SYMPOSIUM

TERRITORY, BELONGING

SECESSION, SELF-DETERMINATION AND TERRITORIAL RIGHTS

IN THE AGE OF IDENTITY POLITICS

EDITORIAL PREFACE

BY

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Editorial Preface

The recent emergence of separatist claims in some countries has brought legal and political theorists to shift the focus from the traditional principle of self-determination to a possible right to secede. But it is far from being uncontroversial and widely accepted in the academic debate—as well as in other fields—that there is such a right.

Many philosophers take secessionist demands as claims of justice and a question of fundamental human rights. Some scholars do recognize the fundamental right to secede but they limit it to ethnically or culturally distinct groups and grant such a right provided that it is consistent with a liberal democratic framework. Others again have conceptualized more modest notions of this right, understood sometimes as a 'remedial right' or a 'contingent right.' Philosophical disagreements notwithstanding, all theorists do acknowledge that there are unjust territorial arrangements, but condemn the violent and sometimes 'illiberal' character of groups making a claim of secession and the role of democracy are at the stake.

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This special volume of *Philosophy and Public Issues* addresses these problems through a discussion on the notion of secession and territory belonging. In the first part of the volume, Neera Chandhoke presents her recent *Contested Secessions. Rights, Self-determination, Democracy and Kashmir* (Oxford: Oxford University Press 2012), addressing questions by Allen Buchanan, Margaret Moore and Valentina Gentile. In the second part, we host three papers critically engaging with contemporary theories on secessions and political and philosophical relevance.

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IN THE AGE OF IDENTITY POLITICS

A PRÉCIS TO

CONTESTED SECESSIONS

RIGHTS, SELF-DETERMINATION, DEMOCRACY AND KASHMIR

BY NEERA CHANDOKE

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A Précis to Contested Secessions Rights, Self-determination, Democracy and Kashmir

Neera Chandhoke

The argument in this work has a two-fold objective: to assess liberal theories of secession from the vantage point of contested and messy separatism in the postcolonial world, and to evaluate such cases by tapping the resources of liberal theory. I suggest in the opening chapter that for a long time western political philosophers have assumed that the territorial borders of the society they prescribe justice for are a given. This particular supposition took a rather hard knock in the period that followed the end of the cold war. The collapse of actually existing socialist societies inaugurated an era of hyper ethno-nationalist movements, especially in the region of the Balkans and the Caucasus. The consequences of the upsurge have been serious. Countries dissolved, federal systems melted away, and a number of new states emerged out of the debris of old ones, often through armed struggle, ethnic cleansing, and genocide.

The pace at which existing states broke and new states were created, was quite unprecedented. And the issue was catapulted

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onto the theoretical agendas of political philosophy. This is a welcome development. Though an indispensable precondition for 'stateness' is international recognition, international law has seen this issue as a matter for and of politics. There is nothing in international law that tells us whether secession in particular cases is justified, and if so why. This task was now taken up by liberal political philosophers.

They had little option but to deal with territories, with self-determination, and with secession, because state breaking and state making exerted a profound domino effect across the world. Among some examples of secessionist movements are the Kashmiri's, the Naga's, and the Bodo's in India, the Chechens in Russia, separatist movements in Azerbaijan (Nagorno-Karabach) and Moldova (Trans-Dniester), Baluchistan in Pakistan, West Papua in Indonesia, the Oromos and the Somalis in Ethiopia, the Kurds in Turkey, till May 2009 the Tamils in Sri Lanka, and South Ossetia and Abkhazia in Georgia. Regions in Canada, the United Kingdom, and Europe, such as Quebec, Scotland, Catalonia, the Basque country, and Corsica continue to demand independence, admittedly off and on.

Among some of the anxiety ridden questions political philosophers had to deal with are the following: in what circumstances is secession justified? Which sort of group does this right supervene on? What are the moral considerations that bear on this right and that have to be taken into account? What kind of a right is secession, or which category of rights does it fall into? What are the legitimate restrictions on the right? And finally even if the right of secession can be morally justified, should we be defending it politically?

Western political philosophers have been able to develop a normative theory of secession simply because they take as their conceptual referral cases that fall into the category of procedural

secessions, for example, Quebec. But all parent states, and all separatist movements, do not follow a pre-ordained script that has been indelibly etched onto the liberal stone. Most cases of secessions in the Balkans, the Caucasus, and in much of the postcolonial world, provide examples of contested secessions.

The one feature that constitutes secession as a contested political act is the employment of indiscriminate violence by the government and by the leadership of the movement. We have seen that violence tends to breed violence and over time the trajectory of violence outstrips the initial reason for the outbreak of the movement. Violence, in effect, acquires a biography that begins and ends with itself. Since contested secessions are usually stamped with the cloven hoof of extensive violence, it does not take an astrologer to tell us that secessions or even aspirant secession will, in all probability, inflict major harm upon populations who live in the disputed territory, as well as on populations who live outside the territory. And this by itself is troublesome.

There are further troubles in store for liberal political theorists if they perchance happen to address contested secession. This genre of theory hesitates to grants the right of self-determination for groups that are illiberal, if the group is mixed with minorities, if the separation will prove harmful for the parent state, if the group is not prepared to accept the results of a democratically held referendum, and if it is not prepared to negotiate on significant issues ranging from the institutionalisation of liberal democracy, to meeting of debt obligations.

What would be the response of western liberal philosophers if we, situated in the postcolonial world, were to illustrate the complexities of contested secessions? Simply put, whereas the group might be the wrong one, the cause for which it seeks to secede might be the right one. Deny the right of secession and

the group is denied justice. Grant this illiberal group the right of secession and there is very real danger that the state it establishes might be illiberal to a high degree. The issue becomes particularly problematic in democracies such as India.

In the second chapter I illustrate this problem by taking up the issues involved in the demand for secession in the Kashmir Valley in India. The context of the secessionist movement; that is formal democracy, distinguishes the Kashmir case from Bangladesh. The secession of Bangladesh can be traced to the institutionalisation of extreme injustice in erstwhile East Pakistan by the Government of Pakistan. The text; that is the use of violence by the state and by the movement distinguishes Kashmir from Quebec. In effect, Kashmir represents what can be termed an anomaly in democratic theory, the use of violence amidst electoral democracy. And it represents an anomaly in conflict theory insofar as conflict takes place in a democracy. It is this particular mix of contradictions and paradoxes that makes the Kashmir case so difficult to address and yet so fascinating. It may even mount a profound challenge to theories that strive to elicit coherence out of messy situations.

In this chapter I point out that though the Indian state has claims to formal democracy it has subjected the inhabitants of J and K to institutionalised injustice The roots of institutionalised injustice can be traced to (a) violation of the special status granted to the state by the constitution (b) closing off of democratic space to political contestation, (c) imposition of repressive legislation, and (d) major violations of moral rights of the people. Since 1999, groups of Kashmiri's have resultantly taken to the gun, and demanded a separate state.

Considering the scale of institutionalised injustice in the valley, the right of the Kashmiri Muslims to secede from India can be seen as justified. Rights are not however asserted in a

political vacuum, they invariably involve trade-offs particularly when countervailing rights are asserted. For example, other groups living in the state of Jammu and Kashmir oppose the move altogether. Hindus in Jammu, Shia Muslims in Kargil, Buddhists in Ladkah, the nomadic Gujjar community, the Pahari people, the residents of the Chenab Hill Council, and the Hindus who were exiled from the valley have demanded closer integration with India, and liberation from the Sunni Muslim dominated valley by the grant of autonomous political status. This factor alone tosses the minority issue sharply onto our agenda.

Two, a number of third party agents from outside the country, who speak the language of Jehad have taken up cudgels against the Indian government. Three, violence has become an endemic feature of the Kashmir situation. Whereas the use of violence by the Indian state is condemnable, the separatists have inflicted massive violence on their own people and on minorities in the state and outside.

Further, given democracy in the country, the institutionalisation of checks and balances in the political system, and a vibrant civil society in the country, it is *possible* that the state can be pressed to reverse institutionalised injustice, compensate the victims of injustice, and establish justice for the citizens of the state. The right to secede is thus infinitely complicated.

Traditionally secession has been justified on the plank of national self-determination. In chapter four and in the conclusion I suggest that even if the proposition that nations have a right to their own state carries considerable political weight among secessionists and aspirant secessionists, the connection between nations and secession just does not hold. It is not entirely clear why 'nations' are entitled to their own state. More significantly the concept of the nation is far too problematic. Nations are

conceived, constructed, and constituted through intentional processes that are indisputably political. The political route that leads to the 'construction' of a nation, an ideology called nationalism, and the demand for a state of one's own can rapidly descend into narrow chauvinism, and, often, exclusionary discourses that lay down who belongs, and who does not belong. The whittling down of moral obligations to ones' own immediate community; and the renunciation of obligation to others to whom we are bound by reasons of a common citizenship if not a common humanity, are intrinsic to the construction of a national self that seeks to attain a distinct political personality, and an independent political status. We can hardly grant and institutionalise a right to secede, when the *status* or even the credibility of the rights holder is itself uncertain. If a case for secession has to be justified, it must be constructed on grounds other than national self-determination, notably institutionalised injustice. The right of secession is not an absolute but a contingent right.

The argument in chapter one suggests that secession is a right that yields to justification only in certain and very specific circumstances, that of institutionalised and irrevocable injustice. Defence of core moral rights begin with the assumption that these rights supervene onto conceptions of what it means to be human. Secession is justified when core moral rights have been conclusively infringed. The right itself can be categorised as either strong or weak keeping in mind that a weak right can become a strong right.

In democracies like India secession is a weak right for two reasons. One, democracies can prove self-correcting if groups in civil society take up the issue and press the government to reverse injustice. Two as suggested above secession negatively affects the interests of minorities living in that territory. The overwhelming

presence of third parties further weakens the right. We in India have obligations to ensure that our fellow citizens are given justice. If the state does not reverse injustice heaped upon the head of fellow citizens, we might have to defend the right of the affected group to secede. Do we owe anything to jehadis that have come in from outside the valley and who speak a language that cannot be defended, that of the impossibility of two-nations living together in India? The right of a nation to its own state vide the principle of self-determination is simply not acceptable to democrats.

There are other reasons that might lead to the conclusion that though we should take secession seriously, there is need to deflect such demands using all resources that our political imaginations and innovations offer us. In chapter three I argue that secession is harmful *even* if it does not result in harm. For this we need to foreground one of the most significant questions asked by political philosophers in every age. What social backgrounds provide the best context for human beings to realise their projects and make their lives worthwhile? I draw upon the ideas of M. K. Gandhi to argue that plurality of perspectives, beliefs, and ideologies enable the making of informed projects; encourage a spirit of toleration, and boost prospects of dialogue. A readiness to acknowledge the right of secession as valid encourages the consolidation of narrow perspectives turned inwards towards the group, and away from other groups.

One way in which minority groups can be given justice is through the institutionalisation of minority rights and ethno federalism. In chapter four the argument defends the idea that ethno-federalism and minority rights protect minority identities, and enable groups control over their affairs. The grant of minority rights within a democratic political community can serve

to avoid ghettoization as well as encourage interaction between minorities and other groups in the wider political community.

The establishment of institutions that realise self-determination as a constitutive aspect of democracy, rather than that of secession, might help us to negotiate a rather thorny problem. In a world marked by scarce resources and imperfect altruism, rights claims over territory will as a matter of course come into conflict. Notably if group P wishes to appropriate the territory it resides in and establish a state of its own, the assertion of the right of secession conflicts with the rights of group Q, R, and X (a) not to secede from the given state, (b) not to live in a state of another's making, and (c) not to leave their homes and hearths and involuntarily migrate to another place.

We can through considered deliberation make a strong case for the right of group P to exit the existing state. But it will still conflict with another group's freedom to move and settle in any part of the territory within a country. There is nothing in the conceptual repertoire of rights, or the language of rights that either pre-empts such conflict, or tells us how to negotiate it.

In the chapter on rights I suggest that the core moral right of freedom, equality, and justice demands that the rights of one person or group should not be held hostage to the right held by another person or group. Therefore if P's rights conflicts with Q's rights, the rights should be ideally be balanced rather than traded off against each other. But such balancing can only be maintained if the good that P asserts a right to, is scaled down. Correspondingly the demands of other groups should also be scaled down. If regional autonomy is reinstated in the Kashmir valley as per the constitutional mandate, secessionists should in the interests of maintaining the territorial integrity of the state accept this offer. In turn the minorities in the state should likewise scale down their demand for closer integration with India

or autonomous political status that grants them independence from the Sunni Muslim dominated valley. Since there is no consensus re secession among the inhabitants of Jammu and Kashmir, the only option to regional autonomy that permits self-determination along with considerable protection for minorities, is the partition of the state. And this as the partition of India in 1947 shows is ruinous.

Partitions and the constitution of new nation states resolve nothing. At the heart of the issue of rights, self-determination/secession and democracy, which is the sub-title of this work, is a basic question. Democrats must ask themselves a basic question: is it more important that a new nation state, which we cannot assume will be democratic, should be constituted out of the old one? Or is it more important that the existing state accommodates the demands of the secessionists makes way for territorial decentralisation, institutionalisation of minority rights and recognition of the rights of minorities within the rights of minority. This option might deflect secession, and open the way for groups to live together in their homeland.

It is perhaps time we detach the principle of self-determination from that of secession, and conceptualise it as a constitutive principle of democracy. Self-determination is a right, but there is nothing that dictates that this right can only be realised through the establishment of a state of one's own. If the existing state establishes preconditions for self-determination, the option of secession might well become redundant. This is important because a scaled down version of self-determination can help mitigate the conflicts of rights, which is endemic to secession.

This, as a matter of course, holds good only when there is enough evidence that the state intends to reverse institutionalised injustice, compensate the victims, and institute conditions

favourable for the realisation of core moral rights. That is if violations of core moral rights are not irrevocable, and if formal democracies offer opportunities for reversal of historical wrongs, and for the institutionalization of justice, then this right does not hold.

In cases of contested secession, it is almost impossible to cleanly and unambiguously weigh act A against benefit or disbenefit B. What is incontrovertible is that ultimately imperfectly just states have to be made fully democratic through a variety of means: institutionalisation of structures of participation and representation, political dialogue, constant watchfulness against transgressions, some anxiety, some trust, a fair degree of distrust of people in power, and mobilisation against injustice and protest. Democracy is a project that is constantly in a state of realization through intentional and purposeful action. When democracies falter, and make mistakes, the responsibility lies upon civil society groups to insistently and resolutely press for a reversal of historical wrongs, and for the institutionalization of justice. The importance of citizen activism and public vigilance, the need for informed public opinion, the presence of a multiplicity of social associations, a free media, and the indispensability of democratic deliberation cannot be stressed enough. It is only a vibrant civil society that can prevent the political elite from lapsing on its commitments and responsibilities.

Secessionist demands need not always mount a challenge to our fondly held beliefs in the sanctity of territorial borders. They can serve as a wake-up call and compel us to respond in politically innovative ways on how the faults and the flaws of a formally democratic, but an imperfectly just order can be addressed and negotiated. Secessionist demands stimulate existing political imaginations, what we make of our existing problems and the remedies that we suggest. If secession is a response to

certain conditions that prevail in a given state, the challenge is to *neutralise* these conditions. The answer to secession is not to hype up immoderate nationalism or bolster the security state. This is brought out in the conclusion to the work where I suggest that the vital issue is not only the sanctity of territorial borders. The issue is whether these borders contain a political community that is organised on principles of democracy and justice.

The concluding chapter holds that secession has to be taken seriously both by leaders of such movements and its defenders, and justified rigorously. Though in much of the literature acts of secession are likened to divorce; the divorce analogy seems to be a rank misfit. Divorce is painful and scars the consciousness of erstwhile partners. But it still does not involve the same scale of dislocations, violence, and major infringements of human rights as secession does. The right of secession can best be likened to the right of euthanasia.

That is secession can be conceived of as a contingent right in precisely the same way as euthanasia is a qualified right. The right to life is inalienable, and no one has the right to take her own life. Yet when the health of persons is so impaired that they live a life below the threshold of what we consider distinctively human, when their future seems to be ridden with nothing but pain and suffering, some states allow the terminally ill to choose to put an end to their misery. But just because a case can be made out for the right to put an end to one's life, or authorise someone else to do so in very special circumstances, it does not mean that we defend euthanasia per se, *except in the very last instance.*

What is required is the investment of more energy into finding a solution to the problem, more funds for medical research, and more energy into preventive medicine. Euthanasia might be a last option when everything fails, but easy resort to premeditated and intentional death is best avoided. Similarly, even

though secession might become a necessary course of action; it is best that the invocation of this right is forestalled through imagination and through breaking of boundaries of what is considered permissible.

Finally, it is nigh impossible to arrive at clear cut conceptualisation of the right of secession. Yet, hesitation and the insertion of numerous ifs and buts into an argument is not necessarily a bad thing. Uncertainty and contradictions marks most discussions on rights and harmful consequences of the assertion of this right, from hate speech to pornography. As W.H Auden philosophised:

> *Whether conditioned by God, or their neural structures, still*
> *All men have this common creed, account for it as you will:*
> *The Truth is one and incapable of contradiction;*
> *All knowledge that conflicts with itself is Poetic Fiction.*

Contradictions are not only a feature of poetic fiction; they permeate political practices as well as reflections on how to resolve the problems that follow in the wake of these practices. It is in this spirit of accepting contradictions as integral to an activity we call politics, as well as to political theory that seeks to address knotty political dilemma's that this work has been written.

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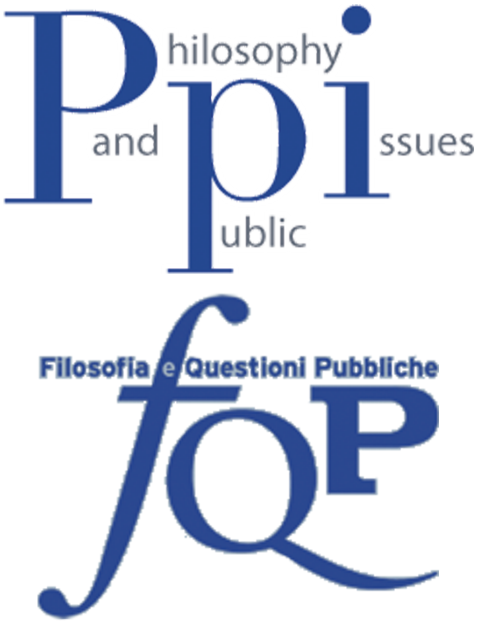

THE INTERNATIONAL DIMENSION OF THE PROBLEM OF CONTESTED SECESSIONS

BY ALLEN E. BUCHANAN

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The International Dimension of the Problem of Contested Secessions

Allen E. Buchanan

Attempts to secede and expressions of desires to secede are at an all-time high. Hence Professor Neera Chandhoke's book is timely. It is also seriously argued, balanced, and informed by history and the relevant facts about a number of current cases, including, preeminently the case of Kashmir.

I

Secession in the Post-Colonial Context

The most important contribution of *Contested Secessions* is to focus attention on the most morally perplexing cases of contested secessions, taking Kashmir as an exemplar of this genre. Here is how Chandhoke herself describes what she takes to be the most distinctively valuable aspect of her work.

> The objective of this work is to build into liberal theories of secession the experience of the Post-colonial world so that the 'right' questions can be asked of these cases as well. Therefore, additional factors that mediate the

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> context and our texts need to be registered, the moral implications of these factors noted, and theories adjusted.[1]

But what exactly are the distinctive features of secession in the post-colonial context—that is, cases of secession that occur in states whose peoples were previously subjected to colonial rule? It cannot be that they are contested, because most secessions, wherever they occur are contested. It cannot be that they involve minorities who do not wish to secede, since that is true in almost every case of secession, regardless of whether the context is post-colonial. Instead, Chandhoke apparently thinks that what is distinctive of the post-colonial context of contested secession—and what requires revision of liberal theories of secession—is that one more of these factors is present: (1) The secessionists are using or are prepared to use excessive or premature force, (2) the new state the secessionist strive to create will not be liberal, or (3) the state from which they wish to secede is not fully democratic. But of course these factors are not peculiar to the post-colonial context. All three were present in the case of the secession of the Southern states in America in 1861 and in the case of at least some of the secessions from Yugoslavia and from the Soviet Union in the early Nineteen Nineties. So, Chandhoke has not succeeded in identifying a morally relevant distinctive feature of contested secession in post-colonial contexts.

Has she succeeded, nonetheless, in showing that liberal theories of secession require revision? The answer here is not so clear. The most distinctive feature of her normative account of secession is her insistence that where the state is a "formal" democracy, the right to secede is overridden. Her idea is that in a "formal" democracy, there is the possibility of a peaceful redress of the "institutionalized injustices" which, on her account,

[1] Neera Chandhoke, *Contested Secessions. Rights, Self-determination, Democracy, and Kashmir* (Oxford University Press, 2012), 86.

generate the right to secede. Unfortunately, she does not say enough about what 'formal democracy' means; but she apparently means a form of government that has most of the distinctive features of democracy, though they are imperfectly realized. She appears to think that even where a territorially-concentrated group suffers "institutionalized injustices" they have the right to secede only as a last resort and that where there is a "formal democracy" the last resort condition is not satisfied.

It is plausible to hold that, in some sense, unilateral (that is, nonconsensual) secession should be a last resort, given the stakes. But here, as in just war theory, spelling out a plausible 'last resort' proviso is notoriously difficult. Be that as it may, relying on the notion of 'formal democracy' does not seem to do the job. On any reasonable interpretation of 'formal democracy'—let us say a characterization that includes majoritarian voting procedures for selecting legislative representatives, separation of powers, entrenched individual civil and political rights, and an independent judiciary—one can imagine circumstances in which the government did not respond adequately to the legitimate grievances of secessionists. One case in which this might occur is where the state has acceded to a group's demand for some measure of intrastate autonomy (limited self-determination), but then reneged on its promise, as Chandhoke notes has occurred in the case of Kashmir. In such a case, what is relevant is whether the pledge to accord instrastate autonomy has been broken, not whether the state is a formal democracy.

Nonetheless, she has suggested something very important, namely, that democratic states—even imperfectly democratic ones--*in principle* have more resources for addressing the legitimate grievances of secessionists without granting them full independence. This is not a new point in the secession literature, but it is one well-worth emphasizing. One implication of this

point—and this is something that I think Chandhoke would heartily endorse—is that when democratic institutions are present, dissatisfied territorially concentrated groups have a moral obligation to seek redress for their grievances through democratic means before resorting to unilateral secession. The difficult issue, of course, is what is the scope of this obligation? How long must the group keep attempting to achieve redress before they resort to unilateral secession? Chandhoke does not address this question, but, so far as I can determine, no one else has either.

II

The Double Assurance Problem in Contested Secessions

In her nuanced and well-informed analysis of the case of Kashmir, Chandhoke argues that the "institutionalized" injustice that creates a prima facie right of secession is India's defaulting on its promise to accord that region considerable autonomy within the Indian State. As she notes, I have argued previously that the state's defaulting on an intrastate autonomy agreement can justify unilateral secession.[2]

She advances this argument in the context of her attempt to show that in general the best solution to legitimate demands for self-determination by territorially-concentrated groups with the state is some form of intrastate autonomy, not full independence. However, in my judgment she overlooks the fact that in many cases, including perhaps that of Kashmir, judgments of fault with respect to the breaching of intrastate autonomy agreements are contested and in some cases difficult to ascertain. She fails to

[2] Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2003).

consider that in some cases, the state may plausibly claim that the group to which it granted some form of intrastate autonomy has abused its powers of self-government—for example, by discriminating against members of the group that is a majority in the state as a whole but a minority in the autonomous territory. The Serbian government claimed that this was true in the case of Kosovo, for example. More generally, Chandhoke does not consider the fact that in some cases—and again, Kashmir may be one of them—it may be reasonable for the state to refuse to grant intrastate autonomy or to carry through on its grant of it when doing so would contribute to inter-ethnic violence or institutionalized discrimination. Or, the state may simply conclude, not unreasonably, that political fragmentation with a serious potential for violence makes it infeasible—and irresponsible—to turn over important governmental functions to the local level.

There is a deeper, much more important point here. When one advocates intrastate autonomy as the preferred alternative to secession, as both Chandhoke and I do, one must acknowledge that there is a *double assurance problem*. The dissatisfied minority needs assurance that if it forswears the attempt to achieve full independence, the state will carry through on its promise of intrastate autonomy; and the state needs assurance that if it grants intrastate autonomy to the group, this will not lead to secession, to discrimination against some group within the new self-governing unit, to unacceptable levels of violence, or to an egregious failure to provide the basic goods and services for which government is instituted. Because she does not address the double assurance problem, Chandhoke's enthusiastic recommendation of intrastate autonomy as superior alternative to secession will strike both representatives of the state and members of groups seeking self-determination as somewhat facile.

III

Internationalizing Contested Secessions

The lack of attention to the double assurance problem implicates a more basic shortcoming of Chandhoke's approach: She largely regards the problem of contested secessions as a two-party problem—a problem for the state and for the secessionists. She does not consider the possibility that solving the double assurance problem may require third party action. In particular, she does not consider whether it might prove valuable for an international organization to broker and monitor compliance with intrastate autonomy agreements. Without such action, one or both of the assurance problems will not be solved. The state may not be willing to confer intrastate autonomy out of fear that it will lead to secession, and it may not be willing to stick to an agreement if it believes the other party is abusing it. On the other side, third-party involvement could provide the autonomists with assurance that if they act in good faith, the state will not renege on the agreement and that if the state attempts to justify reneging by falsely claiming that the group has abused the agreement, this ploy will be exposed.

More generally, I think it is fair to say that Chandhoke does not sufficiently emphasize the international dimension of the problem of contested secessions. She endorses the analogy of divorce favored by theorists who are much more permissive about secession than she, such as Harry Barran, Andrew Altman, and Christopher Wellman. The divorce analogy is misleading, however, so far as it overlooks the effects that secession can have on third parties. For example, consider the case of irredentist secession. If a group wants to secede in order to accede to a state

on the borders of the state from which it is seceding, this may greatly alter the balance of power between the two states and create an intolerable security risk. The divorce analogy obscures this fact. Because secession can have serious effects on other states and whole regions, there is all the more reason to take seriously the idea that regional or international organizations could play a constructive role in mediating secessionist conflicts.

Consider another type of case. Suppose that the territorially concentrated group that seeks independent statehood occupies the only part of the state that contains valuable resources and that without access to those resources the "remainder state" will very likely fail and descend into violent chaos. In these circumstances, regional and/or international organizations would have a legitimate interest in pressuring—if not forcing--the state and the secessionists to agree to third party brokering and monitoring of an intrastate autonomy agreement. Because she focuses only on the institutional resources of the state—and in particular whether it is at least a 'formal' democracy—Chandhoke overlooks the possibility of enlisting regional or international institutional resources to help achieve morally defensible resolutions of contested secessions.

IV

Sauve Qui Peut Secession

There is at least one case where unilateral secession could be morally justifiable that is not covered by Chandhoke's list of justifying conditions: What I have referred to elsewhere as *sauve qui peut* secession. Consider the case of the Democratic Republic of the Congo or some other instance that fits one's definition of a

failed state. Suppose that central authority has completely broken down and that the general condition is Hobbesian: if not a war of all against all, at least a grim arena of multiparty conflict in which physical security and the conditions for a decent life have disappeared. Suppose that no external parties shoulder the task of mediating peace agreements and helping rebuild the country. If a territorially-concentrated group reasonably concludes that its only hope for physical security is to create a new state in their portion of the failed state and if they provide credible pledges that they will not discriminate against minorities within their territory, then they would have a strong case for unilateral secession. This scenario is most likely perhaps in countries like the Democratic Republic of Congo that were previously subject to colonial rule. But in spite of the fact that she says she will direct attention to the post-colonial context of contested secession, Chandhoke does not consider this sort of situation. Of course, she might reply that if it is really a failed state, then this is not secession—that it is the creation of a new state amidst the ruins of a state, not the breaking away of a part of a state. The problem is that there may be no clear boundary to be drawn between secession from a very poorly functioning state and creating a new state in a condition of anarchy. Moreover, from the standpoint of international law, what we call a failed state is still a state and one important task for a moral theory of secession is to determine the conditions under which international law should recognize a right of secession. The more important point, however, is that this scenario is not a fanciful one in the post-colonial context upon which Chandhoke urges us to focus our attention.

In this essay, I have raised several criticisms of Chandhoke's view—and, following the usual practice of critics I have not noted all the points on which I think her analysis is on target. I would like to conclude by emphasizing, however, that she has done the literature on secession two important services: first, she

has provided perhaps the best analysis of the moral issues involved in the secessionist movement in Kashmir; and second, she has urged those who think systematically about secession to focus on the most morally difficult cases of secession, and in particular, those in which neither sides has clean hands.

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SYMPOSIUM

TERRITORY, BELONGING

SECESSION, SELF-DETERMINATION AND TERRITORIAL RIGHTS

IN THE AGE OF IDENTITY POLITICS

CONTESTED LAND AND CHANDHOKE'S KASHMIR

BY MARGARET MOORE

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Contested Land and Chandhoke's Kashmir

Margaret Moore

When Allen Buchanan wrote *Secession; A morality of political divorce from Fort Sumter to Lithuania and Quebec,* he argued that we needed a distinctive set of political principles to deal with cases of secession, and he defended and elaborated his own just–cause or remedial rights theory of secession against a rival view of secession as appropriately subject to democratic or plebiscitary choices by the population.[1] This influential book set the terms of the debate, and subsequent theories in the ethic of secession were elaborated and developed, based largely on Buchanan's two categories (justice and choice) in liberal political thought. Plebiscitary (or choice) approaches to secession were grounded in liberal principles of freedom of association, and autonomy; and remedial rights only theories emphasized the state as a vehicle of justice, and argued that secession was justified only if the state had violated human rights.

Chandhoke's book focuses on contested secession in an area of the world that is not marked by liberalism, and in which secession is deeply and violently contested, both within the

[1] Allen Buchanan, *Secession: The Legitimacy of Political Divorce From Fort Sumter to Lithuania and Quebec* (Boulder: Westview Press, 1991).

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secessionist unit (Kashmir) and by the two rival states that claim an interest in it (Pakistan and India).[2] It therefore promises a unique perspective on secession. It only partially delivers on its promise in part because Chandhoke does not move out of the framework set by that original ethics of secession literature, framing the discussion in terms of a conflict of rights, and the consequences of asserting various rights, but does not consider more fundamental issues of territory and territorial rights, which are directly raised by her case. And it does not succeed also in part because the suggestions that she offers are under-argued philosophically, and this is true particularly where she departs from Buchanan's original just-cause understanding of secession, and focuses on democracy as a foundational principle by which legitimate political orders are measured.

I

Territorial Rights

In the last few years, there has been a flurry of interest by political theorists in the idea of rights over territory, what they consist of, what justifies them, and who holds them.[3] This set of

[2] Neera Chandhoke, *Contested Secessions. Rights, Self-determination, Democracy, and Kashmir* (Oxford University Press, 2012).

[3] Avery Kolers, *Land, Conflict, and Justice: A Political Theory of Territory*. (Cambridge: Cambridge University Press, 2009); Tamar Meisels, *Territorial Rights*, 2nd edition (Dordrecht: Springer, 2009); David Miller, "Territorial Right: Concept and Justification", *Political Studies* 60 (2012): 252-268; Margaret Moore, "Natural Resources, Territorial Right and Global Distributive Justice," *Political Theory* 40 (2012): 84-107; Cara Nine, *Global Justice and Territory* (Oxford: Oxford University Press, 2012); Ryan Pevnick, *Immigration and the constraints of justice; between open borders and absolute sovereignty* (Cambridge: Cambridge University Press, 2011); A. John Simmons, "On the Territorial Rights of

debates promises to ground the issue of secession in a deeper, more fundamental analysis of the kind of thing that territory is, and to situate this within a normative account of the proper relationship of territory to the people living on the land, and/or with interests in it, and the state that claims jurisdictional authority over the land. Chandhoke does not engage with this set of debates, at least not directly, and, I will argue below, this limits the usefulness of her analysis. Nevertheless, since the territory of Kashmir is the focus of the study, it is possible to extract the approach to territory that is implicit in her analysis and her proposals with regard to Kashmir.

We tend to think of territory as involving a triangular relationship between (1) a piece of land, (2) a group of people residing on the land, and (3) a set of political institutions that govern the people within the geographical domain (the territory).[4] There are many different possible relationships between people, land and the state and correspondingly different ideas of what territory is for, which suggest different conceptions of the appropriate territorial right-holder.

The main question raised in the case of Kashmir is: who ought to hold territorial rights? What kind of entity should have jurisdictional rights over territory? This first question is raised at a very specific level, because there are a number of possibilities. Kashmir is currently divided between India and Pakistan (and there is also a small, relatively unpopulated part within China, a point that I bracket here). This means that first we have to consider, generally, whether Kashmir should remain divided or

States," *Philosophical Issues; Social, Political and Legal Philosophy* 11 (2001): 300-26; Anna Stilz, "Nations, States and Territory," *Ethics* 121 (2011), 572-601. Lea Ypi, "A permissive theory of territorial rights," *European Journal of Philosophy*, first published online 9 Feb 2012.

[4] D. Miller, "Territorial Right: Concept and Justification," 252-268.

unified, and in the latter case, whether it should be part of India, part of Pakistan, or independent. The answer to these questions depends, at least to some extent, on more general understandings of what kind of entity ought to hold territorial rights and the relationship of that entity to the people living there. There are two dominant positions on territory and territorial right-holders in the theoretical literature, which do not exactly correspond to the just-cause/choice division which marks Buchanan's original analysis, and around which Chandhoke frames her discussion. (1) On one understanding of territorial rights, the appropriate or legitimate holder of territorial rights is (1a) a state or (1b) a legitimate state. The general assumption of both traditional international relations theory and international law is that territory is an indispensable component of the sovereign state, indeed, it is definitional of the state that it has control over territory; related to this, many political theorists assume that whatever justifies states will also justify the territory that states have, and the various dimensions of state sovereignty. If we take that view, there are direct implications for our interpretation of the history of the Kashmir problem and whether what happened in 1947 was legitimate; and implications too for whether, since it happened, India now has legitimate territorial rights in (Indian) Kashmir.

Chandhoke discusses this historical story at length, arguing that the princely kingdom of Jammu and Kashmir, along with the United Kingdom, which claimed paramount sovereign authority, could transform itself from an independent state to a unit of the federation of India, a transformation which involved, not only constitutional change in the structure of the state but also the transfer of territorial rights (right over territory as jurisdiction) to another constitutional entity, India. As Chandhoke relates, when India gained independence, the princely state of Jammu and Kashmir was not part of British India, but the princely kingdom was not independent of British sovereignty either, being subject

to the doctrine of paramountcy through various treaty and political arrangements in force. In October, 1947, Pakistan backed armed incursions into pro-Pakistan parts of Jammu and Kashmir, which led the Hindu princely ruler to request military aid from India, which, in turn, requested that the state of Jammu and Kashmir accede to India prior to sending troops. This led to the signing of the Instrument of Accession on 26 October 1947, which was accepted by Lord Mountbatten, the Governor General of India. In a letter accompanying the Instrument of Accession, Lord Mountbatten stipulated, however, that the decision of territorial control of the princely state could not simply be decided by the prince and another state (India) but should be ultimately decided through a plebiscite. Let us set aside for the moment the issue of the plebiscite, because it raises a different view of the territorial right-holder. The operative assumption in the request by India and the prince's accession to that request is that the existing state had the authority to make that kind of decision, that it is the fundamental holder of territorial rights and could transfer those rights – rights not only to legislate across the domain, but also decide the terms and structure of the entity with jurisdictional authority -- without regard for the people who live on the land. This functionalist and statist view of the holder of territorial right has important implications not only for accession cases, but also for cases of a failed state and a conquered state.

It is also subject to a number of serious criticisms. First, it's not clear how a *moral* right can be conclusively justified by purely empirical considerations, such as the fact that an entity has *de facto* control and can fulfil the functions of the state. The second is that, on this conception, territorial right is purely retrospective – it is conferred on whatever entity can exercise power across the domain and fulfil state functions, but this cannot decide when two aspirant groups are claiming territorial rights over a geographical area. Third, and perhaps most significantly, it

ignores the interests of the people who live in the territory, which we often think of as one of the three (crucial) elements in the triangular relationship between land, state and people.

To avoid the criticism that statist theories of the territorial right-holder grant moral rights to powerful agents regardless of how they treat their citizens, or interact with similar (collective) agents, many political theorists follow in the footsteps of Kant and argue for a more normatively justified account of the state, such that a state has territorial rights if and only if it is a just (or legitimate) state. This brings in the third element of the triangular relationship by viewing a state as justified in having rights over a territory when there is a certain (appropriate and normatively justified) relationship between the state and the people who are governed by the state and live within its territorial domain. This account accords better with our sense of the basis of state authority, and is the one most commonly invoked by Chandhoke in her endorsement of standards of justice and democracy to assess the position of India in relation to (Indian) Kashmir. Helpfully, Chandhoke applies these standards both to the state of India as a whole, and to Kashmir specifically – suggesting that the Indian state itself is sufficiently just/democratic to claim authority, but that there are deficiencies in the Indian state's relations with Kashmir in particular.

There is a problem however with this general picture. If this is her view, then it is not clear that either the prince or the British had territorial rights to pass along to India in the first place. That is to say, if the appropriate standard for holding territorial rights is the standard of justice, even understood in a relatively relaxed way, then, if we apply this view retrospectively, most political entities cannot be thought of as entitled to their territory in the first place. Indeed, it is unclear whether we can say that many states in the past had any territorial rights. This conception also

has perverse consequences in cases where a state is unjust or unable to exercise authority, because it suggests that another (more just, more effective) state could be justified in exercising territorial rights across that domain, a point which I've made elsewhere.

The other two rival theories of territorial rights argue that the fundamental holder of territorial rights are the people, understood either as (2a) a cultural nation (Miller) or (2b) as a politically mobilized community that shares a common political identity and relationships (Moore). It is not the point of this Comment to discuss the strengths and weaknesses of these rival conceptions of territory, but only to note that Chandhoke herself never considers the possibility that the right to create jurisdictional authority might not be held by the state, nor even a just state, but ultimately by the people, in some configuration. Yet this is at the heart of the rival perspectives on the Kashmir question. Although these territorial issues are not discussed directly, she mainly follows Buchanan's just-cause theory of secession, which is grounded in the Kantian view that territorial rights are held by a just state, and does not consider the rival view that that the people (or nation) are the fundamental holder of jurisdictional authority,

Although at various places she laments the fact that the referendum to decide the future of Kashmir was not held, this seems to be largely because this would have constituted a mechanism of conflict- reduction, rather than as a fundamental right that the people of Kashmir held. Indeed, she is clear that many histories dwell on the "non-holding of the plebiscite" as "an original sin of the Government of India", but, she insists, "the fault lies elsewhere." (p. 26) and she details the various ways in which the original autonomy and minority protections that were in place were not adhered to in the period immediately

following accession, thereby suggesting that the problem was injustice. This is of course consistent with the view that some people in Kashmir felt that the constitutional status quo (Indian rule) was illegitimate, and responded violently, which in turn led to a repressive response by the Indian state in exerting control over the territory.

At the heart of the Kashmir problem, then, is the question of who has rights to exercise jurisdictional control over the territory. The problem with Chandhoke's discussion is that, although it is clear that she is opposed to secession, and so in some sense must regard India as now the appropriate territorial right-holder, it is not clear exactly why she thinks this, and how this fits with her historical narrative about the development of the Kashmir problem.

II

Self-determination and democracy

Towards the end of the book, Chandhoke makes some substantive recommendations about improving justice and democracy in Kashmir, but these interesting and largely sensible suggestions are not given sufficiently rigorous argumentation. She argues for an expansive understanding of the ideal of democracy to include rights of participation and procedural fairness (p. 173), address background inequality (p. 174), include linguistic and cultural rights (pp. 180-1), reconsider our commitment to majoritarian forms of democracy (p.172) and she offers a guarded acceptance of ethno-federalism (pp. 180-7). She also argues that the concept of democracy includes the idea of self-determination, a point to which I will return below.

I agree with many of her suggestions: the proposals for linguistic and cultural rights and the openness to power-sharing forms of democracy and to territorial forms of self-determination (ethno-federalism) presuppose an acceptance of collective (rather than individual) forms of identity, and the proposal for ethno-federalism suggests the view that there might be overlapping legitimate collective agents to exercise territorial forms of self-determination. Unfortunately, this part of Chandhoke's argument is more suggestive than philosophically rigorous. She does not define democracy in conventional terms, as a way to ensure input, or equal political voice, by the governed about the way that they are governed, and who governs them, but in a much looser way, so that it is co-extensive with many good things which are logically separate from how we ordinarily think of democracy. As an example, she writes: "Democracy is about safeguarding the rights of each individual irrespective of cultural belonging" (p. 172). Democracy is also identified with economic and social justice: "If the basic precept of democracy, that is, equal moral status has to be validated through the processes and procedures of democracy, then social and economic inequalities must be tackled through redistribution, as a matter of priority." (p. 174) A little further down, she writes: ".. political democracy and social/economic democracy are not distant cousins, they are constitutive of democracy itself." (p. 174). It is not clear why Chandhoke seeks to assimilate these distinct values into the ideal of democracy. It is at least equally plausible to think that there are different principles to legitimize a political order: as Luuk van Middlelaar has recently argued with respect to the E.U., there are principles of justice, including principles to ensure the just distribution of benefits and burdens of cooperation; principles of democracy or equal political voice in the institutions of governance; and principles of self-determination, which are concerned with group or collective identities and the aspiration of

people in their collective identity to have control over the collective conditions of their existence.[5] There are probably normatively important, internal relationships, to be worked out, between these ideals; for example, one might think that a fully just political order would also have to be democratic; or one might think that the principle of self-determination implies some kind of vertical (democratic) relationship between the governed and the institutions of governance, and that these internal relationships could be explored through careful argumentation. But Chandhoke does not do this: instead, she defines these ideals as included in, constitutive of, democracy itself. And since India is a democratic state, it suggests that India is, in spite of its deficiencies in other respects, a legitimate governing authority in Kashmir, with only a few reforms to make its democracy more perfect.

With respect to self-determination, which is at the heart of the Kashmir problem, Chandhoke argues that the ideal can be captured by a more capacious understanding of democracy. Again, it is not clear why we should think that the self-determination (of a collective entity) is encompassed by democracy, on any ordinary understanding of the terms. In ordinary language, democracy refers to the institutions of governance which ensure that the governed have equal political

[5] Luuk van Middlelaar, *The Passage to Europe*, (New Haven: Yale University Press, 2013). Middlelaar argues that there are three different sources of legitimacy, which have distinct historical roots, and which underlie many of the reforms to different structures, procedures and policies of the E.U. There is the Roman strategy, associated with justice; the Greek strategy, associated with democracy; and the German strategy, associated with popular sovereignty. In Middlelaar's work, these are presented as instrumental to attaining sociological legitimacy, whereas I am suggesting that they could also constitute ways to secure moral legitimacy, in so far as each is responsive to our modern recognition that no one has any natural authority over another, and that the exercise of social power needs to be justified.

voice in the making of political decisions, usually through the election of political elites. Self-determination by contrast is about collective self-rule, where the group has the capacity to make principles and policies with respect to the collective conditions of its existence. The fact that the two are distinct can be seen by considering the (hypothetical) case of Tibet within a democratic China. Even if China were to transform itself democratically, into a society that recognizes equal individual voice and equal individual influence over decision-making, this would still involve a denial of the political associational life of Tibetans as a group, who are demographically outnumbered by Han Chinese and who cannot make rules or instantiate principles to govern their own affairs.

Moreover, Chandhoke does not simply argue for a more capacious understanding of democracy, but that we need to narrow the concept of self-determination. She writes: "If we scale down the concept of self-determination as a legitimizing principle of *state-breaking* and *state-making* and see it as a constitutive aspect of democracy instead" (173), we can move beyond the current stalemate. This is equivalent to suggesting that those people in Kashmir who are worried about their self-determination as Kashmiris, or people on the territory of Kashmir, should just adopt another view. This places the blame squarely on those people who care about their collective self-determination as Kashmiris; and who question the appropriateness of Indian jurisdiction over Kashmir. The problem would be solved if these people could seek their self-determination within a democratic and inclusive India. Indeed many problems can be solved if people think in ways other than they do.

While Chandhoke does offer useful suggestions, both for a changed democratic order in India, and for a more modest idea of self-determination, they are not placed within a philosophical

treatment either of territorial rights, or of the precise relationship between people, territory and the state that is implied either in the territorial rights literature, or by a more pluralist understanding of different relationships and configurations between the ideals of democracy, self-determination and justice.

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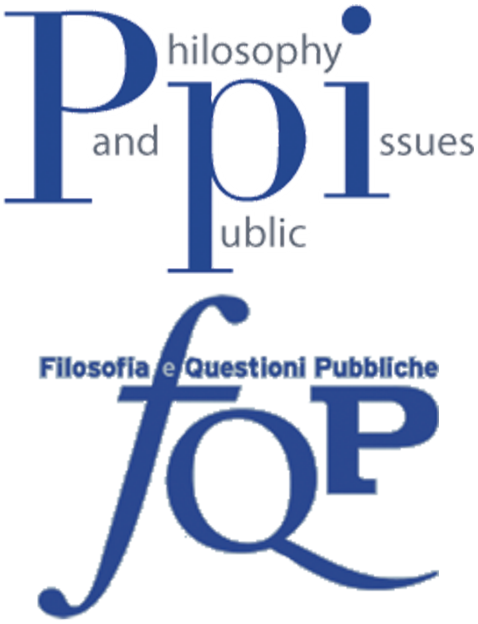
TERRITORY, BELONGING

SECESSION, SELF-DETERMINATION AND TERRITORIAL RIGHTS

IN THE AGE OF IDENTITY POLITICS



RECONSIDERING CONTESTED SECESSIONS: UNFEASIBILITY AND INDETERMINACY

BY VALENTINA GENTILE

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Reconsidering *Contested Secessions*: Unfeasibility and Indeterminacy

Valentina Gentile

Writing about secession is not an easy task for a political philosopher. It is significant that leading political philosophers of the past, from Plato to Marx and Hegel, did not pay any systematic attention to the issue secession.[1] The absence of a theory of secession is even more remarkable if we consider traditional liberal theory, from Locke and Mill to Rawls. Though liberalism places great emphasis on values such as liberty and autonomy, and while some liberal scholars have elaborated interesting theories on the idea of civil disobedience and the right to rebellion, very little consideration has been given to the idea of secession within liberal political philosophy, at least until the last two decades.[2]

Three main reasons might explain this gap in traditional political philosophy and, in particular, within liberalism. First, conceptually the notion of secession has a double dimension, namely a domestic and an international one and this complicates our ability subject it to a direct and straightforward analysis. As a domestic matter, secession is manifested in a refusal of the state's

[1] Allen Buchanan, "Toward a Theory of Secession," *Ethics* 101 (1991): 322-42, at 323.

[2] *Ibid.*, 324. See also Christopher H. Wellman, "The Morality of Secession," in Don H. Doyle (ed.), *Secession as International Phenomenon, From America's Civil War to Contemporary Separatist Movements*, (Athens, Georgia: University of Georgia Press, 2010), 19.

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political authority by a portion of its citizens. From an international perspective, succession is conceived as a sort of right, itself derived from/dependent on a certain interpretation of the right to self-determination, which entitles a particular group of people, whether culturally defined or not, to separate from an established state.[3] It is therefore not clear how claims linked to these two dimensions can be accommodated in one general theory. Second, a consistent part of liberal theory, in particular contractualism, has been concerned primarily with social unity and the stability of the political authority: an alleged right to secession would undermine the very basis of the consent on the common justification of the coercive power. Third, from an international perspective, both advocates of and those opposed to (a right of) secession tend to remain confined within the limits of either a statist or a nationalist paradigm. The traditional and entrenched doctrine of state sovereignty and territorial integrity is confronted with new nationalist or statist claims to territory.[4] As a consequence, many attempts to theorize secession from an international point of view reflect and are constrained by this incapacity to overcome the statist paradigm.[5]

Writing about secession in India raises further practical and theoretical problems. Under the provision of the Article 248(aa) of the Indian Constitution, in 1967 the Parliament passed the Unlawful Activities (Prevention) Act, which states that any action

[3] Margaret Moore, "The Ethics of Secession and a Normative Theory of Nationalism," *Canadian Journal of Law and Jurisprudence* XIII (2000): 225-250; "On National Self-determination," *Political Studies* XLV (1997): 900-913; Christopher H. Wellman, "A Defense of Secession and Political Self-Determination," *Philosophy and Public Affairs* 24 (1995): 142-171.

[4] C. H. Wellman, "A Defense of Secession and Political Self-Determination," 144.

[5] Allen Buchanan, *Justice, Legitimacy, and Self-Determination. Moral Foundations for International Law* (Oxford: Oxford University Press 2004), 7.

or intention, including words "either spoken or written," that may support a claim of secession is punishable with imprisonment.[6] Beyond these legal provisions, a major political concern in India today is whether it is possible to balance and accommodate the need for a shared political institutional framework with the necessity of giving voice and proper representation to the multiple sub-national communities that populate the country. As I have argued elsewhere, however, constitutional and legislative provisions on minorities have not prevented the emergence of new forms of religious fundamentalism, such as Hindutva or Islamic fundamentalism, and have not reduced the distance between local traditional communities and central state structures. In addition, violence makes this political impasse even more complex since in many regions—like in Kashmir—it easily translates into violent conflicts and ethnic cleansing.[7]

The incredible task of professor Chandhoke' new book, *Contested Secessions*, is thus to provide a restatement of a liberal theory of secession, understood as a *remedial* right theory, which is still compatible with situations of contested secessions, such as those occurring in many post-colonial societies and, in particular, in contemporary India.[8] Chandhoke faces both these challenges with intellectual courage and great acumen. As a political philosopher with a liberal orientation, she re-conceptualizes a right to secession from the vantage point of post-colonial societies. From a theoretical point of view, this implies acknowledging the risks of two distinct forms of relativism,

[6] Patrick Hoening, "Contesting Secession," *Economic & Political Weekly* XLVII (2012) 44-46, at 44.

[7] Valentina Gentile, "Secularism in Contemporary India," in P. Losonczi and W. Van Herck (eds.), *Secularism, Religion, and Politics: Concepts and Context in India and Europe* (New Delhi: Routledge 2014).

[8] Neera Chandhoke, *Contested Secessions. Rights, Self-determination, Democracy and Kashmir* (New Delhi: Oxford University Press 2012).

namely the post-colonial critique of "western-centrism," on the one hand, and the liberal presumption of superiority of the West, on the other.[9] Both forms of relativism fail to recognize that historical dissimilarities do not produce significant changes in the "conceptual framework of inquiry" that concerns justice.[10] Chandhoke therefore tracks a third way: she employs the idea of 'contextualization' understood as an encounter between western theorizing about secession and the experience of post-colonial societies. In this respect, she argues that "theorists should search for cases that are especially challenging to his or her theoretical position […] to rework their assumptions and presuppositions and introduce greater complexity in arguments."[11]

The book starts by asking what sort of right is the "right to secede." In responding to this, Chandhoke outlines three ways to justify this right, corresponding to three liberal approaches—namely, national self-determination, consent and just cause.[12] For her, only the just cause approach, and especially the version presented by Buchanan, satisfies the moral requirements of a right of this sort. Following Buchanan's Remedial Right Theory, she believes that a right to secede can be justified only as a remedial right, that is, as a way to redress "institutionalized injustices."[13] However, the case of contested secessions shows that it is highly problematic to make this *remedial* right to secession an effective one, especially when weak democratic governments have to negotiate with secessionist groups, which are often illiberal and violent, and mixed to oppressed minorities.

[9] N. Chandhoke, *Contested Secessions*, 34.
[10] *Ibid.*
[11] *Ibid.*, 35.
[12] *Ibid.*, 64-87.
[13] A. Buchanan, "Toward a Theory of Secession"; "Theories of Secession." *Philosophy and Public Affairs* 26 (1996): 31-61; *Justice, Legitimacy, and Self-Determination.*

The case of India and Kashmir is for Chandhoke a plain example of this practical and theoretical deficiency in liberal theory. In India, disputes about secession are in fact characterized in three specific ways: first, although the state is a formal and legitimate democracy, it has subjected a group of people in Kashmir to institutionalized injustice; second, secessionist movements in this territory are often illiberal and their actions involve the use of violence; finally, any solution in Kashmir between the State and secessionist groups should not override the rights of other ethno-religious minorities settled in the same part of the territory.[14] To disentangle this complex reality, Chandhoke seems to follow Buchanan's strategy to "isolate and proliferate."[15] She thus places great emphasis on possible ways to accommodate pluralism and guarantee a degree of autonomy within the democratic framework of post-colonial societies.

Although Chandhoke is very influenced by Buchanan's seminal work, her strategy seems to differ from his in some crucial aspects. In particular, Chandhoke does not seem to disregard the role of collective identities in enabling individual autonomy and, for this reason, an important section of her book is devoted to spelling out an account on pluralism's intrinsic value. In the following sections, I will focus on two distinct yet related sections of Chandhoke's theory: her distinctive version of remedial theory, and her emphasis on a form of comprehensive pluralist liberalism. I argue that this approach might result in inconsistency due to the conflicting demands of these two approaches. If we take seriously Chandhoke's political claim in favor of the legitimacy of what she calls "formal" democracy,

[14] N. Chandhoke, *Contested Secessions*, 114.
[15] A. Buchanan, *Justice, Legitimacy, and Self-Determination*, 344.

further clarifications are needed with respect to the account of pluralism she proposes.[16]

I
Liberal Approaches to Secession: Mapping the Debate

Two broad distinctions concerning the complex nexus of territory/self-determination/political legitimacy emerge in the contemporary literature on secession. Interconnections between these two give rise to three different normative approaches, namely: ascriptive/nationalist theories, associative/plebiscitary theories, and remedial right theories. (See, table 1).

	Nationalism	**Statism**
Primary Right	Ascriptive and Nationalist theories (e.g., Moore) • National/cultural group has a legitimate political claim to its territory; • Collective autonomy; • Emphasis on National Self-determination; • Ideal theory	Associative and Plebiscitary theories (e.g., Wellman): • Legitimate states have a moral claim to territory; • Individual autonomy; • Emphasis on Political Self-determination; • Ideal theory
Just Cause		'Remedial right only' theories (e.g., Buchanan) • Legitimate states have a moral claim to territory; • A group has the right to secede only if it has been subjected to systematic and enduring injustice. • Non-Ideal and institutional theory

Table 1: Nexus territory/self-determination/political legitimacy

[16] N. Chandhoke, *Contested Secessions*, 90.

The first distinction is articulated across two axes, namely nationalism vis-à-vis statism. It corresponds to two different ways to respond to the question whether a group or association has a legitimate claim to its territory.[17] According to nationalist theories, national or cultural groups that inhabit a certain portion of territory have a legitimate political claim to it. Statist approaches, instead, affirm that only a legitimate state has a moral and political claim to territory.

The notion of self-determination introduces the second distinction wherein lies the philosophical justification for the alleged right of secession. Two different strategies, primary right and just cause, have been pursued to respond to the questions of whether and how the principle of self-determination interacts with both territory and legitimacy. A first group of theories affirms that a (moral) right to secede should be justified in the light of an extensive interpretation of the right of self-determination, and therefore of autonomy (either collective or individual) of peoples or nations. In general, Ascriptive and Nationalist theories as well as Associative and Plebiscitary theories admit a strong presumption in favor of the liberal idea of freedom of political association.[18] However, a major difference arises in respect to the notion of autonomy linked to this freedom.[19] Ascriptive and Nationalist theories insist on an idea of collective autonomy. That is, communities, cultures or nations give a fundamental ethical content to individuals' ways of life, which might naturally bring cultural/national groups to have a shared aspiration to constitute their own political unit, including a

[17] On this distinction see also C. H. Wellman, "The Morality of Secession."
[18] See also A. Buchanan, "Theories of Secession," 38.
[19] Margaret Moore, "The Ethics of Secession and Political mobilization in Quebec," in Don H. Doyle (ed.), *Secession as International Phenomenon, From America's Civil War to Contemporary Separatist Movements* (Athens, Georgia: University of Georgia Press 2010).

legitimate claim to the territory where they live. For the second group, a right of self-determination of "politically *viable* groups within the territory"[20] should be justified on the basis of the foundational value of individual autonomy.[21] According to this assumption, the legitimacy of secession is assured if a "territorially concentrated majority expresses the desire to secede through a referendum or a plebiscite."[22] In this second case, it is the democratic procedure that gives legitimacy to secession rather than the ascriptive character of the seceding group.

The second group of theories provides a more restrictive interpretation of the right to secede, understood as dependent on a 'just cause.' Supporters of this approach are generally wary of the incendiary potential that an extensive understanding of a general right of self-determination would have in destabilizing both national and international institutions, so they firmly ground the principle of self-determination in the commitment to protect basic human rights.[23] It is therefore only when a state systematically fails in protecting the basic human rights of its citizens that a right to secession can be invoked as a last-resort 'remedial right.'

Buchanan's remedial right only theory—perhaps, the best known of this group of theories—affirms that international law should recognize a 'remedial right to secede,' understood as a last-resort response to serious injustice, but it should generally

[20] C. H. Wellman, "The Morality of Secession," 22.

[21] M. Moore, "The Ethics of Secession and a Normative Theory of Nationalism," 232.

[22] *Ibid.*

[23] A. Buchanan, *Justice, Legitimacy, and Self-Determination*, 332. Buchanan argues that "a moral theory of international law should provide practical guidance for defusing the self-determination bomb, while […] giving legitimate interests in self-determination they due" (*Ibid.*).

encourage alternatives to secession.[24] A distinctive aspect of this approach concerns the kind of theorizing it employs about the international system. Buchanan provides a *nonideal* institutional theory of international law, grounded on the principle of international legitimacy, meant to offer a "principled guidance for how to cope with the problems of noncompliance" in our real world.[25] For Buchanan, primary right theories are different insofar as they are concerned with the morality of secession and, therefore, they offer an *ideal* (and not necessarily institutional) theory/mode of theorizing that provides a sense of how a theory of secession should look like under conditions of perfect compliance.[26]

II

Secession As a *Remedial Right*.

What Is New With Chandhoke's Proposal?

As I mentioned before, Chandhoke seems to agree with many of Buchanan's conclusions. She shares Buchanan's wariness of coupling the concepts of self-determination and secession, considering secession as an ultimate danger for autonomy. Like Buchanan, her suggestion is to increase the degree of internal autonomy of minority groups within existing territorial boundaries and argues

> instead of focusing on secession we perhaps need to think out alternatives to the nation state, how the aspirations of minorities can be best realized

[24] *Ibid*., 343.
[25] *Ibid*., 55.
[26] C.H. Wellman, "The Morality of Secession," 28-39; A. Buchanan, "Theories of Secession," 60-61.

> within the state and how sovereignty can be diluted through political arrangements within the state.[27]

Yet, unlike Buchanan, she does not renounce to provide an ideal (moral) theory of 'substantive democracy' that incorporates the notion of self-determination as its constitutive aspect.[28] Therefore, a distinctive feature of Chandhoke' s theory is that she seems to move back from the nonideal institutional ground of Buchanan's theory to another version of ideal theory. Such a theory would incorporate the right of self-determination into a broader moral, rather than political, conception of "substantive democracy." For her then, secession is a weak right in democracies, which does not come into play as long as they can adequately respond to injustice, compensate victims, and accommodate pluralism.

As I said, Buchanan's theorizing is institutional (and to certain extent realistic) and considers the issue of secession from the perspective of those institutional tools already existing in the international legal framework, which are themselves evaluated in the light of a nonideal 'moral theory of international law.' Such a nonideal kind of theorizing presupposes the existence of both states, understood as fundamental political units of the international society, and an emerging international moral and legal framework. Thus, the condition of partial or non-compliance that characterizes contemporary international society sensibly reduces the normative assumptions of the theory of secession, and compels us to rethink those legitimate institutional constrains that might balance competing claims. This approach considers both the domestic and the international dimensions of the problem of secession, and offers solutions which take into account not only seceding groups and parent states but also

[27] N. Chandhoke, *Contested Secessions*, 41.
[28] *Ibid*., 158.

international society as a whole, which is in various ways affected by these events.

Chandhoke is engaged in quite a different enterprise. For her the problem of secession is primarily a domestic issue that should be accommodated within the framework of a pluralist liberal theory and this is particularly urgent in weak post-colonial democracies. Although she never refers clearly to the distinction between ideal and nonideal theory, her account of 'substantive democracy' seems to constitute an important part of a comprehensive theory of liberalism, one which incorporates a notion of value pluralism at its core. Chandhoke thus resists a right to secession because it would be inconsistent with such an account of value pluralism. Yet, this sort of ideal theorizing is quite different from that offered by supporters of Primary right theories. For while the latter are concerned with providing the ideal conditions for a moral right to secession in a context of full compliance, Chandhoke provides an ideal (moral) theory of liberal democracy that incorporates a notion of value pluralism. This sort of theorizing expects therefore that a denial of the right of secession is shared and endorsed by all citizens.

III

Ideal Theorizing and Comprehensive Pluralism: Some Theoretical Reflections on Chandhoke's Approach

If my reading of Chandhoke's argument is correct, I may have unearthed a problem for her theory. Although she is aware of the discrepancy between the ideal conditions assumed by several liberal theories and the reality of most secessions, in particular those occurring in post-colonial democracies, her theory does not

significantly differ from other liberal theories in setting ideal conditions for the justification of principles of justice. However, in real world, not only national minorities or secessionist groups but also democracies are not perfectly just as her theory seems to assume.

The major problem of ideal (moral) theorizing is the transition from ideal theory to nonideal circumstances that so often demands that we abandon many of our (idealized) assumptions, which reduces the substantive moral claims of the theory.[29] This occurs because the ideal conditions of full compliance, necessary to the justification required by ideal theory, presupposes what Rawls, in his *A Theory of Justice,* has called the "congruence" between the principles of justice recognized by the theory and the deep convictions of all members of the ideal "well ordered society" to whom these principles should apply.[30] However, the assumption of (reasonable) pluralism causes us to reconsider the ideal conditions of the theory in favor of a non-comprehensive or "freestanding" conception of political authority, as Rawls puts it in his second book.[31]

Chandhoke's proposal goes in a different direction. She starts from a crucial distinction between empirical and normative pluralism. In defending a sort of intrinsic value of communities, she argues that we should move from an empirical or descriptive

[29] A. Buchanan, *Justice, Legitimacy, and Self-Determination.* On this see also Laura Valentini, "On the Apparent Paradox of the Ideal Theory," *The Journal of Political Philosophy* 17 (2009): 332-355.
[30] John Rawls, *A Theory of Justice* (Cambridge (MA): Harvard University Press 1971).
[31] John Ralws, *Political Liberalism* (New York: Columbia University Press 1993).

understanding of pluralism to a normative one. Inspired by Berlin's idea of value pluralism,[32] Chandhoke argues that

> though pluralism is a value, it is a value with a difference. Like other normative concepts, such as equality, or freedom or justice it captures the desirability of a certain state of affairs. But unlike most other values, pluralism is a precondition for a plurality of values."[33]

These intuitions lead her to develop a comprehensive theory of liberalism based on value pluralism.

In conclusion, I wish consider some of the weaknesses of Chandhoke's normative proposal discussed so far. First, as with other cases of ideal theorizing, her theory of a 'community sensitive' liberal pluralism becomes problematic when we move to real circumstances. Chandhoke argues that in contexts where democratic governments are able to self-correct, secession can be rejected on the basis of moral considerations, e.g. protecting other minorities in the territory, contrasting illiberal and violent movements both in favor and against secession.[34] However, when real cases of 'formal' (unjust) democracies dealing with both illiberal secessionists groups and other illiberal minorities are considered, the theory is in fact not able to offer a clear framework of moral prescriptions.

This brings to my second consideration, related to her account of normative pluralism. My intuition is that Chandhoke's very idea to develop a comprehensive pluralist liberalism is

[32] See Isaiah Berlin, *Liberty* (Oxford: Oxford University Press 2002). Chandhoke explicitly refers to Berlin in note 2 to the chapter, p. 155.
[33] N. Chandhoke, *Contested Secessions*, 130.
[34] *Ibid*., 212.

inconsistent with her value pluralism premises.[35] This is evident when the theory postulates the extension of liberal toleration to both secessionist and minority groups, irrespective of the fact that they might refuse the fundamentals of liberalism. This situation produces two possible outcomes that I call unfeasibility and indeterminacy. First, if we assume that the commitment to value pluralism is dependent on the acceptance of some prior fundamental liberal values, the theory is unfeasible since any governmental attempt to address democratically secessionist and minority claims would find a strong resistance of non-liberal secessionist or minority groups. Second, if we assume that the commitment to value pluralism is independent of liberalism, the theory is indeterminate since it is not able to adjudicate disputes among liberal and other, even non-liberal, claims.

Chandhoke is aware of the risk raised by this second account of value pluralism but, in the attempt to avoid the indeterminacy, she provides a comprehensive liberal theory that risks becoming inconsistently pluralist and, for this reason, unfeasible. The problem here is that her theory implies a strong commitment to some fundamental liberal values that inevitably have priority over nonliberal values.[36] In my view, only an account of non-comprehensive liberalism, like the one proposed by Rawls, is compatible with a *thin* or reasonable form of value pluralism.[37] Accepting this, when we move from ideal conditions to real circumstances of divided societies characterized by competing unreasonable claims, the pluralist premises of the theory should be interpreted in a narrow sense so that it becomes possible to

[35] On this argument see also Robert Talisse, "Can Value Pluralists be Comprehensive Liberals? Galston's Liberal Pluralism," *Contemporary Political Theory* 3 (2004): 127-139.
[36] *Ibid.*, 136.
[37] John Rawls, *Political Liberalism*.

select those institutional and widely accepted political principles that actually set the limits of liberal toleration itself.[38]

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[38] I am indebted to Sebastiano Maffettone, Anne S. Hewitt and Domenico Melidoro for their evaluable comments to an earlier draft of this paper.

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IN THE AGE OF IDENTITY POLITICS

TALKING SECESSION

BY NEERA CHANDHOKE

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Talking Secession

Neera Chandhoke

I am indeed gratified that such eminent political philosophers have taken the trouble to engage with the argument in *Contested Secessions,* and done so in a spirit of friendly criticism. I appreciate each one of these responses. My own rejoinder to the insightful issues that have been raised, and to the reservations that have been expressed, will, in all probability, prove inadequate. That is perhaps a given. Few authors can claim that they have said what needs to be said, and that nothing more needs to be said. I am certainly not one of them. I believe that the purpose of scholarship is to keep a conversation going. Profound gratitude to Sebastiano Maffetone, Gianfranco Pellegrino, and Michele Bocchiola for providing the space and the opportunity for one such conversation is, therefore, in order. Many thanks to Valentina Gentile for making this happen.

Let me begin my response to these comments by reiterating a point made in the book on methodology. I do not buy into notions of exceptionalism, or to the idea that the study of political phenomenon in the global south demands a qualitatively different set of presuppositions and theories. The perspective is, of course, disputed. A number of distinguished scholars, speaking of the distinctiveness of the Indian experience, argue strenuously that western theories cannot possibly apply to the postcolonial world. Authenticity and indigenous social science are undeniably the flavour of the current intellectual season.

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The proponents of indigenous social theory make a valid point, but they also miss out on a great deal. In today's world, the central problem for societies is that of realising justice and institutionalising democracy. We have a great deal to learn from each other on this count. On a lighter note, we, in the postcolonial world, can hardly duck theories that come to us in waves from western universities and think tanks. How is it possible to do so? We have cut our academic teeth on them. Western philosophers and philosophies are part of the folklore of the Indian academy, ironically much more than canons of Indian political thought.

Still doubts about the capacity of these theories to negotiate a qualitatively different political context remain. Take secession, the contrast between the Quebec, Scotland and Catalonia on the one hand, and Kashmir, Baluchistan, and Tamil Eelam in Sri Lanka on the other, is striking. Can theories that take as their referral the decision of the Canadian Supreme Court on Quebec, adequately deal with the complexities of the Kashmir problem? That was at the back of my mind when I suggested that in contexts stamped by excessive violence, third party intervention, mobilised minorities, and illiberal leaderships of the separatist movement, even limited advocacy of the right to secede might well become much more wary and hesitant.

I

Allen Buchanan casts a sceptical eye on this suggestion. What is so specific about the Kashmir case he asks, are not all cases of secession contested? They certainly are. Contestation is, indisputably, inbuilt into secession. A month ago Crimea broke away from the Ukraine vide a referendum, and was incorporated

into Russia. According to plebiscitary theories of secession this particular case of procedural secession should have occasioned little controversy. The decision, however, took the western world by storm, prompted hysterical predictions of another cold war between an existing super-power and a resurgent one, and led to the imposition of sanctions on Russia. The secession of Crimea from Ukraine and incorporation into Russia was not contested by the erstwhile parent state, but both acts were vociferously opposed by the international community.

Secession is a particularly difficult theme for political philosophy, points out Valentina Gentile, for it is difficult to accommodate the international and the domestic aspect of secession in the same theory. Indeed, the point is well taken. Yet in some cases the duality does not pose a problem in practice and, therefore, for theory. Bangladesh, for instance, was accepted as a member of the United Nations almost three years after it declared independence; that is after Pakistan recognised the new state. This is clearly in keeping with the conventions of international law; that the recognition of a new state by the U.N. is dependent on the recognition of the state by the erstwhile parent country.

However, this particular convention has hardly deterred individual countries from recognising a new state, even if the parent state and the United Nations have withheld recognition. Kosovo is a case in point. Notably the recognition of de facto states by powerful Western states has proved arbitrary and self-serving. Powerful Western countries have rushed to recognise Kosovo, but denied recognition to the free zones established by the Polisario Front, or to the Government in Exile declared by the Saharawi Arab Democratic Republic in Western Sahara, a region that has been annexed by Morocco. The existence of the Independent Republic of Somaliland has not been recognised by other states to date. Nor have important countries recognised the

right of the Palestine people to the establishment of a state of their own. Some cases of secessions are contested if not by the erstwhile parent country, by the international community. Others are contested by the parent country but not by powerful members of the international community. Clearly the laws that regulate secession in international relations are the laws of war. And this poses a problem for normative theory.

But the laws that negotiate secession or attempted secessions in the postcolonial world are also laws of war. The reason why secessions are so messy in the postcolonial world, compared to, for example, the impending separation of Scotland and Catalonia from their parent country, is fairly obvious. For countries that wrested independence from colonial powers in the second half of the twentieth century, secession signposts a dramatic failure, the failure to consolidate the territory of the nation state. The nation state is highly overrated, and in our part of the world—South Asia—it appears as one of the major mistakes of history. Even so, in a global context that continues to hold the belief that the only state worth its name is the nation state, and considering that nations are the chief legitimacy claim of states, postcolonial states simply cannot come to terms with loss of territory.

Matters are worsened because in the international community states that cannot hold their territories together are castigated, even dismissed as failed states, as crisis states, and as fragile states, by other governments, donors, rating agencies, and western academics for whom research on 'failed states' has become a profitable industry. Any one of these dubious titles casts a particularly dark shadow on state capacity. It is not surprising that the response of the state has been to accelerate 'nation-building' through coercive means. There are a great many tragedies waiting to happen in South Asia, simply because state making has not

been preceded by nation-making, as was the case in Italy and France.

Consider India that has historically been a highly plural, and regionally defined, society. There is little in common between a Hindu from Punjab and a high caste Brahmin from Tamilnadu. There is even less in common between a Sunni Muslim from the Valley of Kashmir and a Muslim from Kerala, or indeed a Shia Muslim from Kargil in the northern reaches of the state of Jammu and Kashmir. Heavy handed attempts to forge a nation have rebounded leading to a proliferation of secessionist demands. Both sides to the conflict have invoked and harnessed hyper-nationalism to their projects. And the country has been rent asunder by violence, by xenophobia and by bigotry.

Some years ago a film, 'Roja' by the noted director Mani Ratnam on the kidnapping of the South Indian protagonist by 'terrorists' in Kashmir, caused audiences in the south of the country to erupt in vociferous protests. South Indians are politically more concerned with the Tamil problem in Sri Lanka, than Kashmir which is geographically distant. But this film provoked immense rage over 'terrorism' in Kashmir. Cinema halls were nearly burnt down, anti-Pakistan slogans were raised, and very soon these slogans slid into verbal attacks on Indian Muslims. The immense potential of what is euphemistically called the 'Kashmir' problem, to spark off violence against fellow citizens who bear a Muslim name, is unbelievable. It is also very frightening.

Nationalist anxieties over the eruption of sub-nationalism legitimise extreme violence on both sides. Paranoia over territory lost and dreams of territory regained, sanctions the imposition of draconian laws, violations of basic civil liberties in the Valley, encounter deaths, and mass graves. And hyper-nationalism in the country has authorised the breaking of a contract that granted

regional autonomy to the state of Jammu and Kashmir. The argument in *Contested Secessions* holds that if the violation of a constitutional provision and the breaking of the contract was the original sin, injustice has been compounded by violations of fundamental rights and denial of democracy. This is enough cause to see secession as a prima facie right.

II

Margaret Moore disputes the argument. According to Moore the relevant question is not whether secessionists have just-cause to renege on political obligation to the state. The problem of secession, according to Moore, is grounded in a deeper and more fundamental analysis of the kind of thing that territory is; a normative account of the proper relationship of territory to the people living within it, or with interests in it, and its relationship with the state that claims jurisdictional authority over it. In the specific case of Kashmir, asks Moore, is the paramount problem of who holds territorial rights, India, Pakistan or China. Or should the state of Jammu and Kashmir be unified?

The second problem identified by Moore is whether the monarch in 1947 had the legitimate right to sign over the territory of Jammu and Kashmir to India. The act of signing the Instrument of Accession assumed that the existing state had the authority to make that kind of a decision. Was the existing state the fundamental holder of territorial rights, and could it transfer the right to not only to legislate across the domain, but also decide the terms and structures of the entity with jurisdictional authority without regard for people who lived on the land? The act ignored the interests of the inhabitants of J and K.

Specifically Margaret Moore's criticism hinges on the point of view that I follow the just-cause theory of secession grounded in the Kantian view that territorial rights are held by a just state, and do not consider the rival view that the people or the nation are the fundamental holder of jurisdictional authority. The idea of a plebiscite in *Contested Secessions* she suggests seems like a mechanism of conflict resolution, and not as a fundamental right that the people of Kashmir hold.

Two sorts of responses are in order here. The first has to do with the troubled concept of 'the people.' And that the concept is troubled can hardly be denied. The distinguished jurist Sir Ivor Jennings had famously declared that the principle of self-determination that argues 'let the people decide' was ridiculous. "The people," he remarked, "cannot decide until somebody decides who are the people."[1] On the other hand, Edmund Morgan suggests that 'the people' is an elaborate fiction deliberately designed by representatives during the English civil war to replace another fiction that had been discredited, the divine right of kings. In the name of the people the representatives succeeded in exercising power far in excess of what was warranted. Something has to legitimise the exercise of power. In democracies the people or the political public is a convenient ploy to do so.[2]

The slippery concept of the people has often by sidestepped by theorists, who prefer to speak of the rights of the nation to its own territory. Now the nation can be a sociological category, or an empirical one. To be the bearer of rights the nation has to reinvent itself as a political category through processes that

[1] Ivor Jennings, *The Approach to Self Government* (Cambridge: Cambridge University Press, 1956), 56.
[2] Edmund Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: W.W Norton, 1988).

include as well as exclude. It is precisely this aspect of defining who belongs and who does not to the nation that is troublesome.

Consider that Pakistan was created as a homeland for the Muslim community. Yet in the country a sub-sect of Islam, the one million strong Ahmadiyya's, have been categorised as non-Muslim, and as heretics, because they believe that Mirza Ghulam Ahmad born in the 14 Islamic Century, was a prophet and a messiah. The Ahmadi's are interpreters of the Koran and proselytizers of the faith, yet they have been persecuted and hounded in the homeland of South Asian Muslims. Interestingly the headquarters of the community are in Qadian in Indian Punjab.

Clearly the claim that nations have a right to their own state reproduces infinitely the minority problem. If the new state has to confront the issue of minority rights as Pakistan did when the Bengali speakers asked for a state of their own, then the establishment of a state based on national self-determination can be, but, a temporary resolution. The problems of one minority can be resolved by secession, but the problem of other minorities within the new state remains. Even if we grant that an endless cycle of secession can provide a resolution to the 'minority problem,' the multiplication of nations and demands for statehood is not likely to make the minority problem go away.

The problem is not only that secession causes political instability; the problem is that secession is often seen as a way of resolving conflict. Yet conflict, as we have seen, cannot be resolved by the setting up of a new state. Is it not then more important to establish and strengthen structures that can contain conflict by democratic means? For these and other reasons elaborated in this work, I have argued that secession cannot be justified on the presumption that nations are entitled to their own states.

My second response to Moore's argument has to be empirical. There is no disagreement with the view that the plebiscite in J and K should have been held. This was in keeping with the commitment made to the people of the state by the Governor General Lord Mountbatten. But in J and K the holding of the plebiscite to determine the popular will was pre-empted by a number of factors. Shortly thereafter the issue was internationalised and the first war between India and Pakistan broke out over Kashmir. In this context the Security Council laid down that certain conditions had to be fulfilled before the plebiscite could be held. The Pakistani army and infiltrators from Pakistan were to withdraw, followed by the withdrawal of the Indian army. It is only then that the Indian Government could supervise the holding of the plebiscite. Both these conditions remained unfulfilled. And the plebiscite became one of those 'might have been' of history. After the first Indian-Pakistan war and the internationalisation of the Kashmir issue, the Government of India no longer had sole control over the territory, which in any case was divided between two, and then three states. I see little point in castigating the Indian government on this count, though it certainly can be castigated on others.

III

There is a more fundamental problem at stake here. In principle it is not too late to hold a referendum on which way the people of the Indian part of the state of J and K want to go, reunification with the rest of the state (which requires negotiations with Pakistan and China) accession to Pakistan, independence, or remaining with India. However a great deal of water has flown under the bridges of the spectacular river of the

even more spectacular Valley of Kashmir, the Jhelum. In 1989 the uprising in the valley was centred on the demand for azadi/freedom, which can be interpreted either as independence or autonomy. The main grievances articulated by the people of Kashmir had to do with violations of the pact that granted regional autonomy, the closing of the political space, and corrupt electoral practices. By the mid-1990s the struggle had been hijacked by Islamist mercenaries from Afghanistan and Pakistan. They proceeded to bend the entire political agenda of an uprising against injustice to their own end, jehad.

The entry of third parties into a conflict situation, catapults to the forefront a question famously asked by Plutarch about the Ship of Theseus. If the wooden planks of an old ship, asked Plutarch, are replaced over a period of time in order to restore the ship, is the ship the same or a different one? Thomas Hobbes asked another question of the same phenomenon. If the original planks of the ship are not discarded but used to build another ship, which is the real ship of Theseus?

Witness the paradox. Concerned citizens of India have the moral obligation to express solidarity with fellow citizens who have been subjected to institutionalised injustice, and who wish to secede. Do we hold quite the same obligation when an entirely new set of agents come into the territory from outside the boundaries of the state, rework the litany of grievances, and assert a right to an independent state that will have room only for believers? We have to recollect that the Valley had been subjected to ethnic cleansing in 1990. By the mid-1990s, this process was fast-tracked, and not only Hindus and Sikhs but also moderate Muslims were either killed, or forced to leave the Valley that had been their home for generations. In the same period the leadership of the Kashmiri people withdrew from the armed struggle and opted for peaceful methods. The original ship of

Theseus has been remodelled; it is simply not the same ship. And if the original components of the ship are used to create a new ship, which is the ship of demands that merits wholesale defence? Who are the people who will decide their own fates in this case? Empirical evidence forestalls the taking of uncompromising positions on the proposition that the people should decide.

IV

We come to the question of minority rights, a question that Buchanan suggests is endemic to any problem of secession. The minority issue has caused in many philosophical circles a sense of permanent disquiet about secession, even if some philosophers like Harry Beran put forth the idea of recursive secessions. A number of liberal philosophers taking cognizance of minority rights have laid down elaborate procedures to ensure that the new state guarantees the rights of minorities. Does this position hold if the minorities have staked claim to a different political status, and if they have mobilised against secession?

The state of Jammu and Kashmir was an artificial creation a veritable patchwork of nationalities, linguistic and religious groups put together by the British. Many of the inhabitants of the territories that were attached to the Valley of Kashmir do not want to accede to Pakistan. Nor do they want independence from India. The Buddhist community in Ladakh had begun to assert a distinct identity as far back as the 1930s, and held that it preferred to be governed directly by the Government of India, or be amalgamated with Hindu majority regions in Jammu, or join East Punjab, or be reunited with Tibet. The Buddhists continue to reiterate the demand. In Jammu, the predominantly Hindu community has joined rabid right wing forces in demanding

autonomy from the valley, abandonment of regional autonomy, and firmer integration into India. The former residents of the Kashmir Valley, the exiled Hindu Kashmiri community, have begun to agitate for a separate homeland comprising the region to the East of the Valley and the North of the Jhelum. The nomads-the Gujjar community, which constitutes 9 per cent of the state's population, have been given benefits that follow the grant of Scheduled Tribe status by the Government of India. The Pahari or the hill people have demanded separation from the Valley, as well as a distinct political status. And the residents of the Chenab Valley have also out forth a claim for an Autonomous Hill Council. The issue of the status of the state of J and K has simply been pluralised. Even if the leadership commits to minority rights, groups other than the Sunni Muslim majority in the Valley do not subscribe to the project of secession. This has foregrounded the clash of rights problem.

V

Negotiating the conflict between rights is the precise challenge for anyone who sets out to study the complexities of the Kashmir problem. The two set of rights-the right to secede, and the right not to secede are incommensurate. And there is nothing in the vocabulary of rights that tells us how to resolve conflict between rights; there is nothing that tells us what to do in cases of clashes between rights. What is clear is that we, as democrats, cannot privilege one set of rights over another. In order to forestall the overriding of one right by another I suggested in the work that the rights of all parties should be upheld and protected, by reducing the scale of the good they aspire to. The best way of doing this is to accommodate the demand for azadi within a

loosely articulated federal system that grants considerable autonomy to regions, and also reduce the demand for closer integration into India.

A loose and de-centralised polity might serve to deflect secession, though of course we cannot be confident that regional autonomy will realise this hope. Whether decentralisation can or cannot prevent secession is an enduring debate, and the jury is still out on the issue. But we can try. The idea is not new or particularly innovative. It is there, embedded in the constitution in the form of Article 370 that grants special status to J and K. The sanctity of constitutional guarantees, which have been seriously infringed, has to be reinstated. There is no other option. This is the first step towards the restoration of peace in the state. India has to honour the structure of the federal system, as well as strengthen minority rights.

VI

This brings me to the point raised by Valentina Gentile, i.e., the shift from non-ideal to ideal theory. Gentile referring to the chapter on empirical and normative pluralism holds that theories of community sensitive liberal pluralism are problematic when we move to the real world. These theories do not enable us to negotiate ill-liberal views.

Let me restate the larger point before I negotiate this specific issue. I argue in the work that a political theory of secession cannot deal only with the contiguous and the direct implications of the act of separatism. Political philosophy is a normative enterprise, and we have to ask where exactly secession fits into the classical concerns of this genre of reflection and critical

engagement with pressing issues. It is important that we do so because otherwise we get bogged down in the here and the now. A sense of urgency and of immediacy tends to abstract political practices from long term perspectives as well as impede both moral and political judgement.

For this precise reason we should try to evaluate secession from the vantage point of the following question. What sort of a society provides an enabling political context for persons and groups? Do human beings realise themselves and their projects in a society that is bound together by shared meanings provided by one language, and one religion? Or do plural societies, or societies that contain within their territorial borders a number of communities, each of which subscribes to a distinctive conception of the good, provide such a context?

To synopsise a larger argument, plural societies make for enabling political contexts because they enable access to other perspectives and world views, because exposure to other cultural groups fosters the spirit of toleration, and because democratic dialogue demands, as an essential precondition, a plurality of views. In monochromatic societies, people inhabit closed off spaces, stripped of challenges or confrontations that can act as a touchstone for their beliefs. This still does not help us to address the question raised by Gentile: how do liberals deal with illiberal cultures. It is well known that liberal theories of toleration come unstuck at the precise moment when liberals are confronted with illiberal cultures. Why should we tolerate illiberal cultures which do not tolerate us, and which are heedless of the rights of their own members, particularly the rights of women? But then the concept of toleration acquires meaning only when we are confronted with the intolerable.

Let me suggest one possible resolution to this problem by referring to an argument that I had made in an earlier work on

secularism. [3]Why should we subscribe to the notion that each individual/group is free to practice his/her/its own religion, and that this right is equally held by all, *unless* we subscribe to the generic right to freedom and equality? And why should a society subscribe to these rights unless it subscribes to the value of democracy?

Secularism as understood in India as equality of religions is not an autonomous concept. In order to unravel the meaning of secularism, we try to unravel the implications of the foundational concepts that give it [secularism] meaning—equality, freedom, and democracy. The antecedent moral principle that informs the practice of secularism in India, as equality among religions, is that of equality.

But if we begin to look closely at equality we find that it is by no means a self-evident concept. Whereas in a purely formal sense equality means that each should be treated equally, this interpretation ignores the fact that the constituency for equality is supremely unequal. If we apply formal equality in an unequal society we land up reproducing inequality, which is something that the egalitarians have been warning against.

There is only one way out of reproducing inequality through equal treatment, and that is to treat different groups differently or according to their specific circumstances. In this sense equality of religion would mean protecting those groups whose identities and religious beliefs are under constant threat of being subordinated to the majority. Of course this implies that we add to the original egalitarian agenda, which is closely involved with the notion of redistribution, the idea of recognition. It also means that we think out in detail the relationship between group rights and individual

[3] Neera Chandhoke, *Beyond Secularism: The Rights of Religious Minorities* (Delhi: Oxford University Press, 1999).

rights. Individuals need access to their cultures/religious affiliations because this gives them their basic system of meaning. But groups and their rights are important only insofar as they are important for individuals. Therefore, individual rights cannot be subordinated to group rights. This is one way we can begin to address illiberal cultures. If these cultures or religious groups demand the right to equality, they must be prepared to treat their own members equally.

VII

The other substantive question that Moore raises has to do with the way I conceptualise democracy. Whereas she conceives of democracy as a way of guaranteeing equal political voice by the governed about the way they are governed, and who governs them, I conceptualise democracy in a looser way. In my definition democracy becomes coextensive with good things, which should normally be separate from democracy. Why does Chandhoke asks Moore, assimilate social and economic justice, redistribution, and political democracy which are distinct values? There are different values to legitimize a political order, there are principles of justice including principles to ensure the just distribution of benefits and burdens of cooperation, principles of democracy or equal political voice in the institutions of government, and principles of self-determination concerned with group or collective identities and aspirations of people in their collective identity to have control over collective conditions of their existence.

I think Moore and I do not differ greatly about the way we conceptualise what a good political society looks like. She would rather see different values emanating from different principles. I on the other hand see these values as intrinsic to the basic precept

of democracy for one basic reason. I may be wrong but I can think of few works that have worked out the relationship between democracy and justice in a systematic manner. Justice is not after all the prerogative of democracy, every authoritarian ruler in this world seeks to legitimise his rulings by reference to this or that authoritative text which establishes what justice is. So what is the relation between democracy and justice?

Suppose we were to work through the principles of democracy suggested by Moore, that of equal political voice. In order for people to have equal political voice, surely the state or some other institution should be charged with the responsibility of ensuring that background inequalities are addressed and neutralised to some extent for two reasons. Social equality and political equality are not siblings or first cousins, they are constitutive of democracy. Moreover, how can we escape the realisation that social inequality inhibits greatly equality of voice in the public sphere? Shapiro points out that "no conception of democracy as geared towards reducing domination can ignore the relations between the political system and the distribution of income and wealth."[4] At the same time he cautions that there is no demonstrable relationship between expanding the democratic franchise and downward redistribution, and that universal franchise democracies have coexisted with regressive redistribution. This problem might be circumvented when we draw on the resources of democratic equality to conceptualise justice-that each individual has the right to share equally in the benefits and in the benefits of her society.

The main problem with privileging different values as the outcome of different principles is that in the process concepts tend to stand in for each other, and diminish the significance of

[4] Ian Shapiro, *The State of Democratic Theory* (Princeton: Princeton University Press, 2003) 105.

the concept they stand in for. One example that readily comes to mind is the contemporary debate on poverty. Consider how easily in a number of theories, redistributive justice has come to stand in for equality. But equality is not in the first instance about the redistribution of material and symbolic resources. It is about the standing that people hold *relative* to each other, and about the way they are *enabled* to participate equally in the multiple transactions of society. Redistributive justice is an essential precondition of equal political voice; it is not a synonym of equality. When philosophers focus on redistributive justice they often do so at the expense of equal moral worth. This is as true of the school of luck egalitarians as it is of the global justice debate. The emphasis has shifted from equality to the principles that should govern redistributive justice in the first case, and from equality to moral obligations of citizens of western countries in the latter. In both cases the global poor are dished out what appears as compassion.[5]

VIII

One minor point might be in order. In his response to the argument in *Contested Secession*s, Buchanan suggests that I liken secession to divorce. I am afraid he misreads my argument. *Contested Secessions* concludes with the suggestion that the right of secession has to be taken seriously both by separatists and its defenders, and justified rigorously. Though in much of the

[5] Neera Chandhoke, "Equality *for* What? Or the troublesome relation Between Egalitarianism and Respect," in Gopal Guru (ed.), *Humiliation: Claims and Contexts* (New Delhi: Oxford University Press, 2009), 140-162; "Why Should People Not Be Poor?" in Thomas Pogge (ed.), *Freedom from Poverty as a Human Right* (Paris: UNESCO, series editor Pierre Sane); "How Much is Enough Mr Thomas? How Much Will Ever be Enough?", in Alison Jagger (ed.), *Pogge and his Critics* (Cambridge: Polity Press, 2010), 66-83.

literature acts of secession are likened to divorce; the divorce analogy seems to be a rank misfit. Howsoever painful a process may be divorce; howsoever badly the act may scar the consciousness of erstwhile partners, it still does not involve the same scale of dislocations, violence, and major infringements of human rights as secession does. The right of secession can best be likened to the right of euthanasia, conceived of as a contingent right in precisely the same way as euthanasia is a qualified right. The précis of the book, which is carried in this Symposium, expands on this point more.

What is important is that secession can be forestalled by breaking the mould of the nation state, which has set and thereby truncated political imaginations as Buchanan suggests, modifying hysteria on national integration and unity, and decentralising power to grant regional autonomy. Within the region, minorities should be assured of constitutional protections against regional majorities. The suggestion is not new, but perhaps worth reiterating. The reframing of the issue as a challenge that democratic politics in India must take up and engage with, is meant to establish exactly the point made by Buchanan that democracies have resources that they can use to downplay the conflict and find a third way between secession and integration into the Republic of India.

IX

Finally on another lighter note. Margaret Moore in her incisive response to *Contested Secessions* concludes that though I offer useful suggestions both for a changed democratic order in India, and for a more modest idea of self-determination, these are not placed within a philosophical treatment of territorial rights.

Moore's response begins with the comment that *Contested Secessions* only partially delivers on its promise because the argument does not move out of the framework set by the original literature on secession; that of framing the conflict in terms of rights and consequences of asserting various rights. This lack she finds deplorable. In short, she thinks that I should have adopted a completely different perspective while studying secession.

The irony is that in the paragraph immediately preceding the conclusion in her response, Moore criticises my proposal that self-determination should be thought of as a constitutive aspect of democracy. I believe, according to Moore, that Kashmiri's instead of thinking of self-determination should just adopt another view. In a 'tongue in cheek' comment in the last sentence of the paragraph, Margaret Moore observes that many problems could be solved if people think in ways other than they do.

In two consecutive paragraphs the argument I make is criticized on the ground that I urge another frame of thought on the people of the valley. But I am also criticized for not casting my argument in another conceptual frame notably that of territorial rights. If I am guilty of imposing a view on Kashmiri's that they should think about democracy more and about self-determination less, I am also held guilty of not adopting the theoretical framework provided by theories of territorial rights. I should have engaged with this literature. Because I did not, this, according to Moore, limits the usefulness of my analysis.

But then all of us, including Moore, tend to view issues through our own sets of conceptual lens. We might have good reasons for doing so. This is perhaps not of significance. The moot point is not that other scholars should not think the way they do, but to accept that other points of view might worthy of being engaged with. On this front I have no quarrel with Moore.

To conclude, in situations such as Kashmir we confront an extremely difficult problem. The right of secession can be prima facie justified. At the same time, the right can prove weak when balanced against considerations that have a bearing on the right. What can a liberal theorist do in these circumstances? Defend the right irrespective of the fact that the original planks of the ship of Theseus have been replaced and it is no longer the same ship? Oppose it? Or strive toward second level mediation. The original injustice that was the cause of secession has still not been remedied, but the added complication is the one posed by competing rights? The problem is complicated and no easy solutions are on offer. And in the meantime references to Kashmir continue to overheat the political atmosphere. That is the story of secessionism in Kashmir.

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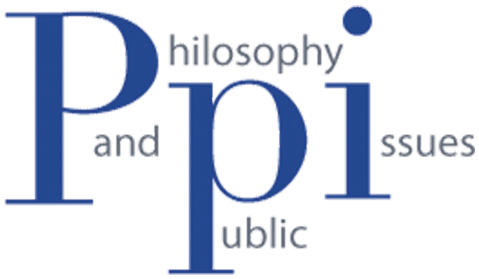
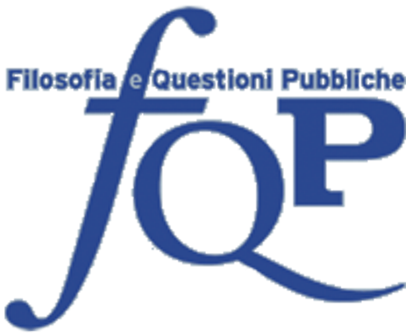
SYMPOSIUM

TERRITORY, BELONGING

SECESSION, SELF-DETERMINATION AND TERRITORIAL RIGHTS

IN THE AGE OF IDENTITY POLITICS





TURNING SELF-DETERMINATION ON ITS HEAD

BY DIMITRIOS MOLOS

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Turning Self-Determination on Its Head

Dimitrios Molos

Abstract. With its intimate association with important moral values and political ideals, the principle of self-determination has served as a beacon of hope for the cultural survival of a wide array of minority communities living under foreign rule. Yet, the lack of clarity surrounding the nature, content and scope of this right in international law has resulted in much resistance from sovereign states concerned with maintaining their sovereignty, territorial integrity and political unity in the face of what are often viewed as subversive challenges to their political and legal authority. The general approach to self-determination has been to try to identify the appropriate type of right-holder, and then to allow each group of that type to determine its political status. I propose to turn this approach on its head by beginning with various aspects of the determination component, and then identifying the conditions of groups to be entitled to specific measures of self-determination. My proposal avoids the difficulties of social ontology and the individuation of communities that has long plagued the right to self-determination. On the basis of my analysis, I conclude with four suggestions for a feasible approach to the right to self-determination in international law.

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National aspirations must be respected;
peoples may now be dominated and
governed only by their own consent.
Self-determination is not a mere phrase.
It is an imperative principle of action,
which statesmen will henceforth ignore at their peril.[1]
US President, Woodrow Wilson

The phrase is simply loaded with dynamite.
It will raise hopes which can never be realized.
It will, I fear, cost thousands of lives…
What a calamity that the phrase was ever uttered!
What misery it will cause![2]
US Secretary of State, Robert Lansing

I

Introduction

With its intimate association with important moral values and political ideals, the principle of self-determination has long served as a beacon of hope for a wide array of minority communities living under foreign rule. It is a key instrument in the United Nations' mission to establish global peace, stability and justice, as well as a potent ideal with the ability to garner widespread and enthusiastic support from across the political spectrum, and to mobilise sizeable movements for political change. Yet, the lack of clarity surrounding its nature, content and scope in international law has resulted in much resistance from sovereign states, which tend to covet their sovereignty, territorial integrity and political unity against what they regard as subversive challenges to their legal authority. Given this dynamic, it is not surprising that

[1] Woodrow Wilson, "War Aims of Germany and Austria (Feb 11, 1918)," in *The Public Papers of Woodrow Wilson: War and Peace*, eds. Ray Stannard Baker & William E Dodd (New York: Harper & Brothers, 1927), 182.
[2] Robert Lansing, *The Peace Negotiations: A Personal Narrative* (Boston: Houghton Mifflin Company, 1921), 97-98.

struggles for self-determination tend to be passionate and all-encompassing, or that they often have the potential to destabilise not only individual states, but entire regions – in Lansing's words, self-determination is 'simply loaded with dynamite'. The upshot is we are confronted with the task of honouring the right to self-determination without causing massive domestic, regional and international explosions with their concomitant devastation on human lives. At its most basic, this is the essence of the problem of self-determination in international law, and the subject of this paper.

The general approach to self-determination has been to identify the proper right-holder, and then to allow right-holding groups to determine their political status. The problem of the self component is an old and familiar difficulty, and international lawmakers have struggled with it on numerous occasions. Yet, this problem's full magnitude has not been properly appreciated, or so I will argue, and, consequently, international lawmakers continue to repeat past mistakes. The problem is that social reality is too complex for the uncontroversial individuation of nations, peoples or some other similar community, and this difficulty raises questions about the right to self-determination's ability to serve as the organizing principle of the international legal order. To take the dynamite out of self-determination, I propose that we turn it on its head.

This paper is divided into three sections. In the first section, I review the self-determination principle to highlight its relationship with nationalism, democracy and sovereignty, as well as its moral legitimacy, its ability to incite serious controversy, and its explosive implications.

In the second section, I analyze the role of self-determination in international law prior to and immediately after the First World War, during the drafting of the United Nations' Charter (1945),

during European decolonisation, and leading up to the United Nations Declaration on the Rights of Indigenous Peoples (2007). Until the UNDRIP, there was a resounding consensus that the right to self-determination was confined to 'abnormal' situations where groups were not located within the political boundaries of a sovereign state. Now, there is significant uncertainty about its content because it is unclear whether there has been an expansion in the notion of 'abnormal' situations, or whether international law recognises a role for self-determination in 'normal' situations too.

In the third section, I discuss the exciting recent developments in indigenous rights in international law, and I relate the right to self-determination of indigenous peoples to the history of the right in international law and the problem of the self component. While it is still too early to assess the UNDRIP's impact, it is quite clear that the old problem of identifying the proper right-holder has resurfaced, and it has resurfaced in a form that threatens to erase some of the recent progress in indigenous rights. Based on this analysis, I conclude with four suggestions for a feasible approach to the right to self-determination in international law, a proposal that would effectively turn self-determination on its head.

II

The Political Principle of Self-Determination

The literature on self-determination distinguishes between the concept's constituent parts: (i) the *self component* identifies the right-holder, whereas (ii) the *determination component* specifies the control, power, or autonomy exercised by this entity over its

affairs. Each component may be expanded or contracted for different purposes. In its broadest form, the principle of self-determination holds that *any* collection of individuals who identify themselves as a group is entitled to *any* level of autonomy. This formulation is unlikely to garner much popular or scholarly support, so the self component tends to be restricted to a specific type of group, typically a nation or people. This endeavour has yielded distinct 'nationalist' and 'democratic' versions of self-determination.

For many scholars, self-determination was a natural corollary of eighteenth-century European nationalism. Broadly, nationalism is the view that there ought to be some sort of congruence between the national and political, and the nationalist ideal advocates 'a state for each nation, and a nation for each state'.[3] There is a related, but distinct, interpretation from the democratic tradition. This version holds that government should be democratic in the sense captured by US President Abraham Lincoln in his Gettysburg Address: "government of the people, by the people, for the people."[4] Quite often, the democratic and nationalist versions are conflated due to the familiar ambiguities of the terms 'nation' and 'people'. The problem is that, in ordinary usage (and too often in the academic literature and legal documents as well), these terms are subject to both cultural and political interpretations, such that a 'nation' or 'people' could refer to either a cultural or a political group. To avoid the confusion generated by this conflation, it is prudent to situate the term 'nation' within the nationalist tradition, and the term 'people' within the democratic tradition.

[3] Ernest Gellner, *Nations and Nationalism* (Oxford: Basil Blackwell, 1983), 1.
[4] Abraham Lincoln, *The Gettysburg Address (November 19, 1863)* (Minneapolis: Compass Point Books, 2005), 8.

This semantic point about 'nations' and 'peoples' allows us to distinguish between two distinct self-determination claims. On the one hand, the nationalist view holds that the nation should govern itself because there is something objectionable about foreign rule, but it does not stipulate that the nation should be governed *democratically*. The nationalist ideal of congruence between the national and political seeks to adjust political boundaries to avoid foreign rule or colonisation, but it does not necessarily prescribe democratic governance. On the other hand, the democratic view prescribes democratic rule within a territorially-defined political community without any regard for the citizenry's cultural traits. On this view, the 'people' is synonymous with the 'citizenry', and self-determination amounts to democratic self-government.

The nationalist and democratic views of self-determination are not necessarily mutually inconsistent, and they often form a coherent coupling, but there is the possibility for tension between them. The democratic view functions as a legitimizing principle for the sovereign state system. It holds that a politically-defined people should be free to govern itself without external interference, and political independence, territorial integrity and legal sovereignty are considered preconditions for this freedom and its exercise. But, as Martti Koskenniemi notes, "there is another sense of national self-determination which far from supporting the formal structures of statehood provides a challenge to them."[5] The nationalist view requires that nations have (at least) whatever powers are required to protect their survival and promote their culture and identity, even if secession is required. In theory, at least, these two views of self-

[5] Martti Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice," *International and Comparative Law Quarterly* 43, no. 2 (1994): 246.

determination could coexist harmoniously within political arrangements offering internal autonomy over cultural affairs to nations within democratic sovereign states, but too often in practice, the democratic view is used to legitimise democratic states as political communities, while the nationalist view encourages secessionist claims to political independence. This is a paradoxical feature of self-determination: it is a principle of moral legitimacy for sovereign states, while concurrently subverting their legitimacy and exerting secessionist pressure on them.[6]

Yet, the international community has never accepted the self-determination principle as the sole, or even primary, factor in the assessment of claims to statehood, secession or independence.[7] Nonetheless, Hurst Hannum speculates, "no contemporary norm of international law has been so vigorously promoted or widely accepted as the right of all peoples to self-determination."[8] Another paradoxical feature of the self-determination principle is that, when expressed as an abstract ideal, it tends to garner

[6] The interplay of these two views of self-determination is a constant feature of the politics around self-determination in international law.

[7] Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990), 7.

[8] Ibid., 27. The widespread and enthusiastic support for self-determination among liberals, libertarians, democrats, communitarians, socialists, feminists and nationalists is not difficult to understand. The ideal of self-determination is associated with the idea of government of, by and for the people, and important moral values, like liberty, freedom, autonomy, agency, democracy, equality, subsidiarity and recognition. According to Isaiah Berlin, given the choice of being ruled by a co-national dictator or a "cautious, just, gentle, well-meaning administrator from outside", people would rather be ruled by a dictator from their midst. Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 157-158. For Jan Klabbers, the explanation is straightforward: "Being governed from the outside would imply being less than fully free and, therewith, being less than fully human". Jan Klabbers, "The Right to be Taken Seriously: Self-Determination in International Law," *Human Rights Quarterly* 28 (2006): 187.

instant, widespread and enthusiastic support; however, when transformed into a concrete policy proposal or legal right under international law, it tends to rouse fervent opposition and serious controversy. If self-determination is to function as a concrete political principle or legal right in those situations where it is most needed, then it is necessary for scholars of international law and political theory to explicate sensible connections between the abstract ideal and their proposals. It is fair to say, in my estimation, that the international community has been moving slowly toward such a balance.

Yet, it is also fair to say that, despite many noteworthy revisions to the nature and content of self-determination in international law over the last century, self-determination has remained loaded with dynamite. It is not difficult to see why this is the case. On the one hand, the ideal of self-determination has been criticised for being impossible to actualise because human communities are often so comingled as to preclude their separation into homogeneous, territorially-defined political units. Former UN Secretary-General Boutros Boutros-Ghali warned that "if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security, and well-being for all would become even more difficult to achieve".[9] Of course, even this warning presupposes a reasonably clear understanding of the self component, and there remains much controversy over what type of community should be self-determining, how to distinguish this type of community from similar communities that lack this right, and how to individuate particular communities of this type under conditions of disagreement and contestation.

[9] Boutros Boutros-Ghali, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, Report of the Secretary-General, UN Doc A/47/277-S/24111 (1992), 5.

These are familiar problems, and they do not disappear, even if we assume that only nations have a right to self-determination. After all, we are still left with the question of what characteristics or properties distinguish nations from other similar communities without self-determination, and how to individuate one nation from its neighbours. It is my contention that these are intractable problems for the right to self-determination, for reasons that will be explained below. For now, it is sufficient to note that self-determination has been criticised for being an impossible ideal, and for recklessly establishing expectations that cannot be satisfied.

On the other hand, and this point was expressed well by Lansing in the opening quote, self-determination is loaded with dynamite because it forms the basis of destabilizing movements; that is, the quest for self-determination itself may be pernicious as it wreaks instability and disorder. Self-determination may still be a beacon of hope for colonised peoples, but Klabbers notes that it becomes subversive when it favours "a breakup of states over other modes of settlement and coexistence."[10] Self-determination does not necessarily entail independent statehood, since it is consistent with various forms of internal political autonomy, but Klabbers is gesturing toward a general tendency toward divisive political conflict. To sum up all too briefly what is a complicated and diverse process, it is often the case that minority communities have grievances directed toward state governments. The logic of self-determination as a principle of political legitimacy encourages the state to present itself as a nation-state by exaggerating the unity and cultural similarity of its citizens, thereby further neglecting and marginalizing minority communities already under assimilationist pressure. The state claims a right to self-determination within its jurisdiction, while

[10] Klabbers, "Self-Determination in International Law", 187.

the minority community claims a right to self-determination over its own affairs. State representatives insist on universal policies treating all citizens equally, while representatives of the minority community seek 'special' accommodations or internal political autonomy or even secession also in the name of equality. Given the association of self-determination with liberty, freedom, autonomy, agency, democracy, equality, subsidiarity and recognition, as well as the dehumanizing aspect of heteronomous governance, it is hardly surprising that ignored, unaddressed or disregarded grievances from minority communities tend to escalate into significant struggles for self-determination.

When we factor into the equation that most struggles between states and minority communities have an international component, self-determination appears to be loaded with enough dynamite to destabilise not only individual states, but also entire regions. This international component may be due to a minority community in one state forming a majority in a neighbouring state (e.g., the German-speaking population in South Tyrol), or a minority community being dispersed within more than one state (e.g., the Kurds in Turkey, Syria, Iran and Iraq). Hannum notes, "[i]f ethnic or communal violence increases, geopolitical concerns often dictate the involvement of outside actors in the conflict, and central governments frequently allege (often correctly) that foreign governments encourage separatist conflicts."[11] This international dimension to struggles for self-determination makes the prospect of secession even more inviting, and tend to complicate efforts to reach a reasonable resolution.

There is a pressing need for scholars of international law to clarify the nature and content of the right to self-determination, even though "[they] need not be reminded of [its] revolutionary

[11] Hannum, *Autonomy, Sovereignty, and Self-Determination,* 4-5.

and unclear character."[12] There are only a few things about self-determination upon which scholars agree with little controversy. One is that much confusion surrounds this right in international law, political theory and practice, and ordinary discourse; another is that it is a matter of the utmost importance that we work through this confusion. At present and for much of its history, Lansing's prophetic words have held true: the right to self-determination has indeed raised hopes within minority communities which would not be realised, and much misery has been wrought in its name. With the importance of the moral values and political ideals associated with self-determination on the one hand, and the imperative to avoid destabilizing violent conflict on the other, we turn in the next section to the history of self-determination in international law to determine its nature and content throughout its evolution, and to assess the successes and failures of the international community in working with a potentially explosive principle.

III

A Brief History of Self-Determination in International Law

"Perhaps no contemporary norm of international law has been so vigorously promoted or widely accepted as the right of all peoples to self-determination. Yet the meaning and content of that right remain as vague and imprecise as when they were enunciated by President Woodrow Wilson and others at Versailles."[13] This section reviews the right to self-determination in international law during four significant periods: (i) the Paris

[12] Koskenniemi, "National Self-Determination Today," 241.
[13] Hannum, *Autonomy, Sovereignty, and Self-Determination*, 27.

Peace Conference after the First World War (circa 1919), (ii) the drafting of the United Nations Charter (1945), (iii) the European decolonisation project (circa 1960s), and (iv) the post-decolonisation period (circa 1970-2006). In brief, this history reveals a gradual evolution of its status from political principle to legal right, a definite preference for prioritizing the self over the determination component, and a slow, but inconsistent, expansion of the self component.

The ideal of self-determination "has long been one of which poets have sung and for which patriots have been ready to lay down their lives",[14] but in the nineteenth century, the success or failure of claims to self-determination depended on the external support of the Great Powers.[15] Hannum explains, "the winners and losers were determined more by the political calculations and perceived needs of the Great Powers than on the basis of which peoples had the strongest claims to self-determination."[16] Self-determination may have informed the political rhetoric of the time, but it had no legal standing.

Yet, at the Paris Peace Conference after the First World War, the self-determination principle emerged as an obvious instrument for the re-division of Europe after the collapse of the Austrian, German, Russian and Ottoman empires; however, it was applied only within the narrow context of defeated empires, and other borders were not adjusted to eliminate national minorities. While it would not be unfair to question the motivations of the victorious states' representatives, even with suitably honourable intentions, they would have encountered the problem of ascertaining which communities demanding self-determination were entitled to it and what criteria they satisfied to

[14] *Ibid.*, citing John P Humphrey.
[15] *Ibid.*
[16] *Ibid.*, 28.

be so entitled. Koskenniemi believes that, because it was not possible for this problem to be tackled in a consistent way, "[o]ther principles – sovereign equality, territorial integrity, sanctity of treaties – as well as economic and strategic considerations came to dictate the conditions and modalitities for the application of self-determination".[17] Thus, the problem of the self component had reared its ugly head.

Like in the nineteenth century, "self-determination in 1919 had little to do with the demands of the peoples concerned, unless those demands were consistent with the geopolitical and strategic interests of the Great Powers".[18] Valerie Epps points out the irony of the use of the phrase 'self-determination' during "a time when victorious states expected to, and certainly did, redistribute conquered lands after warfare with no regard for the wishes of the residents".[19] Nonetheless, at this time, the concept did gain some traction, but not enough for self-determination to be considered even a legal principle of international law.

This point is illustrated in two League of Nations reports on the Aaland Islands. In the first report, the primary issue concerned the jurisdiction of international law to decide on the possibility of the Aaland Islands seceding from Finland to join Sweden.[20] The International Committee of Jurists considered the nature and content of self-determination, as well as a significant exception to its application: "Although the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War, it must be

[17] Koskenniemi, "National Self-Determination Today," 253.

[18] *Ibid*.; see also Hannum, *Autonomy, Sovereignty, and Self-Determination*, 28.

[19] Valerie Epps, "Evolving Concepts of Self-Determination and Autonomy in International Law: The Legal Status of Tibet," *Journal of East Asia and International Law* 1 (2008): 219.

[20] *The Aaland Islands Question (On Jurisdiction)*, Report of International Committee of Jurists, LNOJ, Sp Supp No 3 (October 1920).

pointed out that there is no mention of it in the covenant of the League of Nations."[21] Ultimately, it concluded that "Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part."[22] In a second report, notwithstanding its recognition that the vast majority of the Aaland Islands population would opt for union with Sweden, the Commission of Rapporteurs re-affirmed the general conclusion that there was no right to self-determination in international law, and that such a right would be a threat to the sovereign state system and international peace.[23]

Yet, there was a significant exception based on the distinction between 'normal' and 'abnormal' situations. For international law, the normal situation involves stable sovereign states cooperating as members of the international community. In abnormal situations, there is a deficiency of territorial sovereignty "because the State is not yet fully formed or because it is undergoing transformation or dissolution".[24] Under abnormal conditions, where a political entity lacks sufficient sovereignty, the principle of self-determination may be used – in conjunction with

[21] *Ibid*., 5.
[22] *Ibid.*
[23] "Is it possible to admit as an absolute rule that a minority of the population of a State, which is definitely constituted and perfectly capable of fulfilling its duties as such, has the right of separating itself from her in order to be incorporated in another State or to declare its independence? The answer can only be in the negative. To concede to minorities, either of language or religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity." *The Aaland Islands Question (On the Merits)*, Report by the Commission of Rapporteurs, LN Council Doc B7/21/68/106 (16 April 1921), 4.
[24] *Aaland Islands Question (On Jurisdiction)*, 5-6 (my italics).

geographic, economic, security and other similar considerations – to facilitate its transition to a normal sovereign state. Even though these reports affirm that, at that time, there was no right of self-determination in international law, they do identify a role for self-determination in the transitional process of establishing an international community of sovereign states.

It is not surprising that the right to self-determination was not initially recognised as a fundamental right of the United Nations regime. Whatever its political significance, there was a consensus among legal scholars that it was not a rule of international law.[25] The UN Charter does mention the 'principle' of self-determination twice, however. Articles 1(2) and 55 outline the UN's purpose of developing "friendly relations among nations based on the principle of equal rights and self-determination of peoples". While the term 'nations' is somewhat unclear here, there is a consensus that it designates states, since international relations are normally conducted between states, and since the general view in 1945 was that only states had rights under international law.[26]

In her thorough and persuasive analysis, Helen Quane explains that, in articles 1(2) and 55, on the basis of context, purposes and ordinary language, there are three possible interpretations of the term 'peoples' as sovereign states, Non-Self-Governing Territories, or Trust Territories.[27] Non-Self-Governing and Trust Territories were administered by other states. To use the terminology of the League of Nations reports on the Aaland Islands Question, these territories lacked a full measure of

[25] Hannum, *Autonomy, Sovereignty, and Self-Determination*, 33.
[26] Helen Quane, "The United Nations and the Evolving Right to Self-Determination," *International and Comparative Law Quarterly* 47, no. 3 (1998): 539-540.
[27] *Ibid*., 541.

sovereignty as political units in an abnormal situation, but they were thought to be transitioning from their abnormal condition to sovereign statehood. Given these options, Quane concludes that, in 1945, the self-determination principle applied to all three categories, but not to 'peoples' taken in its ordinary (nationalist) meaning as groups characterised "by a common language, religion or ethnicity."[28] When the principle applied to states, it was logically equivalent to the sovereign equality of states principle, and it was possible to speak of the legal right of sovereign states to self-determination as a right to non-interference with their domestic affairs.[29] When applied to Non-Self-Governing or Trust Territories, the principle signified an entitlement to independence from foreign administration, but in this context, there was no legal right to self-determination – only an aspirational legal principle to be pursued with the aim of eventually establishing self-governing states.[30] In short, the UN Charter includes a legal right to self-determination for states in the sense of sovereign equality of states and the right to be free from foreign interference, but no similar right for peoples as sub-state minority communities.

In the context of decolonisation, the vague self-determination principle developed into a 'legal right under international law'. In 1960, this evolution culminated in Resolution 1514 (XV).[31] In the preamble, the General Assembly stresses its awareness of "the passionate yearning for freedom in all dependent peoples" and "the increasing conflicts resulting from the denial of or impediments in the way of the freedom of such peoples, which constitute a serious threat to world peace". Article 1 outlines the

[28] *Ibid*., 539-540.
[29] *Ibid*., 547.
[30] *Ibid.*
[31] *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), 15 UNGAOR, Supp No 16, UN Doc A/4684 (1960).

legal motivation: "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to […] world peace and co-operation." Thus, the General Assembly proclaims "the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations". To this end, it declares in article 2, "*all peoples* have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[32]

Nonetheless, not 'all peoples' had a right to self-determination. Resolution 1514 restricted the self component within the scope of the decolonisation project to only dependent peoples in former European colonies "without further regard for ethnicity, language, religion, or other objective characteristics of such colonised peoples (apart from the fact of colonisation itself)".[33] There is much evidence for this narrow interpretation of 'peoples'. It can be found in (i) the overall context of decolonisation, (ii) the title and purpose of the Resolution, (iii) the overwhelming number of speeches by state representatives directed solely to the plight of colonial peoples,[34] and (iv) subsequent legal practice.[35] There is overwhelming evidence that Resolution 1514 extends the right to self-determination to colonial peoples, but not to internal sub-state communities.[36]

[32] *Ibid*., (my italics).
[33] Hannum, *Autonomy, Sovereignty, and Self-Determination*, 36.
[34] Quane, "United Nations and Self-Determination," 548.
[35] *Ibid*., 548-552.
[36] If the General Assembly assumed that the right to self-determination had already been exercised by peoples organised into sovereign states, also known as normal conditions, then the extension of the self component to include colonial peoples would be a matter of bringing abnormal situations to an end.

Thus, the apparent extension of the right to self-determination to 'all peoples' should not be taken at face value.

More evidence for this territorial interpretation of 'peoples' is available through the *uti possidetis* principle – a Roman legal concept literally meaning 'as you did possess, so you shall possess'. Quane explains, the trend during the decolonisation period was for the right to self-determination to be applied to "the entire inhabitants of a colonial territory" without regard to "ethnic origin, language or religion."[37] "This paradoxical principle […] simultaneously casts off colonialism but insists on […] one of the most powerful manifestations of colonial power, namely the determination of borders."[38] Accordingly, colonial peoples were defined territorially as the entire population of a European colony rather than by their cultural, national, ethnic, linguistic or other traits.

Thus, Koskenniemi explains, the General Assembly contained the right to self-determination's "potentially explosive nature by applying it principally to the relationships between old European empires and their over-seas colonies."[39] Moreover, it guarded against an expansion of the self component by explicitly affirming that "any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations".[40] Again, this provision lends weight to the interpretation of 'peoples' as territorially-defined without regard to nationality, ethnicity, language, religion or other traits. Also, the General Assembly added the usual prohibition against intervention in the internal affairs of states, and a re-affirmation

[37] Quane, "United Nations and Self-Determination," 551-552.
[38] Epps, "Self-Determination and Autonomy in International Law," 221.
[39] Koskenniemi, "National Self-Determination Today," 241.
[40] *Resolution 1514*, art 6.

of the sovereign rights, territorial integrity and political independence of all states.[41]

In 1970, in Resolution 2625 (XXV), the General Assembly addressed the definition of 'people' and the larger issue of whether the right to self-determination existed outside the narrow context of decolonisation.[42] There was no change in its interpretation.[43] In accordance with 'the salt water thesis' or 'blue water requirement', only colonised people in territories outside the European coloniser state have a right to self-determination. There is no right to self-determination for sub-state communities, since the principle of sovereign equality of states guarantees that "the territorial integrity and political independence of the State are inviolable".

Interpretations of the self-determination principle have tended to centre on the self component. The governing assumption has been that once the self component is explicated, the determination component may be identified straightforwardly. In the pre-UN era, self-determination took different forms ranging from secession to direct international protection. In the post-1945 period, the usual form of self-determination has been political independence, but independence was not a necessary result. Resolution 2625 clarifies the determination component's scope: "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 a people* constitute modes of implementing the right of self-determination

[41] *Ibid*., art 7.
[42] *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charted of the United Nations*, GA Res 2625 (XXV), Annex, 25 UNGAOR, Supp No 28, UN Doc A/5217 (1970).
[43] Hannum, *Autonomy, Sovereignty, and Self-Determination*, 34.

by that people."[44] This wide scope was not used by any former colony to establish an unusual inter- or intra-state political arrangement.

This flexibility in the determination component may appear a welcome development, but it may serve to narrow the scope of the self component further. If any self-determining group may emerge unilaterally into any 'freely determined' political status, then undue pressure is placed on the self component as states try to reduce its scope in order to prevent sub-state communities from seceding. According to Michla Pomerance, "the Wilsonian dilemmas have persisted. Except for the most obvious cases of "decolonization", objective criteria have not been developed or applied for preferring one claim over another or for delimiting which population belongs to which territory."[45] Yet, as Quane observes, "the right was only ever intended to apply to colonial peoples. Attempts to overextend the principle simply generate confusion and possibly create or reinforce unrealistic expectations among groups of non-colonial peoples whose claims to self-determination will not be recognised by the United Nations."[46] While the General Assembly appeared to be playing with dynamite with its confused and confusing rhetoric of a right to self-determination for *all peoples*, the decolonisation period marked a significant development in the evolution of self-determination as a legal right for colonial peoples.

"This process of decolonization was assumed to be concluded," according to Siegfried Wiessner, "in the mid-1970s after the demise of Franco and Salazar, the dictators of the last European colonial powers. The Western Sahara and East Timor

[44] *Ibid*., (my italics).
[45] Michla Pomerance, *Self-Determination in Law and Practice* (The Hague: Martinus Nijhoff, 1982), 39.
[46] Quane, "United Nations and Self-Determination," 558.

controversies were just part of the cleanup of this relatively orderly process".[47] In the post-decolonisation era, however, there was a continuing debate among international lawyers about the existence of a right to self-determination in customary international law, and its potential applicability beyond European colonial settings.[48]

Although General Assembly resolutions are not legally binding, Hannum is adamant that the unanimous adoption of resolutions proclaiming the right to self-determination reveals that it is a right in international law.[49] Yet, Quane disagrees because there were nine abstentions from the vote, and "[t]he abstention of all the colonial powers and their dissent on key provisions undermine suggestions that the resolution proclaimed rules of general international law".[50] She concludes, I think correctly, "the resolution was not legally binding at the time of its adoption but it did contribute to the subsequent development of international law in this area".[51]

There is widespread agreement in the academic literature that, by the early 1970s, there was a legal right to self-determination for states and for colonial peoples.[52] This agreement was reached even though there were plenty of instances where former European colonies had been denied a right to self-determination and left as "fair prey for neighbouring, non-European states with real or purported historical claims to the territories in question".[53]

[47] Siegfried Wiessner, "Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples," *Vanderbilt Journal of Transnational Law* 41 (2008): 1151.
[48] See Hannum, *Autonomy, Sovereignty, and Self-Determination*, 44.
[49] *Ibid*., 45.
[50] Quane, "United Nations and Self-Determination," 551.
[51] *Ibid.*
[52] *Ibid*., 558.
[53] Hannum, *Autonomy, Sovereignty, and Self-Determination*, 37.

These exceptions are noteworthy breaks in a general pattern of respecting the right of colonial peoples to self-determination, and continue the longstanding tradition of the inconsistent application of the international law on self-determination.[54] While it may be a fruitful exercise to inspect these exceptions for an underlying explanation for these ostensible violations of international law, the pressing question for scholars has been self-determination's applicability outside the context of decolonisation. Did other types of peoples have legitimate claims invoking the right to self-determination?

According to Pomerance, "no State has accepted the right of *all* peoples to self determination".[55] Even the African states, which helped develop the right to self-determination in the context of decolonisation, have adopted "a very narrow interpretation of the right in the postcolonial context of independence" as a response to the extreme cultural heterogeneity of their states.[56] For these states, as for most sovereign states, the principles of sovereign equality of states, territorial integrity and political unity are paramount. Even though peoples "who are not living under the legal form of a State" have a right to self-determination, there is no right to secede from "an existing State Member of the United Nations".[57] Hector Gros Espiell explains that any secession disrupting "the national unity and the territorial integrity of a State would be a misapplication of the principle of self-determination contrary to the purposes of the United Nations Charter".[58] Quane argues that

[54] Quane, "United Nations and Self-Determination," 552-553.
[55] Pomerance, *Self-Determination in Law and Practice*, 68.
[56] Hannum, *Autonomy, Sovereignty, and Self-Determination*, 46-47.
[57] Hector Gros Espiell, *The Right to Self-Determination: Implementation of United Nations Resolutions*, Report of the Special Rapporteur, UN Doc E/CN4/Sub2 /405/Rev1, 50.
[58] Ibid., 50.

state practice makes it very unlikely that self-determination has developed into a rule of customary international law.[59] With the exception of Bangladesh's independence from Pakistan after a bloody war, the international community did not accept any secessions between 1945 and 1991.[60] Since 1991, the self-determination principle was used to determine state boundaries after the disintegration of numerous multinational states; e.g., the Soviet Union and Yugoslavia.[61] Koskenniemi points out that these applications of the self-determination principle were consistent with the precedent of the Aaland Islands reports as the dissolution of old states created an 'abnormal situation' requiring 'transformation' into 'normal' sovereign states.[62] Ultimately, Quane concludes, the international community "has consistently rejected a legal right to self-determination for ethnic, linguistic and religious groups within States".[63]

The 'domestication' of self-determination by restricting it to the European decolonisation project alone has been challenged for being conceptually and morally arbitrary. After all, any nationalism prescribing congruence between the national and political will not distinguish between external and internal forms of colonisation.[64] During the 1980s, critics increasingly objected to the inconsistent application of the right to self-determination between seemingly comparable cases of alien rule.[65] In Koskenniemi's words, "the [legal] definition of colonisation as

59 Quane, "United Nations and Self-Determination," 563-564.
60 Margaret Moore, "Introduction: The Self-Determination Principle and the Ethics of Secession," in *National Self-Determination and Secession*, ed. Margaret Moore (Oxford: Oxford University Press, 1998), 1.
61 Ibid.
62 Koskenniemi, "National Self-Determination Today," 246.
63 Quane, "United Nations and Self-Determination," 564.
64 Hannum, *Autonomy, Sovereignty, and Self-Determination*, 8-9.
65 Koskenniemi, "National Self-Determination Today," 242.

"alien subjugation, domination and exploitation" is not limited to a Third World context but seems to cover all situations where a foreign minority imposes its rule on the majority."[66] If the injustice to be ameliorated by the right to self-determination is the wrong of "alien subjugation, domination and exploitation", then minority communities may have persuasive claims to that right as well. To quote once more from Lansing's personal notes: "It is an evil thing to permit the principle of 'self-determination' to continue to have the apparent sanction of the nations when it has been in fact thoroughly discredited and will always be cast aside whenever it comes in conflict with national safety, with historic political rights, or with national economic interests affecting the prosperity of a nation."[67]

IV

UNDRIP and the Self-Determination of Indigenous Peoples

In the post-decolonisation era, scholarly opinion converged on the conclusion that indigenous peoples did not have a right to self-determination, despite widespread sympathy with their struggles and the persuasiveness of the argument for the conceptual and moral arbitrariness of the salt water thesis.[68] During the UNDRIP's drafting, the inclusion of a right to self-

66 *Ibid*., 247-248.

67 Lansing, *The Peace Negotiations*, 104.

68 According to Gros Espiell, "The United Nations has established the right of self-determination as a right of peoples under colonial and alien domination. The right does not apply to peoples already organized in the form of a State which are not under colonial and alien domination, since resolution 1514 (XV) and other United Nations instruments condemn any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country." Gros Espiell, *Right to Self-Determination,* 10.

determination often seemed far too ambitious. Alexandra Xanthaki explains, "[s]tates were very vocal […] that such a right is only recognised to whole populations of states; and prior practice and the prevailing interpretations were generally not favourable to indigenous peoples".[69]

Given this background, it was astounding that, in 2007, the General Assembly voted overwhelmingly to adopt the UNDRIP with provisions for indigenous self-determination.[70] In part, this result was surprising because, in 2006, the UNDRIP's progress was halted abruptly when the African Union Assembly (AUA) of fifty-three countries withdrew its support.[71]

Unsurprisingly, the AUA was concerned about article 3, which established indigenous peoples' right to self-determination.[72] It was a major concern that the UNDRIP did not completely exclude the possibility of secession or external self-determination, even though indigenous peoples rarely advance secessionist claims. With the revisions required to garner the AUA's support, article 3 proclaims that "[i]ndigenous peoples have the right to self-determination", and article 4 explains that this right is "the right to autonomy or self-government in matters relating to their

[69] Alexandra Xanthaki, "Indigenous Rights in International Law over the Last 10 Years and Future Developments," *Melbourne Journal of International Law* 10 (2009): 30.

[70] While eleven states abstained, only four states voted against the declaration: Australia, Canada, New Zealand, and the United States.

[71] Wiessner, "Indigenous Sovereignty", 1159-1160.

[72] Wiessner explains, "It did not allay their fears that the original Article 31 was moved up to Article 3 *bis*, which arguably reduced the exercise of the right of self-determination in Article 3 to a right to "autonomy or self-government in matters relating to their internal and local affairs." The protesting African nations were unconvinced by Article 45, which stated that the Declaration did not give indigenous peoples any right to perform acts contrary to the UN Charter, presumably including the principle of the inviolability of territorial integrity." Ibid., 1160.

internal and local affairs."[73] Along with article 46, these provisions extend to indigenous peoples a right to self-determination as a right to *internal* political autonomy over their domestic affairs, without undermining the legal sovereignty, territorial integrity or political unity of states.

The AUA was concerned also about the lack of a definition for the term 'indigenous peoples', and this concern did not lack merit. While it is not difficult to comprehend why indigenous peoples emphasise their need to define themselves and to determine their memberships, subjective self-identification alone cannot establish indigeneity. Without objective criteria, any group could proclaim itself indigenous in order to claim indigenous rights. Despite the very real dangers associated with essentialism and artificially cramming the diversity of indigenous peoples into a legal definition with cumbersome objective criteria, "the identity of the legitimate holder of a right must be discernible for a court or other decision maker to adjudicate a claim based on that right […] Defining the legitimate holder of a right is necessary to effectively protect that person from violations of such right".[74] This type of definitional question has plagued international law over the last century with its failures to define 'nations', 'peoples' and now 'indigenous peoples'.

Nevertheless, the AUA was convinced to drop its insistence on a definition of indigenous peoples in exchange for a preambular clarification that "the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into

[73] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007).
[74] Wiessner, "Indigenous Sovereignty", 1163.

consideration". This compromise allows for a desirable flexibility in the interpretation of the text, but at the cost of legal unclarity.[75]

Despite this serious problem, indigenous peoples – whoever they happen to be – have a right to self-determination as internal political autonomy; that is, a right to self-government short of secession. This is a significant development for indigenous peoples and the right to self-determination in international law, especially considering that the four states opposing the UNDRIP have since reversed their positions and provided qualified endorsements of the declaration. However, the UNDRIP is not legally binding, and it is unlikely that it codifies customary law concerning indigenous peoples because states with sizeable indigenous populations voted against it. Also, Xanthaki adds, "some states who voted in favour of the *Declaration* made it rather obvious that they did not intend to lay down a rule of customary international law. In fact, the language of the *Declaration* itself does not support its reading as customary international law."[76] Though the UNDRIP is not legally binding, it may become binding as its provisions are reinforced by state practice and *opinio juris*.[77] The suggestion that the UNDRIP merely crystallises customary law devalues its significance and overlooks actual practices regarding indigenous peoples beyond Australia, Canada, New Zealand and the United States.[78]

[75] A United States representative, for instance, has claimed that the UNDRIPs failure to define the phrase 'indigenous peoples' is "debilitating to the effective application and implementation of the declaration", especially "if entities not properly entitled to such status seek to enjoy the special benefits and rights contained in the declaration". Ibid., 1164, citing US Advisor Robert Hagen.

[76] Xanthaki, "Indigenous Rights in International Law", 36.

[77] Siegfried Wiessner, "The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges," *European Journal of International Law* 22, no. 1 (2011): 130.

[78] Xanthaki, "Indigenous Rights in International Law", 35-36.

It is still too early to assess what impact the UNDRIP will have on indigenous communities or the right to self-determination in international law. There is room for cautious optimism, but there are good reasons to worry too. In particular, we should be worried that the old problem of the self component has arisen again.

Prior to the UNDRIP, international law had consistently denied the claims of any sub-section of an established state to secession or self-determination. The jurisprudence was fairly clear: there was a legal right to self-determination for states as a right to sovereign equality or non-interference with domestic affairs, and there was a legal right to self-determination for colonial peoples within the context of European decolonisation. There was no legal right to self-determination for sub-state communities seeking secession. With the UNDRIP, however, international law suggests that there is a right to self-determination for indigenous peoples as a right to some significant measure of internal political autonomy.

But this monumental extension may be internally unstable for the simple reason that the legislation does not provide enough information to identify indigenous peoples for the purposes of international law. A quick survey of the international law on peoples, national minorities and indigenous peoples yields the conclusion that there are no established legal definitions for any of these complex social categories. Hannum proclaims, "[a]s is true for the concepts of "minority" and "people," it has thus far proved impossible to arrive at a commonly accepted definition of "indigenousness"."[79] Without a legal conception of indigenous peoples for the purposes of international law, the recent legal gains of indigenous peoples risk being quickly eroded.

[79] Hannum, *Autonomy, Sovereignty, and Self-Determination*, 88.

After all, there is historical precedent for the General Assembly to declare rights without specifying the nature of the right-holder. Given the absence of a legal definition and the lack of a procedure to identify the legitimate right-holders, international courts have refused to decide in favour of secessionist claims, especially when we consider the stakes of a court-ordered breakup of a sovereign state. Instead, the courts have held counterintuitive interpretations of the relevant categories in line with the current jurisprudence, thereby retreating to the legal status quo *prior to the relevant declaration*. Any gains for all peoples vis-à-vis self-determination were quickly withdrawn for peoples residing outside the context of European decolonisation. There is an important lesson here: when treaties fail to provide a definition for the relevant right-holding group, international courts will not legislate a definition for them, and any legal benefits conferred from the new treaty will likely be lost. To preserve the legal rights within the UNDRIP, international law requires a definition of indigenous peoples and soon.

The need is time-sensitive because the undefined legal category will be strained under the pressure of uncertain self-determination claims. We should expect to see a migration of non-indigenous groups to the category of indigenous peoples for the simple reason that international law seems to recognise rights for indigenous peoples that other groups want, think they too are entitled to, but do not currently have. The lack of a legal conception of 'indigenous peoples' facilitates this migration, the resultant flooding of the category, and the corresponding increase in claims. It is unlikely that the right to self-determination for indigenous peoples will be able to withstand this stress indefinitely.

Will Kymlicka shares this worry. He is concerned that the General Assembly's attempt to draw a sharp distinction in legal

status between indigenous peoples and all other minority groups is morally problematic, conceptually unstable, and politically/legally unsustainable.[80] "The problem is not simply how to justify the sharp difference in legal rights […] but how to identify the two types of groups in the first place. The very distinction between indigenous peoples and other homeland minorities is difficult to draw outside the original core cases of Europe and European settler states".[81] Moreover, it is far from clear "how we can draw this distinction in Africa, Asia, or the Middle East, or whether the categories even make sense [there]. Depending on how we define the terms, we could say that none of the homeland groups in these regions are 'indigenous', or that all of them are".[82] Thus, Kymlicka concludes, "whether we say that all groups are indigenous or that no groups are indigenous, the upshot in either case is to undermine the possibility of using the category of 'indigenous peoples' as a basis for targeted norms within post-colonial states".[83]

The problem is not a lack of possible definitions of 'indigenous peoples', however. There is an array of definitions available, but it is unlikely that the court's decision to adopt any one of them would help matters. Influential definitions are offered by the UN Working Group on Indigenous Populations,[84] the UN Indigenous Study Conclusions,[85] the International Labour

[80] Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007), 278.
[81] *Ibid.*
[82] *Ibid.*
[83] *Ibid.*, 279.
[84] Jose Martinez Cobo, *Study of the Problem of Discrimination against Indigenous Peoples*, UN Working Group on Indigenous Peoples, E/CN.4/Sub.2/1982/2/Add.6 (1982).
[85] Hannum, *Autonomy, Sovereignty, and Self-Determination*, 89.

Organization[86] and the World Bank.[87] In these definitions and the academic literature, there are five common conditions of indigeneity:

(i) *a historical continuity condition* recognizing that indigenous peoples are descendants of peoples conquered and/or settled by a foreign people;

(ii) *an ancestral territory condition* recognizing that indigenous peoples occupy their ancestral lands, but that they do not have a full measure of self-governance;

(iii) *a minority status condition* recognizing that indigenous peoples live as minority, non-dominant or quasi-colonial communities without a sufficient measure of self-governance;

(iv) *a distinct culture condition* affirming that indigenous peoples are culturally distinct from the mainstream or dominant portion of the larger society, that they retain many features of the culture inherited from their ancestors, and that they are committed to maintaining aspects of their distinct culture in perpetuity; and,

(v) *a subsistence economy condition* claiming that indigenous peoples have primarily subsistence-oriented economies.

Only condition (v) is likely to arouse serious controversy. Even though there is often a tension between "the centralized, urban, technologically sophisticated character [of contemporary society]" and "the decentralized, rural, technologically traditional societies [of indigenous peoples]",[88] and even though many indigenous peoples have subsistence-oriented economies, it is

[86] *Convention Concerning Indigenous and Tribal Peoples in Independent Countries, No 169*, International Labour Organisation, 76th Sess, 28 ILM 1382 (1989).
[87] World Bank, *Operational Directive 4.10: Indigenous Peoples* (2005).
[88] Hannum, *Autonomy, Sovereignty, and Self-Determination*, 90.

clear that not all do. Condition (v) excludes indigenous peoples who have moved away from a primarily subsistence-oriented economy. Also, this condition functions to trap indigenous peoples in the past as other peoples are permitted to alter their communities and practices. For at least these reasons, the subsistence economy condition is arbitrary and unjustifiable vis-à-vis many significant indigenous rights, like the right to self-determination.

Setting aside the subsistence economy condition, the other four conditions apply well not only to indigenous peoples in Australia, Canada, New Zealand and the United States,[89] but also to groups usually thought to belong to other types of minority communities, including national minorities (like the Kurds), Asian hill tribes (like the Hmong), Middle Eastern and African nomadic or pastoralist tribes (like the Tuarag of the Sahara or the Jie of Uganda), and south American forest-dwellers (like the Waiapi of Brazil).[90] The search for an acceptable conception of indigeneity must meet the challenge of including the extraordinary variety of groups that most observers would consider to be indigenous, while simultaneously excluding non-indigenous groups.

Thus, we find ourselves pulled in two different directions. On the one hand, we need a legal definition of 'indigenous peoples' to assist the courts in adjudicating contested claims, and to decrease the chances of the courts reverting to the legal status quo prior to the UNDRIP. On the other hand, settling on a

[89] Indigenous peoples in Australia, Canada, New Zealand and the United States are often assumed to form the core of the category of indigenous peoples. Kymlicka, *Multicultural Odysseys*, 266.

[90] Contra Kymlicka, Wiessner includes within the category of indigenous peoples groups from around the globe, "such as the !Kung San in Botswana, Angola, and Namibia, the Twa in Rwanda, the Pygmy in the Republic of Congo, and the Maasai in Kenya and northern Tanzania." Wiessner, "Indigenous Sovereignty", 1163-1164.

concrete definition risks being over-inclusive or over-exclusive, thereby undermining the category. Given these pressures, it is not difficult to understand why legal and political theorists have been searching for adequate legal definitions for these social categories.

As a conceptual exercise, the search for a suitable definition of 'indigenous peoples' is hardly pressing, but given the stakes for indigenous communities and their legal rights under the UNDRIP, the definitional question is crucial. "In the end," Hannum argues, "definitional questions become truly important only if inclusion in or exclusion from a particular definition has legal implications […] No state objects to complete self-definition by indigenous peoples for social or cultural purposes; many *would* object to such a practice if it necessarily implied state obligations towards the persons or groups so designated".[91] In international law, at present, "too much depends on which side of the line groups fall, and as a result, there is intense political pressure to change where the line is drawn".[92] We should expect many sub-state nationalist groups and other non-indigenous communities to redefine themselves as indigenous peoples. Ironically, but unsurprisingly, this is simply the flip-side of the earlier trend of indigenous peoples claiming to be nations to further substantiate their claims to self-determination.

This 'back-door route' for non-indigenous minorities to gain significant legal rights may seem prudent, but it is not a sustainable strategy. This tendency, "if it continues, may well lead to the total collapse of the international system of indigenous rights".[93] Unless the present course can be corrected, Kymlicka predicts that, first, "more and more homeland groups [will] start to adopt the indigenous label", and, second, "the international

[91] Hannum, *Autonomy, Sovereignty, and Self-Determination*, 90-91.
[92] Kymlicka, *Multicultural Odysseys*, 284.
[93] Ibid., 287.

community will start to retreat from the targeted indigenous rights track".[94] His worries seem warranted.

Kymlicka suggests a remedy based on a series of targeted declarations of rights for various minority communities. Based on his earlier work on liberal multiculturalism, it is not surprising that he would like to see targeted declarations for national minorities and immigrants as well. What is perhaps more surprising is the expansion of his earlier tripartite social ontology to include also the Afro-Latinos and forest-dwellers in Latin America, hill tribes and caste groups in Asia, pastoralists in Africa, and Roma in Europe.[95] Each of the proposed targeted declarations would be "premised on the assumption that there are standard threats or predictable patterns of injustice suffered by these types of minorities".[96] This multi-targeted approach is expected to relieve some of the pressure from the definitional questions. After all, as long as the rights of hill tribes address the persistent concerns of hill tribes, there will be little incentive for hill tribes to present themselves as indigenous peoples, national minorities or immigrants.

Kymlicka's proposal is interesting and sensible, and it deserves to be evaluated in its own right, but I will not be able to assess it here. Instead, I will suggest that it may reveal part of the problem with the current targeted approach to group rights. A quick survey of minority group rights in international law will reveal a general pattern of targeted group rights without adequate definitions for the groups in question. In this paper, we have seen this problem resurface again and again and again from the principle of *national* self-determination to the right to self-determination of *all peoples* to the right to self-determination of

[94] *Ibid.*
[95] *Ibid.*, 300.
[96] *Ibid.*

indigenous peoples. In each case, international law has advanced a group right without defining the right-holder. This significant omission has led many scholars on a 'wild goose chase' as they have tried to outline subjective and/or objective conditions for the individuation of nations, peoples and indigenous peoples. Kymlicka's proposal highlights the problem that too many groups do not fall within international law's limited social ontology, and his proposal aims to solve a very real problem.

Although Kymlicka is concerned primarily with international norms of minority rights rather than the right to self-determination itself, his proposal may be adapted to our purposes. He may be interpreted as advocating that international law should offer some version of the right to self-determination to indigenous peoples, national minorities, and to whatever other type of social group that is entitled to some measure of self-determination. This approach requires a series of legal definitions for the relevant "selves", but it places less pressure on any one of these definitions, as long as they are balanced enough to not furnish these groups with an incentive to redefine themselves as belonging to another type of group. If indigenous peoples, national minorities, forest-dwellers, hill tribes and pastoralists have a similar enough right to self-determination, then it will not matter (at least with regard to self-determination) within which legal category a group is placed. This multi-targeted approach to the right to self-determination in international law has the virtues of reducing the pressure to get any one legal definition correct, expanding the scope of communities entitled to this right, and reducing the incentives for groups to redefine themselves to attain a legal right to which they believe they are morally entitled.

Kymlicka's multi-targeted approach may have the additional benefit of pressuring the international community and its members to clarify their positions on self-determination.

Currently, too many states reject completely the idea that there are sub-sections of *their* population entitled to self-determination, even in the form of internal political autonomy. These states have supported various versions of the right to self-determination in international law, but their support has been based on their view that there are no groups within their jurisdictions entitled to even some meagre measure of self-determination. On Kymlicka's multi-targeted approach, these states may retreat from their earlier pronouncements, or, more optimistically, they may honour their legal commitments and enter into negotiations with these communities. After all, while there is some plausibility to China's claim that there are no indigenous peoples within its territories, it is extremely unlikely that China will be able to substantiate a credible claim to not having any minority communities whatsoever within its territories. Moreover, China is not alone in denying the presence of minority communities with a right to self-determination within its territories, since many other states hold a similar position. Kymlicka's multi-targeted approach may have the benefit of forcing the international community to clarify its position on the right to self-determination, but this benefit may come at the cost of a wholesale retreat from the hollow declarations of the past.

There are definite risks for the putative legal rights of minority communities on Kymlicka's multi-targeted approach, but there are also difficulties associated with revising international law's social ontology. But, perhaps, the problem of social ontology has yet to be adequately understood and appreciated. Perhaps, the problem is not that Kymlicka's liberal multiculturalism began with three categories, when it should have had at least nine. Perhaps, the problem is that individuals have organised into social groups and these groups do not fall neatly enough into a nine-category social ontology or even a twenty-seven-category one. Perhaps, the most significant problem is that international law does not have

to wade into the murky waters of social ontology at all. Let me explain.

Kymlicka's multi-targeted approach to minority rights under international law is a response to a few related problems, such as the problem of the self component, the problem of the definitional questions, and the problem of neglected types of community. This approach presumes that social reality is carved up into determinate types of social community, and that these types come with a corresponding set of legal rights.

But social reality does not consist of neatly individuatable social groups or types of social group. And if cultural communities merit protection and promotion based on their contribution to our lives, then there are many types of cultural community worthy of such protection. These cultural communities may be distinguished based on metaphysical, moral, legal, political, religious, linguistic, or any number of other differences, and their scope may range from the local to the global. Whenever we attempt to impose a social ontology onto our complex and multifaceted social world, we will inevitably be met head-on with the frustrating realisation that we are unable to find unproblematic conditions for a group to qualify as a group of a particular kind, that we are confronted with troubling counter-examples revealing that our conditions are overly exclusive or inclusive, and that we struggle to individuate the boundaries of these groups, especially the boundaries between them and their closest neighbours. It is often assumed that these difficulties are epistemic, pertaining to our knowledge of the social world, but this is a mistake. The difficulties in arriving at a descriptively adequate social ontology are metaphysical – they arise from the highly complex and multifaceted nature of social reality itself. As such, the problems related to social ontology are not problems related to our attempts to get the facts right, but

rather problems brought about by the imposition of an inaccurate model of social reality. If this analysis is correct, then the problems associated with developing an adequate social ontology will likely prove intractable.

But I have suggested already that international law does not need to wade into the murky waters of social ontology at all. The general tendency in international law theorizing has been to begin with a conception of a type of group and then outline a set of rights and privileges for all and only groups of that type. This approach assumes the priority of the type of group over its members' legal rights and privileges, but it seems to me that we would have a better theoretical foundation were we to begin with specific measures, rights, prerogatives, and so on, and then determine the requisite conditions for groups to qualify for them. This approach would circumvent the search for a social ontology able to deal with the problems listed above.

With self-determination, since the relevant 'selves' have a right to determine their political status from the complete range of available options, there has been an obsessive preoccupation with the self component. This view is the logical consequence of the sovereign state model undergirding the UN regime, and it serves to correct abnormal conditions brought about by the disintegration of sovereign states. Since the international community has not been prepared to permit sub-sections of a state to secede without that state's consent, the right to self-determination's scope has been severely restricted. The threat of secession has hampered the widespread application of the right to self-determination as some measure of internal political autonomy, and this is an unfortunate by-product of the conflation of the nationalist and democratic traditions within a sovereign state model. When confronted with the possibility of destabilizing and violent domestic conflict or, worse still, regional or global

conflict, the international community has opted, first, to try to maintain the status quo, and second, only when it was unavoidable, to establish new political arrangements. The spectre of secession has spooked states and the international community into an adversarial and defensive stance against claims for some measure of self-determination by sub-state communities. The spectre of secession needs to be excised as we endeavour to take the dynamite out of self-determination.

V

Conclusion: A Proposal for an Alternative Approach

To this end, I suggest an alternative approach based on four principles. First, we should appreciate and maintain the conceptual distinction between the nationalist and democratic traditions of political thought. Much devastation has been wrought by the false promises of international lawmakers through their confused and confusing pronouncements of rights for all people, which have impacted the expectations of political activists, international lawyers and academics alike. It is very important to be clear about what legal terms like 'nations' and 'peoples' mean. The distinction between the nationalist and democratic traditions is not solely for the purposes of clarity though: it also permits us to recognise the right to self-determination of minority communities without threatening the territorial integrity and political unity of established states by separating cultural forms of self-determination from political ones. It would be a mistake to continue to underappreciate the clarity and functionality provided by this principled distinction.

Second, in international law, a self-determining group has the right to choose its political status within the international order, and we have seen how the possibility of secession has limited the scope of the right to self-determination to abnormal situations. Many commentators have suggested that we should distinguish between secession and self-determination to reduce the stakes of minority self-determination. In a similar vein, I suggest that the right to self-determination be construed not as a single right with many available options to be chosen solely by the rights-holder, but as an umbrella concept enveloping many specific provisions from secession to the establishment of private educational or religious institutions for a minority community to respect for holidays and so on. This dissection of self-determination into specific measures allows groups to be more specific with their claims. Treating self-determination as an umbrella concept and being specific about the types of self-determination measures possibly available to minority communities would provide for greater flexibility and clarity in the international law of minority rights. Rather than subdivide the self component, my proposal partitions the determination component.

Third, once we have a comprehensive list of self-determination measures (perhaps with a procedure for alternative measures based on a legally-determined negotiation process), the next step would be to outline the requisite conditions for a group to qualify for each specific measure. On my proposal, a group could qualify for some measures without qualifying for others, and this result is desirable because communities differ widely in their characteristics and conditions, and what is appropriate for one group may not be appropriate for another. For instance, a group may qualify for its own private or state-funded educational institutions without qualifying for internal political autonomy, perhaps on the ground that its population is too dispersed. My proposal shifts attention away from the features characteristic of

a particular type of group, and onto the requisite conditions for groups to qualify for a particular self-determination measure.

Fourth, my provision-centred proposal involves reversing the priority of the self and determination components. Consequently, lawyers, legal theorists, political and social scientists, historians and philosophers would devote less time elaborating necessary and/or sufficient conditions for a group to count as a token of a particular type, and, instead, devote their energies to enumerating the qualifying conditions for particular self-determination measures. This task is not easy, but it is more manageable than the present quest for a social ontology mirroring social reality's complexity and richness. With these changes to our approach to the right to self-determination in international law, I believe we can make solid progress in our pursuit of justice for minority communities without destabilizing sovereign states. This is my proposal for taking the dynamite out of self-determination by turning it on its head.

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