination cannot be claimed only for one's own group but must be defended universally for all groups who qualify. This raises the problem how to decide between rival claims to the same territory. Yael Tamir (1993) suggests that nations have only a general right to cultural but not to territorial self-determination. By contrast, Avishai Margalit and Joseph Raz (1990), David Miller (1995) Daniel Philpott (1995) and Chaim Gans (2003) conceive of nations as groups with a desire for territorial self-government and try to limit the exercise of this right in various ways.

There is much to be said in favor of territorial solutions. A general regime of cultural autonomy within a common state would lead to segregated public spheres and a lack of common institutions such as public schools where individuals learn to be citizens. Membership-based political autonomy creates also incentives for community leaders to police the boundaries of membership, i.e. to enforce homogeneity within the group, to exclude dissenters and to force persons with mixed identities to choose sides. And where citizenship rights are tied to membership in one of the constitutive nationalities, those who do not clearly belong to any of these groups will be deprived of some rights. Territorial solutions may be more conducive to the development of civic identities among the hegemonic majority and they assign to political authorities a responsibility for providing equal protection of the law to all individuals who live in their jurisdiction.

The core problem with territorial self-determination is, however, how to achieve stable and fair settlements between rival claims. In an ideal world of liberal nationalism nations are distinct groups with a strong historical and cultural identity shared by all their members and a well-defined homeland where they want to govern themselves. In the real world, however,

membership and territorial claims overlap in multiple ways. This leads to four undesirable consequences of a universal right of national self-determination. First, a Russian doll effect (Tamir 1993: 158): In nearly every territory where a nation has achieved self-determination there is at least one other nation that may try to do the same. The outcome will be a proliferation of ever-smaller states. Second, a domino effect: Independence for groups with substantial numbers of members in neighbouring countries will undermine the territorial integrity of these other states. Third, a trend towards illiberal government: If the justification for forming a new state is tied to the national identity of a majority population, then this state's government has strong reasons to coercively assimilate minorities whose very existence could undermine its legitimacy. Fourth, the violent unmixing of peoples: Where national communities live territorially dispersed, any drawing of borders for the sake of creating nation-states will leave substantial minorities stranded on the wrong side. This produces an incentive not only for assimilation but also for population exchange, collective expulsion or even genocide.

Liberal nationalists may concede most of this and still defend national self-determination as a universal right in an ideal world. Daniel Philpott (1995: 355) has argued that nobody could object to the self-determination of communities that are territorially non-overlapping and unanimously desire independence under a liberal government.<sup>25</sup> If this claim were accepted then a primary right to national self-determination could still be defended as a conceptually coherent and attractive idea whose application in non-ideal world needs to be constrained in order to achieve maximum possible self-determination for all nations.

However, from a liberal perspective there is something profoundly wrong in this line of argument. Such an ideal world ought to be rejected as a false utopia because it regards maximum homogeneity as a desirable feature of democracy (Buchanan 1998: 23). In a society where

internal conflicts over identities and interests were absent there would be no need for liberal democracy. Conversely, every liberal society that establishes the freedoms of speech, association, territorial and marital mobility inevitably undermines the homogeneity envisaged for the 'ideal' world.

#### 4.4. Remedial secession

The theories discussed so far maintain that border changes should be based on democratic procedures, voluntary association or collective identities. The alternative to these approaches is to regard unilateral secession as a strictly remedial right and a last means against persistent injustice. This would still allow for consensual separation or unification where both groups concerned agree, as well as for the right to leave alliances or confederations that explicitly or implicitly include such a provision.

Although a remedial approach is generally more cautious than libertarian and liberal nationalist approaches, it appears to leave more ample opportunities for legitimate secession than the dominant interpretation of international law. The latter generally upholds the right to territorial integrity of states that systematically oppress their national minorities. There are good reasons for maintaining a rather high threshold for humanitarian interventions by other states against despotic regimes. Yet it is not obvious that similar constraints ought to be imposed on challenges to the territorial integrity of an oppressive regime by its internal victim groups. In our world where oppression of ethnonational minorities is a very widespread phenomenon (Gurr 2000), a remedial approach referring to past and current injustices may seem to open very widely the doors for attempts to escape from such oppression through secession.

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<sup>25</sup> Kai Nielsen also develops a theory of self-determination for liberal democracies only and based on the assumption that post-secession states will also be liberal democracies (Nielsen 1998: 113).

On the other hand, a remedy is not merely a justified response to an ill, it must also be shown to be a cure. A remedial approach is both retrospective in its evaluation of injustices that have been committed and prospective in its search for solutions that prevent further harm. It is therefore not sufficient for a remedial secession theory that a group's rights have been violated by a state's government, it is also necessary to show that there is no prospect for a just and stable settlement as long as the group remains included in this state. Moreover, secession is an acceptable remedy only when it does not produce new oppression of the same kind for minorities within the post-secession states. This forward-looking and consequentialist aspect of a remedial secession theory may lead to a much more cautious approach. The dilemma is that those cases where the worst violence has been perpetrated against a minority are also more likely to generate more violence and oppression as a result of secession. While a remedial approach must, for example, take seriously prima facie claims of Chechnya or Kosovo to become independent, there may be good reasons for pressing for extensive autonomy instead of independent statehood and, if that strategy fails, for establishing international protectorates and postponing the question of final status.

From the same prospective concerns a less violent form of oppression of national minorities in a fairly democratic regime may lead to weaker objections against secession if the post-secession regimes are likely to be similarly democratic and are less likely to oppress their internal minorities. The necessary combination of retrospective and prospective aspects within a remedial secession theory creates thus a certain indeterminacy in applying principles to real world cases.

A second difficulty lies in specifying the relevant grievances that may serve as prima facie grounds for breaking away from a state against the will of the majority and the present government. Allen Buchanan, who has consistently defended a remedial-right-only theory of secession, suggests three such grievances: persistent violations of human rights, unjust acquisition of territory, and discriminatory redistribution that systematically exploits one group for the benefit of others (Buchanan 1991; 1997: 310). While I agree that all three grievances are

important in substantiating a secession claim, I nevertheless want to suggest that none is a sufficient and none is a strictly necessary condition for legitimate secession.

Human rights violations are not sufficient, because there are many cases where the group concerned is not territorially concentrated and does not form a political community. For women in today's Saudi Arabia or Blacks under South African Apartheid their grievances justify a right to resistance or revolution rather than to secession. Unjust acquisition of territory is not sufficient, because the annexation of an uninhabited territory may breach international law without giving rise to a secession claim. (Imagine a military occupation of Antarctica in violation of the 1959 Treaty.) More importantly, there must be a statute of limitations for attempts to reverse unjust acquisitions. If a present population has been fully integrated as equal citizens in a state into which its ancestors had been coercively incorporated the historic injustice can no longer count as a relevant grievance that could trigger a right of secession.<sup>26</sup>

Discriminatory redistribution is not sufficient either, because secession is once again no remedy for territorially dispersed identity groups that are the target of economic exploitation. A more difficult matter is how to establish what counts as discriminatory redistribution. Regions whose wealth lies above average as well as poor ones may claim discrimination for opposite reasons: the former because part of their wealth is used to support the poor areas, the latter because there is not enough redistribution to bring them up to a decent level. If regional redistribution is not per se unjust we must deny a right of provinces to the full benefits from their natural resources and

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<sup>26</sup> Colonialism creates a right to self-determination because it is incompatible with equal citizenship within a wider polity. The attempt to integrate Algeria into the French state was bound to fail because of the ineradicable colonial legacy. A former colony may certainly exercise its right to self-determination by opting for full integration and equal citizenship, but it cannot be said to have forfeited its self-determination rights merely because the former colonial power offers such integration. I am going to argue below that equal citizenship may also not be sufficient for rejecting a secession claim if the group in question has a legitimate aspiration for political autonomy. This aspiration may be historically grounded, but it must be broadly supported by the present members of the group in order to count as a relevant claim.

economic productivity. In the absence of a general benchmark for just interregional redistribution the necessary safeguard against discrimination is to give the areas concerned a substantial degree of autonomy and representation in federal institutions where redistributive policies will be decided.

We can see that none of the three criteria is necessary when considering cases where a central state government or parliamentary majority violates a basic federal agreement, for example through merging two provinces so that a group that previously formed a regional linguistic majority is turned into a minority. Suppose the territory in question has not been unjustly acquired but its population has voluntarily joined the federation and there is also no unjust redistribution. Suppose further that the federal government neither discriminates in any way against individual members of the minority nor touches their human right to use their own language in community with other members of their group according to Art. 27 ICCPR. This latter right does not include the political power of a territorially concentrated group to establish its language as an official one for government and public education, which power will be lost as a result of the merger. I contend that the minority in question still has a *prima facie* case for threatening with secession as a means of forcing the majority to respect federal agreements.

My conclusion is that the necessary and sufficient condition for a remedial right to unilateral secession is a persistent violation of legitimate claims to self-government. This is the common denominator for all the items on Buchanan's list but it is also a distinctive collective right that is absent from his account. In this view there is a primary right to self-government that can be sufficiently guaranteed by various federal arrangements for collective autonomy and representation, but not a primary right to self-determination that would include a right to change international borders in the absence of such a grievance. This move resolves some of the dilemmas encountered by theories of secession, but opens up new questions which powers must be minimally included in self-government, how to ensure the long-term stability of multinational polities, and what kind of groups can claim to govern themselves.



## 5. *Who has a right to self-government?*

The first and second of these problems are broadly addressed in an emerging literature on multinational federalism (see e.g. Norman 1994, MacIver 1999, Bauböck 2000, Gagnon and Tully 2001, Keating 2001, Keating and MacGarry 2001, Kymlicka 2001, ch. 5, Stepan 2001). The third question has been less discussed. It is not an easy one for those who don't accept nationalism as a plausible or morally acceptable doctrine. However, from a perspective of international law this problem is not as damaging as the idea of a natural right of peoples to self-determination. If self-determination is legitimate only as a consensual exercise of self-government rights or as a response to a prior violation of self-government rights, then self-determination no longer conflicts directly with the principle of territorial integrity. However peoples or nations are defined, self-government of distinct groups within multinational states is fully compatible with a right of such states to territorial integrity. Indeed, these rights should be understood to be as closely connected to each other as the two sides of a coin. The value of the coin is impaired when either of its sides is severely damaged. If one right is persistently violated, the complementary claim will lose its legitimacy: As long as a multinational state respects a minority's legitimate claims to self-government, the minority has no right to secede. However, the minority is not bound to respect the territorial integrity of a state that persistently denies its autonomy rights. As a means of last resort to regain its self-government either within or outside that state the minority may threaten to secede.

Institutional arrangements that attempt to satisfy minority demands for self-government can answer the who-question in two different ways. Either the minority nation is defined as a distinct community of membership that is recognized as a legal entity and corporation under public law with extensive powers to govern its own affairs,<sup>27</sup> or autonomy is attributed instead to a territorial unit within which a national minority forms a stable majority of the population. In the latter case, from a constitutional perspective it is not the minority nation, but the whole population of the

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<sup>27</sup> During the final years of the Habsburg monarchy, the Austrian socialists Karl Renner (1899, 1902, 1918) and Otto Bauer (1907/2000) proposed a comprehensive model of national cultural autonomy that has never been tested. In much watered-down versions non-territorial autonomy for specific minorities has remained on the political agenda in Central and Eastern European states ever since (Plasseraud 2000).

territory, including members of the dominant majority or other internal minorities living there, that enjoys a right to self-government within the larger state.

Each answer will be appropriate in a different context. Membership-based autonomy arrangements may be necessary for minorities that have historically been excluded from, rather than coercively included in, the dominant nation-building project. This is the situation of indigenous minorities who were classified as racially distinct peoples. While their territory was incorporated into the settler-states they themselves were seen unfit to become full citizens of the nation. In these circumstances, a right to self-government may have to include a right of collective self-determination of membership so that the jurisdiction is not merely defined territorially but also with regard to persons belonging to the group by descent or cultural affiliation. Restrictions of free movement or voting rights for citizens of the larger state in autonomous indigenous reserves and tribal areas are departures from standard citizenship rights in liberal democracies that can be justified by considering the specific conditions for restoring indigenous self-government.

National minorities such as the Quebecois, Catalans, or Scots have a quite different history. They have maintained their aspiration to self-government through resistance to attempts of assimilating them into the dominant national majority. Such interlocking struggles for forming several modern nations within the same political territory have invariably resulted in a less clear-cut separation of populations. While the political liberties guaranteed in contemporary liberal constitutions have finally provided these minorities with opportunities to freely mobilize for their demands for self-government, their members have at the same time become much less distinct from majority populations in terms of their cultural ways of life and political orientations. Their aspirations for self-government can be best accommodated by territorial devolution that allows the minority to establish its language, its cultural and legal traditions as a hegemonic public culture in a part of the state territory, but also requires including every citizen residing in the autonomous territory as an equal member of the autonomous polity. In such federal arrangements there are therefore two answers to the question who is the bearer of minority self-government rights. In legal terms, it is the whole citizen population living within the autonomous territory, but in political terms it is essential that the borders of this territory and its particular public culture can be shaped by the

minority's distinct nation-building project in a way comparable to the impact of the majority's project on the larger polity.

## 6. Conclusions

The paradoxes of self-determination and inconsistencies of international law emerge from two sources, one of which should be blocked whereas the other one may become productive for widening the scope of international law. The idea of an inherent right to freely choose a political status ought to be abandoned, but the presupposition that there are bearers of rights under international law who are neither sovereign states nor individual human beings might eventually become a catalyst for a change in international law similar to the human rights revolution after World War Two. The vexing question who are the peoples who enjoy a right to self-determination opens the door for including other self-governing political communities below, and also above the level of independent states not only as bearers of rights but also as participants in the search for binding norms in a global political order.

A transformation of international law from interstate law towards a multilevel conception of nested political communities requires, however, that self-determination rights be derived from a primary right to self-government rather than the other way round. A primary right to self-determination perpetuates not only struggles over international borders, but also the Westphalian system itself in which independent statehood is the only internationally recognized and protected form of self-government. In an alternative model for a global political system individuals would be simultaneously members of several self-governing polities at different levels below and above independent states.<sup>28</sup> In such a system political memberships would be less exclusive and borders could be much more permeable than in a Westphalian world. Yet international borders would also have to be relatively stable in order to secure the conditions for continuous and comprehensive self-government.

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<sup>28</sup> Among potential solutions to secession and self-determination problems in international law Andrew Hurrell lists international regimes for the protection of minority self-government and the promotion of multilevel governance. Hurrell remains skeptical about the possibilities of a post-Westphalian order within which such solutions could be implemented (Hurrell 2003: 293-4). In the same volume, Benedict Kingsbury suggests that international law might

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be inspired by developments in public law in response to boundary conflicts within multinational and federal states (Kingsbury 2003).

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