Rethinking the boundaries of democratic secession: Liberalism, nationalism, and the right of minorities to self-determination

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Whereas secession has been dealt with extensively in international law, in connection with the creation and recognition of states, it has received little attention as a possible tool in the constitutional protection of minority rights. This paper examines the more frequent uses and invocations of secession and assesses their potential adaptability as means of promoting minority group rights. It argues that international law and the international community have never provided coherent guidance for responding to nationalistic minority aspirations or, specifically, to secessionist challenges. At the same time, constitutional models regarding the management of national diversity have also failed to reconcile liberal democracy and nationalism. From a substantive point of view, there is probably no solution to such difficulties. Neither available model of “constitutional coexistence” nor of secession is likely, ultimately, to be satisfactory. Nonetheless, the adoption of an explicit constitutional procedural approach to secession provides the best means of averting the worst dangers and excesses.

Introduction

Most academic works on secession focus either on its legitimacy in international law, as an expression of the right of all peoples to political independence—which springs from the principle of self-determination—or on the morality of a constitutional right to secede and its compatibility with constitutionalism.

This paper addresses the issue of secession from a different perspective, placing it within a broader discussion on minority rights and citizenship in multinational societies. This approach places the “secession question” within its natural environment, that is, a multinational state inhabited by autochthonous, territorially concentrated minorities that share a national or quasi-national identity. Moreover, traditional minority rights and the right to secession raise similar moral, political,
and legal questions, having to do with the difficulties of reconciling political theories on citizenship and nationalism, self-determination, and sovereignty.

This approach raises a preliminary difficulty, in that neither international law nor the overwhelming majority of constitutions accord to minorities the right to secede. The answer to this problem is twofold. From the perspective of international law, there is no legal basis for denying (at least some) minorities the right to political independence as a corollary of the right to self-determination, which, in principle, is granted to all “peoples.” As there are no agreed-upon definitions of a “people” or a “minority,” and because the two categories often overlap, it is impossible to draw a clear line between the two. Therefore, given certain conditions, there is no theoretical obstacle to granting minorities the right to secede on the basis of their right to self-determination. From the perspective of constitutional law, this paper argues that the right to secede empowers minorities to achieve the ultimate, but certainly not the only, means of political separation. Therefore, in principle, secession is not incompatible with constitutionalism, or, at any rate, is no more incompatible than other formulas of political separation—analyzed below in section 1.2—that are implemented to protect and promote minority rights in deeply divided federations, such as Belgium and Canada.

1. Peoples, minorities, self-determination, and secession: The ambiguity of international law

In international law and in the practice of the international community, the meanings and interpretations of such terms as “minority,” “minority rights,” “people,” “self-determination,” or “democratic governance” have changed throughout the decades.¹

Self-determination means, roughly, the freedom for all peoples to decide their own political, economic, and social regimes. It is, therefore, both a collective right of peoples to decide autonomously the course of their national life and to share power equitably, and a right of all individuals to participate freely and fully in the political process.² Moreover, self determination is a right and a principle that combines elements of nationalism and democracy;³ peoples may invoke the right to self-determination either to secede from a state and give birth to a new one or to achieve other aims, for instance to stop internal

¹ See generally Will Kymlicka, The Internationalization of Minority Rights, 6 Int’l J. Const. L. (I•CON) 1 (2008) (focusing on models of state–minority relations and types of minority rights that have been endorsed by international organizations for different minority groups, and in different contexts, including an analysis of how the rights of national minorities have been discussed within European organizations).


coercion, overturn the state government, or establish autonomous regimes within the state subunits.\(^4\)

International law has never provided coherent guidance for responding to the tensions between these different dimensions (collective/individual and democratic/nationalistic) of self-determination. In particular, neither international law nor international practice have ever agreed on what objective characteristics a “people” should have in order to be granted the right to enjoy the “external” or nationalistic dimension of self-determination, that is, the right to secede. In fact, the “peoples” entitled to the right to political independence have been identified, in different times and according to different needs, as very different sorts of communities.

In the Wilsonian era, such peoples were identified with ethnic or national communities. Nationality and self-determination were the basis of the post–World War I settlement advocated by U.S. President Woodrow Wilson. In his address to Congress on February 11, 1918, he declared that “All well-defined national aspirations shall be accorded the utmost satisfaction,” provided that this would not introduce new elements of discord and antagonism—or perpetuate old ones—likely to break the peace in Europe.\(^5\) But the paradox of self-determination emerged with the twin impossibilities of both giving birth to nation-states for all nationalities and founding ethnically homogeneous nation-states in the territories of multiethnic former empires. At the 1919 Paris Peace Conference that gave birth to the League of Nations, the Allies were obliged, therefore, to address the nationality problem in terms of minority rights when drafting the Covenant of the League of Nations\(^6\) and the treaties on minorities.\(^7\) However, the system did not provide a minimum standard of protection for all European nationalities/minorities, since obligations were imposed only on the new independent states, not on Allied and associated states and not even on Germany. In practice, only


the new states were obliged to limit their sovereignty by accepting minority clauses imposed by the great powers; this was a condition for recognition of their new borders. Minority protection represented, therefore, a limitation on self-determination for the new states and was connected with the rise of expansionist and irredentist nationalism. The “quest for international minority protection in Europe involved the fusing of two powerful opposites: the attainment and maintenance of full national independence versus the expansion of outside control.”

In the post-World War II period, the definition of “peoples” that had a right to political independence radically changed. The right to statehood was granted exclusively to colonial peoples—defined not in ethnic or national terms but, rather, in political and territorial ones—as the political majorities formed by the multiethnic peoples under colonial rule. As Eric Hobsbawm puts it:

> [E]ven when a clearly self-described or recognized “people” existed, which the European liked to describe as a “tribe,” the idea that it could be territorially separated from other people with whom it coexisted and intermingled … was difficult to grasp because it made little sense. In such regions the only foundation for such independent states of the twentieth-century type were the territories into which imperial conquest and rivalry had divided them.  

Peoples under colonial rule were considered as a unity together with the territories that the colonial powers had defined as pertaining to them. This clashed with the individual dimension of self-determination, where each individual may decide to which polity he or she wants to belong. It also clashed with the nationalistic dimension of self-determination, since the decolonization process certainly did not accord ethnic and national groups “the utmost satisfaction.” Many frontiers were changed, under the aegis of the UN, without consulting the (individual and collective) peoples directly affected by such changes. Think, among many other cases, of Rwanda, Burundi, British Cameroon, the federation of Ethiopia and Eritrea, and Palestine.

For noncolonial peoples, the right of “all peoples” to self-determination has been conceived of in “domestic” terms, emphasizing its “democratic” rather than its “nationalistic” dimension. Other principles have prevailed over the right to secede: for example, those barring intervention in the internal affairs of states, with its obvious corollary, the inviolability of frontiers; or the threat or use of force against a state’s territorial integrity and political independence. Existing states with established borders, thus, are supposed to meet the obligations associated with the right to self-determination of all peoples, of whatever size or nature, by safeguarding their linguistic, ethnic, and cultural heritage and by

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guaranteeing both their enjoyment of fundamental rights and the possibility of access to government on an equal footing with the rest of the population. Such access to government is not shaped as a group right to political participation. The right to self-determination, rather, protects the individuals that compose the minority groups, which should not be excluded from political participation, for example, by being denied the (obviously individual) right to vote. 11

Only where such guarantees are absent or gravely limited can the right to self-determination be specified as the right to secede; in other words, where a people is subjugated in violation of international law, it must be able to regain freedom by constituting itself as an independent and sovereign state. 12 The right of secession is, in the last analysis, attributable to peoples who are suffering from discrimination, from the denial of a government that is representative, and only where the discriminatory behavior is so penetrating, ramified, and systematic as to threaten, concretely, their very existence and where there is no strong likelihood of the discrimination coming to an end.

After World War II, nationality and ethnicity ceased to be the condition for granting any collective right, not just that of political independence. With the new universal and individualistic conception of human rights that then prevailed, the very idea of a specific, internationally recognized status for national minorities as collective subjects was put aside. This was done in the hope of solving the problem, not through special group rights but by guaranteeing basic civic and political rights to all individuals regardless of group membership. Neither the United Nations Charter nor the Universal Declaration of Human Rights of 1948 explicitly protects the rights of minorities. The International Covenant on Civil and Political Rights (ICCPR) contains a provision on minority protection that is very limited in scope and structured in strictly individual terms:

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 practice their own religion, or to use their own language.

The Covenant, however, also contains a very different clause according to which “[a]ll peoples” have the right of self-determination by virtue of which they “freely determine their political status and freely pursue their economic, social and cultural development.” 14 Thus, within the same international treaty,


14 Id. art. 1.
these two clauses coexist: the first grants very limited individual rights to members of minorities, and the other fully attributes the collective right to self-determination to all peoples. The Covenant does not contain a definition of these two categories, nor does it explain what the differences are between the two that might justify the radically different legal treatment.

This is very revealing of the ambiguous relationship of law and politics in regard to the thorny issue of defining “minorities” and “peoples” in international law. It is a reflection, as well, of the weaknesses of the approaches and solutions of the international community to minority rights and self-determination rights. Taking for granted that minorities are not peoples, without defining either term, must have seemed the safest solution. “No matter how much care may be taken to circumscribe the objective and subjective characteristics of a people in a somewhat restrictive fashion, it is clear that the majority of States of this globe would then be composed of different peoples which would each have—individually and without any coordination—a right of self-determination.” 15 To dispel all ambiguities, in a discussion that took place within the UN Commission on Human Rights, the majority of members agreed that minority rights should not be interpreted as authorizing any group that inhabits a portion of a state’s territory to constitute communities capable of jeopardizing national unity or security. 16 In other words, minorities, whatever they are, do not have a right to self-determination. However, the very fact that member states felt the need to specify this point reveals that they were aware of how weak was the basis for differential treatment of the two categories. Had the concept of “minority” been clearly distinguished from that of “people,” they would not have felt the need to indicate that minorities did not have a right that was not attributed to them in the first place.

The Final Act (so-called Helsinki Act) of the Conference on Security and Cooperation in Europe (CSCE), adopted in 1975, contains a similar dichotomy. On the one hand, it affirms the right of all peoples to self-determination in broad terms that comprehend all of its dimensions, including the external, or nationalistic, one. The Final Act does not define who the “peoples” are. However, given that the states parties to the CSCE are exclusively European, the term cannot be ascribed simply to “colonial peoples.” Moreover, according to the act, “The participating States will respect the equal rights of peoples and their right to self-determination,” 17 which suggests that “peoples” will not necessarily coincide with each state’s constitutionalized people. Common sense suggests that the only category of European people to whom this right


to self-determination might apply are subnational peoples, that is, national minorities. However, the text seems to exclude minorities from enjoyment of this right, since it refers to the rights of peoples belonging to national minorities in terms that are very close to those of article 27 of the ICCPR.¹⁸ The Helsinki Act makes no attempt to clarify what features distinguish minorities from peoples, thus excluding them from the right to self determination.

The most complex attempt to define minorities as a conceptually autonomous category is made by UN special rapporteur Francesco Capotorti, according to whom minorities are groups “numerically inferior to the rest of the population of a State, in a nondominant position, whose members—being nationals of the State—possess ethnic, religious, or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.”¹⁹ The Capotorti definition raises a number of problematic questions. In the first place, numerical inferiority may not necessarily be a determinative attribute. Consider the case of Belgium: after the birth of the unitary state, French became the sole official language with respect to legislation, administration, the courts, the church, schools, universities, and the military. The fact that the majority of the population²⁰ spoke a “barbarian and imperfect dialect of Dutch”²¹ was simply not taken into account; in spite of their numeric superiority, the Flemish population was relegated to the role of a minority and discriminated against with regard to language.²² Another weakness of the

¹⁸ Id. art. VII provides: “The participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere.” Art. 27 of the ICCPR provides: “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 practice their own religion, or to use their own language.”


²⁰ In 1864, Flemish-speakers numbered 2.4 million, compared to 1.8 million francophones.


²² The reasons for this are manifold. In part they have to do with the “politique hégémonique du français [hegemonist policy of the French language]” in this part of Europe and with the choice of the constitution framers to build up a francophone public space. It should not be forgotten, however, that, at that time, Flemish was not yet a unitary or codified language. A number of thijs dialects were spoken by the rural population of Flanders, while the upper class commonly spoke French. Language and class were, therefore, strictly entangled: lower-class Flemish were discriminated against on the ground of language, but the domination and discrimination was attributable to the bourgeois members of their own linguistic group who choose to speak French. See Astrid Von Busekist, LA BELGIQUE: POLITIQUE DES LANGUES ET CONSTITUTION DE L’ÉTAT DE 1780 À NOS JOURS [BELGIUM: LANGUAGE POLICY AND THE NATIONAL CONSTITUTION FROM 1780 TO THE PRESENT] (Duculot 1998).
Capotorti definition is the reference to nondomianace. Must minorities be nondominant nationally or regionally? Catalans in Catalunya, Corsicans in Corsica, and German-speaking Italians in the province of Bolzano are certainly dominant, as are the Québécois in Quebec—not to mention that they have been consistently overrepresented in Canadian federal institutions. In all of these cases, at the regional level, where the national minority is dominant, there are nondominant subminorities (for example, those speaking Castilian in Catalunya, or anglophones in Quebec) that are part of the group that is dominant at the national level. Which groups are to be considered dominant and which nondominant? Finally, the Capotorti definition does not indicate what parameters determine nondomiance. These could be interpreted in numerical, political, cultural, linguistic, or economic terms. How should a group be defined when it is numerically superior, but nondominant from all other standpoints, as is true of the indigenous population in Guatemala?

In sum, both the numerical and the nondomiance parameters are far too vague to be decisive in defining minorities; actually, either may be misleading. But if we dispense with them, the distinction between minorities and peoples becomes virtually impossible to draw.

A meeting of experts on “the concept of the rights of peoples,” held in Paris in 1989, under the auspices of the United Nations Educational, Social, and Cultural Organization (UNESCO), described “peoples” as groups of individuals who enjoy some or all of the following common features:

(a) common historical tradition;
(b) racial or ethnic identity;
(c) cultural homogeneity;
(d) linguistic unity;
(e) religious or ideological affinity;
(f) territorial connection; and
(g) common economic life.

Moreover, according to the UNESCO experts:

[T]he group must be of a certain number which need not be large (e.g., the peoples of micro States) but which must be more than a mere association of individuals within a State… [and] … as a whole have the will to be identified as a people or the consciousness of being a people—allowing that groups or some members of such groups … may not have that will or consciousness.

Finally, “the group must have institutions or other means of expressing its common characteristics and will for identity.”

This last definition could clearly be applied to many subnational groups that live in a clustered area, share a strong sense of identity and some common characteristics, and are granted some kind of political autonomy. Again, think of Flamands, Catalans, the Québécois, Corsicans, and German-speaking Italians. The difficulty of defining “peoples” and “minorities” is reflected in the failure of international law and practice in both detailing “the circumstances in which measures to protect and promote cultural security should be introduced, or territorial self-government regimes established,” as well as in defining who should be entitled to exercise the right to self-determination.

Since the end of the Cold War and the crises in the former socialist federations, the importance of minority rights and, specifically, of the rights to self-determination and secession have been forcefully demonstrated in the international arena as well as within constitutional systems. Moreover, the emergence of democracy as a legal obligation of states permits the international community to concern itself with both the procedure and substance of ostensibly democratic decisions concerning ethnocultural groups. If democracy is to be understood not simply as majority rule, then cultural conflicts in democratic states must be resolved in a way that is acceptable or at least defensible to all citizens and groups. The right to secession can be the ultimate means to fulfill such needs.

1.1. Contemporary constitutionalism and the minority dilemma
Western political theories have traditionally neglected the claims of minorities. During the whole of the nineteenth century and the first part of the twentieth, the great nations, so called, were seen as the engines of historical development, while smaller, less-developed nations could progress only by abandoning their national characters and permitting their assimilation into one of the great nations. This concept of historical development, according to which progress and civilization require the assimilation of smaller groups, was common both to the liberal tradition and to Marxist-Leninist theory.

Their different theoretical bases (the individualistic approach of liberalism, which ignores the group basis of political life, and socialist internationalism, according to which “the proletariat has no nationality”) led both political theories to be basically hostile to minorities, on the common ground of ethnocentric nationalism.

24 Steven Wheatley, Democracy, Minorities and International Law 127 (Cambridge Univ. Press 2005).
25 This is the theory developed by Wheatley, id.
27 Id.
28 Id.
Traditional liberalism provides the premise for a state model of cultural indifference, based on the notion of popular sovereignty as a normative principle for democratic state organization, on the one hand, and the liberal notion of individual equality before the law—regardless of race, language, gender, or other factors—on the other. In such a rigorously neutral state, that is, a state without cultural or religious projects or, indeed, any sort of collective goals beyond the personal freedom of its citizens, each *ethnos* is supposed to converge on the political community, regardless of the existence of different groups, which are then left to a merely “existential” status. Reality, nevertheless, proves that bonds with communities of origin are tenacious, and the loyalty of individuals to them is often stronger than their loyalty to the state of which they are citizens. The ongoing quest for rights by minorities, and their resistance to assimilation, demonstrates the limits of the strictly individualistic conception of minority rights that renders “minorities vulnerable to a significant injustice in the hands of the majority.”

Contemporary constitutionalism has proven open to a more elastic conception of the rights of minority groups. Postulating a close connection between freedom and equality, and without denying the primarily individual dimension of human rights, it recognizes the role that groups play in the formation and recognition of individual identity. Therefore, most constitutions provide for the protection of linguistic or national minorities and/or minority or national languages, postulating a synthesis between traditional liberalism and communitarism. Thanks to the constitutionalization of minority-oriented clauses, pluralism ceases to be a merely theoretical principle and acquires a normative character. The constitutional protection of minority rights produces a legal differentiation within the constitutionalized *people* of the state, since it postulates the existence of a plurality of communities of citizens where each can be granted a different status on the grounds of their shared, diverse identity.

In other words, states and minorities should, in principle, find some point of balance, where the former need not abandon sovereignty over part of its territory while the latter can retain and develop their own special nature and


30 See Kymlicka, *supra* note 26, at 18.

31 In Europe, see Const. Italy, art. 6; Const. Spain, arts. 3.2 and 3.3; Const. Switz., arts. 4, 70; Const. Belg., arts. 2, 30; Const. Ireland, art. 8; Const. Finland, art. 17; Const. Swed, art. 2, §4, art. 15; Const. Austria, art. 8; Const. Slovakia, arts. 6, 33; Const. Poland, arts. 27, 35; Const. Croatia, arts. 12, 15; Const. Albania, art. 20 §1; Const. Romania, art. 6, art. 32 §2, art. 59 §2, art. 127 §2; Const. Slovenia, arts. 11, 64; Const. Lithuania, art. 45; Const. Estonia, art. 37.

run their communities’ lives autonomously. In an inversion of the historical tendency that saw federalism emerge from a process of unification, today the formula of political decentralization is also used to divide. Constitutional protection of minorities and nationalities is increasingly shaped by virtue of a principle of separation. Strong, territorially concentrated minorities are accorded a high degree of cultural and political autonomy, which confines the role of the state to one of establishing basic principles and precludes its interference in the decision-making processes critical to the development of a minority’s national life.

This centrifugal formula may be applied to the protection of minorities by attributing a higher degree of political autonomy to the substate entity or entities where the minority population constitutes a majority. This results in highly homogeneous territorial subunits, in which the elevation of collective cultural and linguistic goals over individual rights is likely to result in the weakening of the latter. Consider the strict application of linguistic territoriality in Quebec and Flanders, which, while effective in protecting the culture and language of the regional majority, results in systematic interference with the cultural and linguistic rights of individuals who do not belong to the dominant group. Territorial autonomy is likely to prove an effective—probably the most effective—means of protecting a minority. Nevertheless, it seems prone to producing discrimination in favor of numerically or economically stronger groups, or groups that can count on a stronger kin state (and, in some cases, on the international anchoring of their status, as in the case of German-speakers in South Tyrol, or Swedish-speakers in the Åland Islands in Finland).

The case of Italy comes to mind: while the Constitution refers to the protection of “linguistic minorities” generally, only German-, French-, and (to a much lesser extent) Slavic-speaking minorities have traditionally been protected, in this case, by means of a system of “special regional statutes” (by entrenching special autonomy in the Constitution). Such “recognized” minorities enjoy a greater degree of autonomy than other equally autochthonous groups, which are granted a number of linguistic and cultural rights but are not afforded the control over a designated territory that special autonomy entails. The same can be said of Spain, where the Comunidades Autonomas inhabited by the more powerful (“historical”) nationalities are granted a higher degree of

33 Const. Italy, art. 6 (“The Republic protects linguistic minorities through special laws”).
34 Const. Italy, art. 116 (“Friuli-Venezia Giulia, Sardinia, Sicily, Trentino-Alto Adige/Südtirol and Valle d’Aosta/Vallée d’Aoste have special forms and conditions of autonomy pursuant to the special statutes adopted by constitutional law”). Special regional statutes are constitutional laws, which means that they can only be changed through the constitutional amendment procedure. Regions subject to such statutes enjoy a higher degree of legislative and administrative autonomy. See Francesco Palermo, Asymmetric, Quasi-Federal Regionalism and the Protection of Minorities: The Case of Italy, in Federalism, Subnational Constitutions, and Minority Rights 121 (G. Alan Tarr, Robert F. Williams & Josef Marko eds., Praeger 2004).
autonomy. The trend toward the strengthening of a quasi-federalist model within these subunits suggests that the differentiation is likely to remain. 35

Minority protection through territorial autonomy also implies an ethnocentric rather than multicultural understanding of minority protection, mostly because it encourages minorities to develop their national lives separately and to focus on their diversity with respect to the state population; among other things, this can result in a challenge to the uniform application of human rights. This challenge is twofold. On the one hand, subnational entities can claim to develop their own bills of rights in order to better reflect local needs and aspirations. 36 Catalonian nationalists “have argued for such an instrument which would allow a stronger focus upon issues of specific concern to Catalans, such as language rights,” 37 Likewise in Scotland, it has been suggested that the European Convention on Human Rights (ECHR) could have been given effect by the Scottish Parliament in a manner which promoted specific Scottish needs. 38 On the other hand, the state becomes “less and less a direct source of concrete rights and more and more the source of rules for determining the matter in which rights can be exercised.” 39 In other words, the role of the state is increasingly confined to setting basic principles and controlling their application while other levels of governance set forth the operational rules for specific rights. (In the specific fields of cultural and linguistic rights, for example, the basic principles pertain to formal and substantive equality; however, within this framework, it is up to the subnational levels to choose the relevant legal and political means to achieve the goal of minority protection.) 40

The consequences of applying the centrifugal formula are particularly evident in deeply divided federations, such as Belgium and Canada, although the effects are discernible even in regional contexts (Catalunya and South Tyrol, for example). The state subunits, inhabited by the dominant minorities, such as Flanders and Quebec, end up, ironically, by reproducing on a smaller scale a French-style state model, in which minorities exist de facto but not de jure, as they are not entitled to special rights but are protected only on the basis of the principle of non discrimination—the very situation the formula was meant to solve. A state subunit may be ethnically or linguistically very homogeneous, but that homogeneity will inevitably be imperfect. Thus, in Flanders there are francophone enclaves; in Quebec, there are anglophones, newcomers, and natives. These


37 Id.

38 Id.

39 Palermo, supra note 34.

40 Id.
subminorities, or “trapped minorities,” find themselves marooned in strictly monolingual subunits within multinational states. In these countries, all groups enjoy an equal institutional status in principle, regardless of their numbers, and all languages are equally official at the federal level, while at the local level, linguistic territoriality is strictly applied. In other words, each group’s linguistic monopoly roughly corresponds to the territorial dimension of the state subunit. Minorities, therefore, are not legally defined as such but enjoy equal status and are protected through the territorial and state democratic and constitutional institutions as well as through ordinary legislation, applicable to all groups, rather than through special constitutional clauses or special autonomy.

However, in all systems, homogeneity is imperfect, and even highly homogeneous subunits are inhabited by trapped minorities or subminorities. These groups end up lacking a legal basis for protection, because, as the UN Human Rights Committee concedes in the Ballantyne case, “the minorities referred to in article 27 [of the Covenant] are minorities within … a State, and not minorities within any province.” That is, state protection does not apply to trapped minorities because the “multinational” formula, by definition, rejects the notion of minority and promotes equality among all national groups. The definition of minorities in Belgium is a particularly thorny one. The difficulties do not occur at the federal level, where only German speakers can be viewed as a linguistic minority, but concern, rather, the status of trapped minorities within the two monolingual regions: francophones in Flanders and in the German-language region, and Flemish and German speakers in the French-language region. According to the Council of Europe, such groups actually could be regarded as linguistic minorities. Such recognition, however, is


43 See Resolution 1301 (2002) of the Parliamentary Assembly of the Council of Europe, The Protection of Minorities in Belgium (Doc. 9536, report of the Committee on Legal Affairs and Human Rights, adopted on Sept. 26, 2002 (30th Sitting)) (recommending in ¶1, 20) that “the Kingdom of Belgium and its respective competent parliamentary assemblies (including those on the level of the regions and the communities) ratify the framework convention without further delay, in a spirit of tolerance, ensuring that all minorities identified by the Assembly are duly recognised as such on the state and regional level, and refrain from making a reservation incompatible with the content of the framework convention,” while declaring in ¶1, 18 that “The Assembly thus finds that the following groups are to be considered as minorities in Belgium within the context of the Framework Convention: at state level, the German-speaking community; at regional level, the French-speakers in the Dutch-language Region and in the German-language Region, and the Dutch-speakers and German-speakers in the French-language Region.” Available at http://assembly.coe.int/Documents/WorkingDocs/Doc02/EDOC9536.htm#P149_29623.
likely to challenge the principle of territoriality, which “remains the fragile and therefore static basis on which the actual Belgian state rests.” It is not by chance that Belgium signed the Framework Convention on Minority Protection in 2001 but made the reservation that “the notion of national minority will be defined by the Belgian inter-ministerial conference on foreign policy.”

The cases of Belgium and Canada would suggest that an ultrafederal formula is not a universal panacea for resolving nationalist conflicts. Radical forms of centrifugal federalism seem not to restrain the impetus for independence—nor to be completely consistent with such principles as equality among minorities and respect for individual cultural and linguistic rights or for individual self-determination. When even federal models specifically designed to permit coexistence among different groups with strong national identities fail, one could argue that secession might be an appropriate option. It can be argued (and secessionist movements do argue) that secession is a natural and just development of the de facto or de jure coexistence, within the same constitutional system, of a plurality of peoples; and that they are entitled to develop their own separate political and territorial spheres. From a theoretical standpoint, the justifications for granting or denying minorities the right to secede may be the same as the bases for granting or denying them other collective rights. Secession is the definitive, but certainly not the only, step toward political separation and, as noted, there are other models of domestic self-determination that may achieve similar objectives and produce similar consequences.

1.2 Domesticating secession: The risks to be avoided

Secession may come about in stages, either by adopting formulas that may be called federal but, in reality, come closer to confederation—as is happening in Belgium—or by a single stroke, when part of a country simply secedes. In either case, one may ask whether it is advisable to formalize the process or, instead, to leave it to the political actors.

The question is by no means purely theoretical. Between 1947 and 1991, secession occurred only in one case (Bangladesh). International law viewed state boundaries as permanent features of the international state system, and the practice of states and the United Nations prevented the external (or nationalistic) dimension of the right to self-determination from transgressing the boundaries of the colonial world, and certainly not the notions of suitability entertained by the


so-called first world. The fall of the Berlin Wall and the subsequent disintegration of the socialist federations, together with the worldwide “ethnic revival,” radically shook up this state of affairs; the number of secessionist struggles has been increasing constantly in Africa, Asia, the Americas, and Europe ever since.

Liberal federations are reluctant to enshrine a secession clause in their constitutions, due to the potential strategic use that may be made of it, either by the state or by the subunits. Moreover, the compatibility of a secession clause with the very nature of a constitution is doubtful, because it suggests not only the coexistence of more than one people within a state but also that the state’s subunits possess a form of quiescent sovereignty, as it were. In the face of this, in most federal contexts, a constitution, as the U.S. Supreme Court puts it, “in all its provisions, looks to an indestructible union.”

There are instances where the secession clause has been exploited to fraudulent ends by a government during periods of nation building; this was done to strengthen cohesion by inducing state subunits to accept more far-reaching forms of integration as well as to attract other states to join the new multinational state. The secession clause may be a crucial tool in this process, because existing subunits and new states rely on it and accept the limitation of their sovereignty, given the assurance that they will be able to regain it. In other words, the central government uses the secession clause as an enticement to subunits or other independent states to accept annexation. The latter, as long as they can count on a future option to withdraw, are more amenable to transferring powers to the central government or to joining a federation. However, once the central power has achieved its objectives and consolidated its authority, the secession clause either disappears or amounts to a dead letter. The 1931 constitution of

46 Recall, for example, the attempted secession of Katanga from the Congo, which the UN considered an internal matter, and thus subject to the principle of nonintervention. Once the danger was past, the secretary-general declared that the UN “... has never accepted, does not accept, and ... will never accept a principle of secession from a Member State.” See René Lemarchand, The Limits of Self-Determination: The Case of the Katanga Secession, 56 Amer. Pol. Sci. Rev. 404 (1962). Similarly, the uprising of the Ibo minority in Biafra, which accused Nigeria of genocide before the United Nations, was not the object of international intervention, based on the technicality that no issue had been brought before the Security Council, and on the principle of inviolability of the member state sovereignty. See Charles R. Nixon, Self-Determination: The Nigeria/Biafra Case, 24 World Pol. 473 (1972). The UN did not even oppose Ethiopia’s unilateral abolition of Eritrea’s federated region status in 1952 or address the question of the military support that Addis Ababa was receiving from the Soviet Union and Cuba. See Eyasu Gayim, The Eritrean Question: The Conflict Between the Right of Self-Determination and the Interests of States 716 (iustus Forlag 1993).

47 This expression is borrowed from Anthony D. Smith, The Ethnic Revival (Cambridge Univ. Press 1981).

48 I am aware of only one exception: Const. St. Kitts & Nevis, art. 115, “Secession of Nevis” (“If, by virtue of a law enacted by the Nevis Island Legislature under section 113(1), the island of Nevis ceases to be federated with the island of Saint Christopher, the provisions of schedule 3 shall forthwith have effect”).

49 Texas v. White, 74 U.S. 700, 726 (1869).
the Chinese Soviet Republic (adopted at a time when the Communist Party did not control the entire national territory) recognized “the right of the national minorities to self-determination … going as far as the formation of an independent State for each of them” and specifying that “Mongolians, Tibetans, Miao, Yao, Koreans and others … may join the Union of Chinese Soviets or secede from it and form a sovereign State.” The short-lived constitution of 1975, however, adopted after the Communists had assumed control over the mainland and subjugated neighboring territories such as Tibet, was less generous in its approach to minorities and the territories they inhabit—judging, at least, from article 4, which provided: “The Chinese People’s Republic is a unitary multinational State. The areas having regional autonomy are inalienable parts of the Republic.”

The charter of the Soviet Union of 1918 similarly constitutionalized the right of secession. Recognition of this right, in Lenin’s opinion, was to lead, not to the formation of small States, but to the enlargement of the bigger ones—a phenomenon more advantageous for the masses and for the development of the economy.

The Constitution of the Union of Burma of 1947 also contained a secession clause.
the practical feasibility of which was never the subject of anyone’s illusions. One contemporary example of this attitude may be seen in the Ethiopian Constitution of 1994, in which the guarantee of the right of secession seems largely motivated by the desire to dissuade the component subunits of the state from following the example of Eritrea.

The federation’s subunits may also take advantage of the right to secede in order to seek gains having little to do with secession. For example, in the U.S. in the 1860s, in order to strengthen the constitutional position of the South, [M]any statesmen advocated the extreme position of temporary separation from the North... A. H. Handy, [Secession] Commissioner from Mississippi, in urging the Governor of Maryland to take steps towards separation, defended his position on these grounds: “Secession is not intended to break up the present government, but to perpetuate it... we go out for the purpose of getting further guarantees and security for our rights... our plan is for the Southern States to withdraw from the Union for the present, to allow amendments to the Constitution to be made, guaranteeing our just rights.

Moreover, after the secession war, in regard to the (secessionist) position of Georgia, Alexander H. Stephens wrote: “Two-thirds at least of those who voted for the Ordinance of Secession, did so... with a view to a more certain reformation of the Union... they acted under the impression and belief that the whole object... could be better accomplished by the States being out of the Union, than in.”

Additionally, the democracy and transparency of decision-making processes may be threatened when the right of secession is exploited by the most populous or richest subunits, taking advantage of their greater bargaining power to put forward non-negotiable demands in search of immediate gains instead of compromise solutions to the detriment of the national interest. In such cases, cooperation between the state’s components is replaced by forms of autonomous development, thereby reducing the level of interdependence among the subunits.

56 See Alem Habtu, Multiethnic Federalism in Ethiopia: A Study of the Secession Clause in the Constitution, 35 Publicus 313 (2005) (“the secession clause was incorporated for reasons of ideology and necessity... Although the secession clause has symbolic value, it is unlikely that any Ethiopian government would allow secession to take place”).
58 Id.
59 See Jenna Bednar, Valuing Exit Options, 37 Publicus 190 (2007) (analyzing the effect of a secession threat on the union’s productivity and arguing that, if the exit option yields less benefit than can be derived from a thriving union, member governments should voluntarily submit to measures that make exit as costly as possible).
The risks that a secession clause may be used for strategic purposes emerged, as well, in the debate on the voluntary withdrawal clause that was introduced in article I-60 of the European constitutional treaty. This clause was conceived as a counterbalance to the loss of sovereignty imposed on member states when the drafting convention still hoped to overturn the rule of unanimity in the amendment procedure; ironically, the provision survived, even in the absence of the function to which it was linked. The potential for abuse of article I-60 was clearly perceived by members of the convention: “Such an explicit exit clause could allow Member States to blackmail the Union, paralyze its decision-making processes and even endanger the stability.”

To offset this risk, the European Peoples’ Party Convention Group proposed that if article I-60 were included in the treaty, it must be “subject to strict procedural and substantive conditions” and be “complemented by a right of the Union to expel a Member State” in case of an abuse of the right of withdrawal.

Another convincing objection to enshrining a secession clause in a constitution is that secession may not be consistent with such basic values as equal respect for minorities, and it may not provide a stable solution to ethnic conflict. The Supreme Court of Canada, pronouncing itself on whether Quebec had the right to secede and requiring that the secessionist desire be expressed by a clear majority, refers to the trust that subminorities place in the federal Constitution for the protection of their own rights. Opinion surveys, moreover, clearly showed the wish of the indigenous peoples and of nonfrancophones, in general, not to become Québécois but, rather, to stay Canadian.


61 Id. at 3.

62 See, e.g., Donald L. Horowitz, The Cracked Foundations of the Right to Secede, 14 J. DEMOC. 5–6 (2003) (“Secession … does not create the homogeneous successor states its proponents often assume will be created. Nor does secession reduce conflict, violence, or minority oppression once successor states are established. Guarantees of minority protection in secessionist regions are likely to be illusory; indeed, many secessionist movements have as one of their aims the expulsion or subordination of minorities in the secessionist regions. The very existence of a right to secede, moreover, is likely to dampen efforts at coexistence in the undivided state including the adoption of federalism or regional autonomy, which might alleviate some of the grievances of putatively secessionist minorities.”) See also John McGarry, ‘Orphans of Secession’: National Pluralism in Secessionist Regions and Post-Secession States, in NATIONAL SELF DETERMINATION AND Secession, supra note 9, at 215 (discussing the problems involved in governing post secession states, arguing that they are often as heterogeneous as their predecessors, as likely to abuse minorities, and, subsequently, as prone to conflict).


Indeed, in a setting such as Canada, marked by a very high degree of democracy and a consolidated tradition of protecting minorities, the problem of sub-minorities would not, even in the event of an unconstitutional secession, present itself in dramatic terms. Moreover, the obligation to negotiate would certainly include the imposition of a duty on Quebec to supply the broadest guarantees regarding future treatment of minority groups. In other contexts, however, there is often no room for trapped minorities. Think, for example, of the Serbs in Kosovo; their exclusion from the body that conferred legitimacy on the state put them in a second-class position, in effect.

Typically, the constitutions of the Central and East European countries that have emerged from the dissolution of the three socialist federations affirm the unitary character of the state and the principle of non-discrimination on, among other grounds, language, race, nationality, or ethnic origin. Moreover, most of them contain specific clauses for minority protection, which are not self-executing, however, but require intervention by the legislature. Their implementation has, in many cases, been delayed by an ultranationalist nation-building process, and the subsequent ethnification of the political process.\(^{65}\)

The overlapping of the concepts of language or culture and ethnicity is also typical of Central and East European constitutional cultures. The preamble to the (very controversial and now repealed) Slovakian law of 1995 on the state language of the Republic of Slovakia\(^{66}\) defines the “Slovak language” as “the most important feature of the individuality of the Slovak nation, the most precious value of its cultural heritage and the expression of sovereignty of the Slovak Republic.”\(^{67}\) Here, the Slovak language is cast as an embodiment of the sovereign character of the Slovak republic; however, one consequence seemed to be that only those who belonged to the Slovak-speaking population were part of the Slovak nation, while members of linguistic minorities were excluded. The equality of all citizens, regardless of nationality, is also affirmed by the preamble to the Croatian Constitution of 1990, but, again, the majority nation is the only entity that—having the right to statehood—is entitled to legitimize the new state: “Proceeding from … the inalienable, indivisible, non-transferable and inexpendable right of the Croatian nation to self-determination and state sovereignty, the Republic of Croatia is … established as the national state of the Croatian people and a state of members of other nations and minorities


who are its citizens.” In other words, Croatia is the state of a collective subject (the Croatian people) entitled to statehood, and of some individuals that do not belong to that collective. Provisions conferring equal rights and special protection to the latter category of citizens cannot upgrade them to the status of the founding nation; they will always be excluded from the sole subject that legitimizes the existence of the Croatian state. The same can be said with regard to other constitutions, including, ironically, that of Serbia, approved in the referendum of October 28–29, 2006—before Kosovo seceded—which in the first article defines Serbia as the “state of the Serb people and all its citizens.”

It has also been claimed that introducing a right to secede has positive effects on the functioning of the system. First, the constitutionalization of such a right may be supported by two arguments of an economic nature: (a) such a right could benefit all subunits desirous of pursuing their own economic interest; or (b) it could be beneficial for regions that are victims of “exploitation” by the central state. Apart from concerns of an ethical nature, the first argument may be challenged on the ground that, even if one or more components of the state contribute more than others economically, ultimately the advantages and drawbacks of unity will tend to reach a balance, whereas the experience of many secessions proves that the “mini-states suffered from precisely the same drawbacks as the older ones, only being smaller, more so.” Similarly—regarding the second argument—it is hard to identify the boundary between economic “exploitation” and a redistribution that penalizes certain subunits in acceptable fashion. Furthermore, there are many advantages, not immediately quantifiable in monetary terms, that the state’s component units enjoy by virtue of belonging to it: cultural life, international image and stature, as well as a broader labor market. Finally, regions may be safeguarded against exploitation through principles guaranteeing a fair taxation system and the full participation of their representatives in decision-making processes.

It can also be maintained that the constitutional right to secede speaks to the wrongs that have been done to those subunits that were previously conquered or annexed against their will (such as the Baltic states). If the loss of sovereignty came about recently, this argument is flawless, at least in theory; for, in practice, one cannot see why one state should annex another and, in the process, guarantee the possibility of its regaining independence.

Otherwise, this argument is very problematic. It poses a twofold challenge to the international community, which may not be prepared to tolerate continual threats to its equilibrium arising from processes of state formation rooted in claims from groups that have been, at one time or another, unjustly deprived of independence. Secession may then have considerable catalytic potential and,

68 CONST. CROATIA, pmbl.


70 HOBSHAWM, supra note 10, at 425.
hence, have a domino effect with highly destabilizing outcomes in a given geographical area (consider the effects on Kosovo of the secession of Montenegro). Moreover, the correspondence between “the people at the time of the loss of independence” and “the people now” may be attenuated. Many states unjustly deprived of sovereignty have been the victims of central government policies aimed at weakening their ethnic identity by transplanting “colonizers” of different stock or from the dominant nation (as in the case of Russians in the Baltic countries), who, in turn, became so rooted in the new territory as to be “citizens” of full right. Such citizens, of course, are still tied to the central state and thus unlikely to support an ideal of independence. In this case, the foundation of the new state along ethnic lines may result in the de facto exclusion of such transplants from full citizenship (as in the case of Russians in the Baltic states).

Finally, “choice theorists” believe that the right to secession derives directly from the principles of autonomy and (majoritarian) democracy and must not be linked, necessarily, to ethnicity or nationalism. This means that any territorially concentrated majority may secede legitimately. Choice theorists often draw an analogy with the dissolution of a marriage:

The right to secession should be treated like the right of no-fault divorce… . No prior or imminent injustice need be shown in either case. If the parties want to split in either case they have the right to split provided certain harms … do not accrue to the other party. If Mary wishes to split with Michael she should have the right to do so, provided there is a fair settlement of their mutual properties, adequate provision and care of any children they may have is ensured, and the like. Similarly, if Quebec wishes to split from Canada it should have the right to do so … .71

The flaw in this analogy is that it assumes that the parties involved in secessionist disputes are two, as would be the case in a divorce. But, as already pointed out, secession has critical consequences for groups and individuals that do not share the secessionist will. These groups and individuals cannot be compared with children. They are on an equal footing with all the other individuals and groups; therefore, their individual and collective right to self-determination should be given the same consideration. Moreover, justifying secession on such a theoretical basis is of little practical use. I am not aware of a single secessionist attempt that is not linked to an ethnic or nationalistic claim.

1.3. Secession and constitutionalism: No necessary collision
Is there a persuasive argument for constitutionalizing the right to secede? A good starting point for this discussion is the decision by the Supreme Court of Canada on whether Quebec had the right to secede under Canadian constitutional law:72 After

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clarifying that the living Canadian Constitution’s underlying principles are federalism, democracy, constitutionalism, the rule of law, and respect for minorities, the Court clearly stated the correlation between the principle of federalism, which “recognizes the diversity of the component parts of Confederation.” and the protection of minorities, whose “pursuit of collective goals” federalism facilitates. However, federalism, according to the Court, is also indissolubly linked to the democratic principle, and democracy does not mean that Quebec is entitled simply to secede following a referendum consultation—an instrument of direct democracy—in favor of independence. Democracy means, according to the Court, that “the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes.” The need for negotiation between the supporters of secession and the upholders of federalism would emerge if a “clear majority” of Québécois were to express support for independence.

The Court held that the negotiation should be governed by the same principles that underlie the Constitution, ruling out the possibility of any obligation on the part of the federal government or of the provinces to give automatic assent to secession by Quebec, with only the “practical details of secession” to be negotiated. The ruling also denied, effectively, any legal relevance to the expression a “clear majority” in favor of secession, since that would clash with the democratic principle. Given that in the Canadian system a referendum does not produce any binding effect (it has been termed “a great solemn opinion poll”), this is by no means a trivial statement.

Finally, by opting not to go into the substance of the political issue, the Canadian court left the field to the political actors who are, in the final instance, responsible for any transition to independence for Quebec. Without intruding on an area outside its competence, the Court nonetheless gave a clear warning: while it is true that secession is conceivable, even if it were conducted outside the constitutional framework, a breach of the latter would entail “serious legal consequences,” particularly at the international level. On the other hand, a sovereign Quebec born of negotiations conducted “in conformity with constitutional principles and values … would be more likely to be recognized” by the community of nations. In other words, in the Canadian Court’s view, there is no straightforward inference to be drawn from democratic principles of a constitutional right to secede; rather, democracy must govern the negotiation

73 Id. ¶ 58.
74 Id. ¶ 88 [emphasis added].
75 The Court does not say in what the “clear majority” consists, but surely it did not mean a simple majority, considering that in the referendum of 1995 the secessionists lost by only 52,000 votes.
and can count for much in terms of international legal recognition of the new-born state. The guidelines established by the Canadian Court have not, as of this writing, been applied in Canada. They are, nevertheless, the same principles that inspired the secession clause enshrined in the 2003 Constitution of Serbia and Montenegro. This is, actually, an unprecedented case where secession took place through a referendum, following the procedure established by the Constitution and satisfying the conditions requested by the European Union, which controlled and legitimized the whole process.

In 2003, the Federal Republic of Yugoslavia became the State Union of Serbia and Montenegro. While a purportedly domestic decision, the conversion was strongly promoted by the European Union, “which wanted to prevent the disintegration of the state by facilitating the creation of a relationship of a different kind” in order not to spark a new conflict in the Balkans. The Constitutional Charter was adopted following the procedure prescribed by the 1992 Constitution, without any formal break of the constitutional continuity. Article 60 of the new Constitution contained a secession clause that provided that, upon the expiry of a three-year period, a member state would have the right to initiate a withdrawal procedure. Such a decision had to be made after a referendum had been held. The referendum was dependent on an Act on Referendum that had to be passed by a member state. Hence, the member state controlled the organization of the referendum, but on the condition that customary democratic standards were taken into account. In other words, it was agreed that a member state could unilaterally withdraw from the Union, following strict procedural rules.

The European Union legitimized the new Constitution of 2003 and, later, the secessionist process of 2006. Moreover, Montenegro, being born “in conformity with constitutional principles and values” did not experience any difficulty with international recognition. This is likely to suggest that international law is moving toward the legitimization of the “secessionist option,” albeit only if it is compatible with democratic standards. Under rules proposed by the European Union and approved by Montenegro’s parliament, a 55 percent majority was needed to mandate secession in order to guarantee the participation of all groups and, particularly, of the Serbian minority (30 percent of the population).

Certainly, a withdrawal clause contributes to the perception that a constitution, in the language of secessionist South Carolina Senator John C. Calhoun, 


78 One could argue that the inclusion of the secession clause in the 2003 Constitution was an expression of the right of the people of Serbia and Montenegro to self-determination, understood in its internal dimension as the right of peoples to establish freely their own internal and external political system and to pursue their own political, economic, social, and cultural development.
is a “compact between” states rather than “a Constitution over them.” 79 The idea that the Constitution could be viewed as a compact was brought to bear in America in the 1860s by Lewis M. Stone, precisely “[i]n the hope of developing stronger constitutional arguments for secession.” 80 Stone, who represented Pickens County to the state convention that Alabama convened in 1861 to discuss secession, started from the fundamental premise of state sovereignty and derived “two concepts of the nature of the union depending upon the character of the Constitutions: the international-law concept and the business-partnership concept. Under the first the Constitution became a treaty, under the second a compact; and in either case the right of secession was equally legitimate.” 81

By the same token, the idea that constitutions do not necessarily look to “indestructible unions” and that they may contain international (or confederal) elements seems to reemerge in contemporary constitutionalism. In fact, comparative analysis shows that there is an increasing number of “borderline constitutions” that combine federal and confederal elements.

The most striking case is the Belgian Constitution, which does not even contain a supremacy clause for federal sources of law. At the end of its constitutional odyssey toward territorial decentralization, 82 we find—lying at the core of the Belgian state and serving as the basis of its functioning at all levels—its two largest linguistic communities. The federal government must always decide by consensus. In the federal Parliament, the agreement between the two linguistic groups is also always necessary, as each may block the legislative procedure in all “sensitive” matters and veto constitutional reforms. At all levels and for all purposes, the federal system is based on a necessary consensus between Flemish and francophone Belgians. The bipolar character of Belgium is not confined to its state organization but extends to virtually every aspect of public life. For a long time, there has not been a singularly “Belgian” cultural life, a “Belgian” university, a “Belgian” public opinion, “Belgian” media, or a “Belgian” party system. The structural risks of this system are legislative paralysis and political deadlock. On December 19, 2007, former prime minister Guy Verhofstadt, a Flemish liberal, assembled a stopgap coalition after 192 days of embarrassing political deadlock. Even forming a temporary government proved difficult because of the deep and bitter division between north and


80 See Carpenter, supra note 57, at 207 [emphasis added].

81 Id.

south. The 2007 crisis demonstrated clearly that the country survives and its political institutions work only for as long as its two founding peoples want, and are able, to make it survive and function.

Interestingly, the Belgian Constitution does not enshrine a secession clause; this right, however, is embedded implicitly in the very logic of the Belgian system. The Belgian people do seem aware of the de facto existence of a withdrawal clause. In December 2006, the state Wallonian national broadcast service, RTBF, broadcast a grotesque parody throughout the country. In the middle of a popular television program, a special news edition was announced. “Good evening, tonight in a special reunion of the Flemish parliament, Flanders has declared itself unilaterally independent. The King has fled the country, citizens cannot cross the borders anymore.” There followed a number of interviews with actual ministers and MPs who took part in the performance. Reactions were varied; many in the southern part of the country did panic. Apparently, however, there was practically no one who disbelieved the broadcast on the grounds that secession was not possible.

There are other instances of constitutions that contain “special regimes” that come close to enshrining sovereign rights for certain minorities. The override clause in Canada is one such case. Article 33 of the Canadian Charter of Rights and Freedoms enables provincial and federal legislatures to override by ordinary majority the rights contained in the Charter for a renewable period of five years. Formally, this clause is applicable to all provinces. However, “a constitutional convention seems to have arisen … that the override provision should not be used at all” either by the federal Parliament or by any of the provinces, with the exception of Quebec. The legislature of Quebec, two months after the enactment of the Charter, in response to adoption of the latter without its consent, passed Bill 62, which basically immunized it as much as possible against the constitutionalized Charter. This bill “repealed and reenacted all of the province’s pre-Charter legislation with the addition of an override clause to each” (the ‘omnibus’ feature) automatically added such a standard override clause into all new legislation,” and “gave the override clause a retroactive effect.” The Supreme Court later invalidated the retroactive effect but upheld the preemptive use of the override “by interpreting Section 33 as containing only minimal formal requirement … and therefore as providing only very limited scope for judicial review of exercise under it.”

Another example of a special regime or dispensation is the right of “interposition” granted to the Finnish Åland archipelago. According to this provision, state acts that relate to the principles governing real or business property in

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83 The override clause added to each was of a “standard” form, simply repeating the language of § 33, to the effect that “(T)his Act shall operate notwithstanding the provisions of Sections 2 [fundamental freedoms] and 7 to 15 [legal rights, equality rights] of the Constitution Act, 1982.”

Åland and international treaties pertaining to matters within the competence of Åland shall not enter into force in the islands without the consent of the local assembly. These kinds of arrangement may be considered, as Markku Suksi puts it, as a “middle ground” between independence and integration and as one way by which minorities may exercise their right to self-determination. This, in fact, seems to be the spirit of the UN’s Friendly Relationship Declaration, according to which the right to self-determination may be implemented by a people either establishing a sovereign and independent state or through the free association or integration with an independent state or, finally, through the “emergence into any other political status.”

In sum, in contemporary constitutional systems, there is not necessarily a strict dichotomy between constitutional and confederal elements. Hence, constitutions survive with internal contradictions or, put differently, with elements that originate in the logic of both constitutional and international law. This may produce a certain degree of fluidity, which can actually be a precondition for the system’s working, especially in deeply divided societies. After all, the EU’s experience shows how problematic it is to draw a clear line between an international treaty and a federal constitution. Analogously, domestic constitutions may “import” confederal (international) elements that prove critical for their functioning.

A secession clause may be one such element. As the case of Serbia and Montenegro shows, to proceduralize secession, making it democratic, and surrounding it with guarantees—that is, to make secession a legal and not just a political issue—can actually help to protect all of the groups involved, and not just the secessionist majority. It is clear that this will apply to ultimate choices, made in contexts in which the wish for separation is such as to make secession a genuine possibility. But why should a state, in order to protect the autonomous development of its distinct communities, go so far as to promote their actual separation, albeit within one system, only to flinch from the ultimate step? Canada is a democratic, federal state with very high standards of living. Within it, Quebec enjoys a very wide range of autonomy. At the federal level it has traditionally been overrepresented relative to its population. If, under such conditions, the separatist desire does not cease, then it is hard to understand why one should deny the eventual likely divorce, given the country’s tradition

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88 Suksi, supra note 77 (emphasis added).
of respect for law. Here, then, is one strong argument—perhaps the only argument—in favor of constitutionalizing the right to secede: it would subject an extremely delicate process to the rules of democratic logic and enable forms of external control over the whole process.

In this respect, the judgment of the Supreme Court of Canada contains a great dose of pragmatism. By not ruling out the possibility of a constitutionally legitimate secession, a secession, that is, springing from democratically expressed will and from a procedure conducted in accordance with the rules of democracy, it sought to channel into acceptable forms a process that could lead to the formation of a new state, which almost always tramples on someone’s rights, often those of the weakest. Had the Court ruled out compatibility of the right to secession with the Constitution, in which the unitary pact is an indefeasible basis, would it have been making a contribution of use to the state that put the question to it? Putting it another way, it is utopian to expect secessionist wishes to stop because of the legal impossibility of seceding; instead, those wishes will pursue their goal in the absence of rules.

1.4. How to shape the right to secession: A procedural model

If we accept that a “democratic secession” is not, in principle, at odds with the nature of a constitution, then the question arises regarding what shape the right to secede may take. It seems preferable to adopt a procedural model rather than to tie the activation of the secession clause to the presence of certain conditions, thus adopting a model of substantive law. The most compelling justification for legitimizing secession should not be remedial. In other words, a secession clause should not be viewed as a remedy of last resort in response to serious and persistent injustice.89

The reasons for this are manifold: if the right to secession is formulated according to a model of substantive law, the state’s subunits will be able legitimately to secede only if at least one of the moral justifications for secession is satisfied. The most compelling moral justifications for secession have to do with unjust treatment of the subunits by the central state but, as Margaret Moore puts it, “many secessionist movements are not primarily about justice or injustice,”90 which means that the substantive-law model may not address secessionist struggles where subunits do not suffer any injustice, as in the cases of Quebec, Catalunya, Scotland, and many others. On the other hand, if a subunit does suffer from unjust treatment by the central state or by other subunits, a secession clause is not likely to provide a solution because, as Allen Buchanan points out, a state that systematically exploits any of its subunits is not likely to

89 But see Hilliard Aronovitch, Seceding The Canadian Way, 36 PUBLIUS 541 (2006) (arguing that, while a right to “nonunilateral” secession is warranted on general moral-political grounds, it should not be encoded or interpreted as a constitutional right, nor should it be called upon except to avoid systematic injustice).

90 Moore, supra note 9, at 6.
let them secede and thus lose the resources it has been gaining illegitimately. Moreover, the “substantive” model makes it difficult, if not impossible, to control the legitimacy of the activation of the secession clause. On what basis can a judge determine whether a subunit is being treated in such an unjust fashion as to legitimate secession? Finally, international law, as pointed out above in section one, already provides for minorities to secede under extremely unjust circumstances, but this has failed to provide any coherent guidance for resolving secessionist struggles.

The danger to be avoided, when fashioning a secessionist procedure, is twofold: either choosing mechanisms that make secession (a) too easy or (b) too hard. In the first case, constitutionalizing the right to secede may have destabilizing, or even devastating, effects on the whole system; in the second, it may prove to be totally useless. For if the procedure is cumbersome, requires too much time or too large a quorum, or, in particular, if it imposes the obligation to hold a referendum in the whole state, then democracy may be saved, in theory, but secession will be legally impossible. Clearly, “[o]n the conception of ‘peoples’ as majorities within accepted political units, the issue of the relevant territorial units in which self-determination is to be exercised is crucial, with different results depending on what is regarded as the area of the plebiscite.”

Again, the thorniest issue is how to guarantee the rights of trapped minorities. Consider Montenegro. In the secession referendum held there, in May 2006, the results varied greatly among the different regions. On the border with Serbia and the Republika Srpska, a clear majority of the population voted against secession, whereas an overwhelming majority voted in favor of it in the area bordering Albania and Kosovo, where most of the population is of Bosnian, Muslim, and Albanian origin. A “cooling-off” period might be a useful tool to avoid the risk of secession resulting predominantly from emotional situations.

A good example of a democratic procedural model that takes into account the will of trapped minorities was that applied in Switzerland to the “domestic” secession of the canton of Jura from that of Bern in 1979. The separation was the result of some thirty years of pressure from separatists in the French-speaking area of the Bern canton. The northern part of the Bernese Jura was strongly Roman Catholic, and many of its inhabitants felt they suffered both religious and linguistic discrimination. However, the breakaway movement was opposed not only by the cantonal government but also by many in the Southern Jura who were Protestants, like the German-speaking Bernese.


92 Moore, *supra* note 9, at 3.

The procedure took place through a series of plebiscites held in the various Jura communes, in order to determine as precisely as possible the extent of the territory to be separated. The referenda showed that popular opinion favored both the formation of a new canton in the north and the adherence of the south to Bern. 94

The mechanism of sequential referenda permits trapped minorities to be officially heard. This does not mean that, should they vote against secession, their will automatically prevails over that of the majority. However, there are a number of possible compromise solutions to guarantee the rights of trapped minorities and make them more visible. For example, if a trapped minority is clustered in an area in proximity to the border between the seceding territory and that of other state subunits, the trapped minority region may be annexed to the latter with only minor territorial changes. If the territory inhabited by the trapped minority borders on that of another state, the trapped minority may prefer to be annexed to the latter, rather than following the destiny of the seceding subunit. At a minimum, when none of the above-mentioned solutions are feasible, the ability of trapped minorities to express their antisecessionist position, officially, through a referendum may encourage the secessionist state to adopt higher standards of minority protection.

Another critical element in the Jura secession was that one of the conditions for secession established by the legislature of Bern (the canton from which Jura seceded) was that Jura adopt a democratic constitution before formally seceding. This condition, when applied to “external” secessions, would constitute a meaningful first step not only in guaranteeing the rights of trapped minorities but also in ensuring a democratic basis for the functioning of the new state.

Finally, a democratic secession clause should establish efficient mechanisms for internal and/or external control. Secession, even if it has been proceduralized by the constitution, may, as the Canadian Court concedes, come about outside the established rules, solely on the basis of political choices. This is exactly the scenario that arose on the occasion of the “velvet divorce” between Czechs and Slovaks. This split was envisaged by a constitutional law taking a democratic form, including a referendum, which the leaders of the two major parties then decided to bypass, preferring to conclude their own agreement, ratified subsequently by the National Assembly alone. Significantly, from all of the opinion polls carried out in the months preceding this agreement, it became apparent that the will of the majority of the populations in both republics, in fact, was not to secede. 95

94 Individual communes continued to shift over the next two decades. In 1989, the residents of Laufenthal voted to leave Bern and join Canton Basel-Land; in 1995, Vellerat voted to leave Bern and join Canton Jura. See id. at 95 (for a map of voting patterns in the Jura).

In order to avoid the risk of secession being effected merely by a majoritarian logic, a minority within the national and regional parliaments should have standing to challenge the constitutionality of the secessionist procedure before the constitutional court.

In the case of Czechoslovakia, the argument advanced by the Canadian Court—that the community of nations more readily recognizes a new state when it is the outcome of a democratically negotiated secession—does not hold, since neither the Czech Republic nor Slovakia encountered any obstacles to their international recognition. However, in less velvety divorces, the very existence of a constitutionalized secession procedure can provide an important means of external control. In the case of Serbia and Montenegro, the secession clause enshrined in the Constitution clearly served as a mechanism for the international community to oversee the democratic aspects of the secession process and to ensure that it took place on the basis of the principle of voluntary secession.

Finally, the international community can play a more indirect role in ensuring the democracy of secessions and, specifically, in ensuring respect for the rights of trapped minorities. The conditions that candidates for accession to the European Union must fulfill, according to the rules established by the European Council of Copenhagen of 1993, play an important role in this regard: “Membership requires that candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for, and protection of minorities…”\footnote{\textit{European Council in Copenhagen, 21–22 June 1993, Conclusions of the Presidency, SN 180/1/93 Rev 1, Para 7, iii, available at http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/ec/72921.pdf.}} Virtually all nascent states in Europe have aimed at integration with the EU and are aware that, during the negotiations, their progress toward meeting the Copenhagen criteria is regularly reviewed, and that the European Commission has been particularly strict in monitoring the level of protection minorities are accorded. Decisions on a country’s readiness to join the Union are based, in part, on these observations.

The preamble to the Constitution of Montenegro, adopted on October 19, 2007, is very revealing in this regard, showing just how this form of indirect control can work. It refers, explicitly, to a “dedication to … the European and Euro-Atlantic integrations.” It adopts a purely political view of the “people of the state,” referring to “[t]he determination that we, as free and equal citizens, members of peoples and national minorities who live in Montenegro: Montenegrins, Serbs, Bosniacs, Albanians, Muslims, Croats and … others, are committed to democratic and civic Montenegro”; it refers, further, to “[t]he commitment of the citizens of Montenegro to live in a state in which the basic values are freedom, peace, tolerance, respect for human rights and liberties, multiculturalism, democracy and the rule of law.” One could argue that this is a purely formal statement; nonetheless, it is notable that this Constitution, unlike the overwhelming majority of constitutions of Central European states, does not legitimize the existence of the new state on the basis of an
ethnic people’s right to statehood. As discussed, such statements lead to the structural exclusion of groups and individuals that do not share the ethnic origin of the majority. No such exclusion is envisaged in the new state structure of Montenegro, and this constitutes a far better ground for the development of a culture of acceptance and tolerance.

2. Concluding remarks

With very few exceptions, notably that of Serbia and Montenegro, secessions have not been undertaken in accordance with any specific legal provision; they have come about either through the use of force or through political agreements, which means that they have not occurred according to any democratic logic. The recognition that international law accords to minorities the right to secede under certain conditions, and the constitutionalization of this right at the domestic level, could be important steps in democratizing secession.

Arguing against constitutionalization of the right to secede, Cass Sunstein draws an analogy with family law, where, supposedly:

[T]he understanding that the unit is not divisible because of current dissatisfaction, but only in extraordinary circumstances, can serve to promote compromise, to encourage people to live together, to lower the stakes during disagreement and to prevent any particular person from achieving an excessively strong bargaining position. A decision to stigmatize divorce or to make it available only under certain conditions—as virtually every state in the United States does—may lead to happier as well as more stable marriages, by providing an incentive for spouses to adapt their behavior and even their desire to promote long-term harmony."

Paradoxically, this can be turned easily into a good argument in favor of constitutionalizing a reasonable secession clause. It is true that making divorce difficult may encourage spouses to take marriage seriously; however, making it illegal may condemn them to unbearable unhappiness, which could lead to violence and worse consequences than divorce. Analogously, a clause that subjects secession to strict procedural conditions is likely to encourage subunits to cooperate and compromise, while making it a legal impossibility is more likely to result in a tug of war between separatist subunits and the central government and, thus, to encourage the resort to violence. Moreover, just as it is true that the absence of a secession clause does not necessarily prevent stronger subunits from achieving excessively strong bargaining positions through strategic use of the threat to secede, so the very absence of such a clause can actually constitute a better basis for strategic behaviors, given that secession can (and in most cases does) occur independently of any legal legitimacy. Powerful subunits are, therefore, freer to threaten secession when it is not regulated by

strict procedural rules but simply is left to political bargaining, since this does not entail any requirement to fulfill specific conditions. On the other hand, if secession is legally available but subject to strict procedural conditions, it is less likely to be used strategically in the absence of a genuine popular will to secede. As Daniel Weinstock puts it, a constitutional secession clause forces secessionists to make “a cold and lucid cost/benefit analysis” of withdrawing versus remaining in the existing federation, that is, to consider seriously the legal obstacles that they must overcome before they can successfully secede.98

In other words, a reasonable secession clause will not play into the hands of richer or stronger subunits; neither will it encourage unwilling subunits to secede, just as a fair divorce law neither plays into the hands of the wealthier spouse nor encourages loving couples to divorce.

I have mentioned many of the theoretical and practical difficulties raised by a minority right to secede, at the international as well as the domestic level—difficulties that are the focus of much of the debate over secession. In my view, this debate is not necessarily of great use when it comes to the reality of secession. As the Canadian Court pointed out, secession is eminently a political, not a legal phenomenon. The sole role of legal instruments is to attempt to subject an extremely delicate process, typified by a very high level of emotion—and often irrationality—to rules of democratic logic.

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