LEGITIMACY, LEGALITY AND SECESSION

by

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ABSTRACT

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The collapse of the Soviet Union, the break-up of Yugoslavia, the conflicts in places like Kosovo, Kashmir and Indonesia, and the possibility of another referendum in Quebec, all draw attention to the urgent need for a satisfactory account of the conditions under which a minority within a state is entitled to secede. The various elements of such a theory have been explored by authors such as Daniel Philpott, Christopher Wellman, Donald Horowitz, Joseph Raz, Kai Nielsen, Wayne Norman and others. A number of authors have spoken of the need for an "institutional" theory of secession.

The following dissertation argues that there are at least two distinct concepts of legitimacy, which can be characterized as a legal and a political standard of legitimacy. The political standard is based on consent and has been extensively discussed. The legal standard is based on moral principles, rather than agreement, which allow us to determine whether the positive law is legally enforceable. Although the dissertation examines the relationship between the two concepts of legitimacy, it focuses on the legal standard, which has not received significant attention in the academic literature.

The dissertation then turns to the notion of legality and argues that it is not possible to develop a legal theory of secession without altering the traditional concept of sovereignty to encompass the possibility of a legal order above the sovereign power. Although we are a long ways from a consensus, the international community now accepts that it has a general obligation to protect the fundamental rights of individuals in oppressive states. Allen Buchanan has already argued that the privileges and prerogatives of sovereignty should not be accorded to illegitimate states, which contravene fundamental human rights.

The dissertation provides the outline of a legal theory of secession, which would bring contested claims within the purview of an international court. This would provide the basis for a court to rule on the validity of the state's title to the sovereign power and the validity of any act of secession. This calls for the development of a more formal concept of legitimacy, which would allow an international court to distinguish between legitimate and illegitimate states. The later chapters consider some of the technical, procedural and evidentiary issues that would arise in establishing a cause of action in oppression.

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I would also like to thank the Atlantic Human Rights Centre and St. Thomas University, for providing me with a doctoral fellowship in human rights.

This is dedicated to the memory of those who disappeared, in so many struggles for what is right.

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Introduction

The collapse of the Soviet Union, the break-up of Yugoslavia, and conflicts in Iraq, Serbia, Sri Lanka, India, Indonesia and a multitude of states have all demonstrated the need for a satisfactory account of the conditions under which a community within a state is entitled to secede. The events in a variety of states also demonstrate that individual rights are precarious in the midst of such struggles. The conflicts between separatist minorities and governments who wish to maintain the integrity of the state have created countless victims, whose individual suffering provides the ultimate motivation for anyone working in the area. It follows that there is a pressing need for a means of resolving such conflicts without the suffering, dislocation and economic adversities which have accompanied them.

The present dissertation has two distinct aims. The first is to set out the philosophical requirements of a theory of secession that would bring secession under the rule of law. No one has developed a theoretical framework which would provide a satisfactory basis for a legal resolution of the claim that a minority has a right to secede. This is in spite of the fact that we are in desperate need of a peaceful means of resolving the social and political conflicts which have arisen over the question of secession.

The second, more practical goal of the dissertation is to set out a theory of secession which provides the basis for an adjudication of a minority's claim that it has a right to secede from a larger state. In the course of doing so, it devotes considerable attention to the practical factors which would determine the effectiveness of any legal process used to resolve such claims. This distinguishes it from most of the contemporary work in the area, which is governed by the theoretical aspects of the inquiry.

The present inquiry is predicated on the notion that states have a responsibility to protect

the rights of individuals in other groups. It is this development which places limits on the kind of autonomy that states are entitled to exercise in their internal affairs. Without such a development, it would be pointless to speak of a legal right of secession. Any legal system requires some degree of political legitimacy, and a legal system which transcends the state requires the recognition of individual states and the international community.

The point of writing about a legal theory or secession, or the legal legitimacy of sovereign states, then, lies at least to some extent in the fact that states are beginning to accept the notion. This takes us naturally towards a legal process, since it is extremely difficult, if not impossible, to decide such disputes in a fair and impartial manner without moving outside the ordinary political process. This is a question of impartiality: it is rather hopeful to think that the Turkish authorities, for example, are in the best position to decide what is fair in Kurdistan. Many of the oppressive and even genocidal policies adopted by states towards minorities have received significant and sometimes overwhelming approval from the majority.

The essential argument is that the Westphalian concept of sovereignty and the principle of territorial integrity needs to be subjected to the constraints of some form of legality. This synopsis of the problem also explains why the question of secession has become so critical in the contemporary world. Since the Second World War, many contemporary states have been riven by internal conflicts, which take the form of movements for secession. These conflicts have generally occurred when an ethnic minority constitutes a majority in a particular region: the events in Bosnia, Kosovo, Kashmir, Kurdistan and various parts of Indonesia all provide examples of such conflicts. The problem, in each and every case, is that it is impossible to intervene in such conflicts without committing something akin to an act of war against a sovereign state.

At the same time, the Westphalian concept of state sovereignty has begun to unravel, as more and more states recognize that the international community has obligations towards individuals living in other states. This is evident in the military actions in Bosnia, Somalia, Kosovo and East Timor. It is also evident in the changing rules with respect to the international recognition of other states. There has also been widespread recognition of the validity of economic boycotts and other strategies to censure states which have failed to respect the fundamental rights of the individuals who are dispossessed or brutalized by such struggles. This brings in the concept of human rights, which already provides a constitutional check on the powers of government in Canada, the United States, and the European Union.

Although we are a long ways from a consensus, there is a large measure of acceptance that the international community has an obligation to protect the fundamental rights of individuals, even if that means piercing the veil of sovereignty. Allen Buchanan has already argued that the privileges and prerogatives of sovereignty should not be accorded to illegitimate states, which contravene fundamental human rights. The dissertation goes further and provides the outline of a legal theory of secession, which would bring contested claims within the purview of an international court.

There are still some parallels in the literature. In his book on secession, Buchanan suggests that there are two fundamental aspects to any philosophical inquiry into the subject. The first concerns the moral provenance of any right of secession: where does such a right originate, we need to ask, and when is it morally compelling? The second concerns the ramifications of the moral right in the legal or political arena. The present inquiry adopts a similar approach, since it begins by examining the moral conditions under which secession can be legally justified. After setting out a principle of legitimacy which would provide the basis of

a legal right, it investigates the implications of such a principle in a legal setting.

There is a fundamental difference, however, between the approach taken in the present work and the approach in most of the contemporary work in the area. That difference lies in the fact that it tries to provide a normative theory which will serve the requirements of the legal machinery needed to adjudicate such disputes. This distinguishes it from most of the work in the philosophical literature, which extrapolates the principles that might be used to regulate secession from the reigning views in liberal and political theory. The problems with such an approach are evident in the hypothetical character of the academic discussion, which has taken place in relative isolation, without consulting the process of resolving conflicts in the ordinary world.

This is not a novel insight. A number of authors have acknowledged the problematic nature of the existing literature. Allen Buchanan, Wayne Norman, and Daniel Philpott have all argued that the philosophical community needs to turn its attention to the need for "an institutional response" to the problems which secession raises. It is in this spirit, then, that the present dissertation adopts a more pragmatic approach and tries to set out a theory which would provide the conceptual machinery needed for an effective legal regime.

Premises and Methodology

The traditional view, at least in the legal commentary, is that secession is a political event that takes place entirely outside the law. Whether a minority has a right to secede is ultimately decided by political forces which are not amenable to regulation by the courts. The adverse effects of such a view are evident in the violence of the civil conflicts in places like the former Yugoslavia and the former Soviet Union. On the one hand, a government which is determined to resist a demand for secession will not accept that its actions are subject to ordinary legal

constraints. But neither will those who participate in an armed struggle, who will usually claim that they are no longer subject to the positive law.[1] In either case, the most striking feature of secession is that it justifies unilateral action by both sides, without regard to moral or legal principles which ensure the larger good.

This analysis of secession accordingly ignores the normative aspects of the issue, which have been left out of the legal account. There is a narrow sense, it is true, in which the "legality" of secession may be determined by the provisions of a domestic constitution and the conventions regarding the international recognition of independent states. This is an impoverished notion of legality, however, which only recognizes events like revolution and secession as a *fait accompli*, after they have occurred. A comprehensive theory of secession needs to cover all three aspects of the matter–the political nature of secession, its effect in constitutional law, and the international norms which govern such an event. The present dissertation comments, in one way or the other, on issues in all three areas.

The focus of the dissertation is more practical, however, and probably more momentous. The present discussion takes it as a given that the political issues which arise in the context of secession are in dire need of moral regulation. This, in turn, requires some form of legal intervention, which can only be supplied by a court. It is pointless, however, to speak about giving a legal body the authority to decide a claim of secession without giving it some authority over the state. force of social and political norms are often overstated, particularly in academic circles, and it is naive to think that the kind of political issues which come to the surface of human relations in the instance of secession can be satisfactorily resolved in a legal system based on convention.

This is a practical issue, more than anything else, since the primary problem in creating a

legal system to regulate secession lies in compelling the parties to obey the orders of a court. Try as we might, there is no escaping this issue in a legal context. There is a sense in which the work in the dissertation reverses the notion of legal sovereignty, which gives the sovereign and ultimately the state the authority to pass and enforce the law. This is because a court which possesses the authority to decide a question like secession can only do so on the basis that the state is subject to some form of law.

The fundamental premise of the present dissertation is that any legal system which is designed to regulate an issue as contentious as secession can only do so if it is compulsory. This is a pragmatic consideration that cannot be ignored if we expect a court to make effective decisions in the area. It is not my intention to argue the matter, however, in the context of the present dissertation. On the contrary, it forms a presupposition, which provides the impetus for an investigation into the theoretical and practical problems that need to be addressed in designing a legal system that can decide a claim like secession. This is done in the sincere and considered belief that other alternatives are destined to fail.

The broader purpose of the dissertation, then, is to extend the notion of legality into the lawless region where political events like secession are said to occur. This is difficult in the case of secession because there is a sense in which session can only be a political event, and exclusively so. Perhaps it can be put in a simple way: secession may be granted by a legal body; but it can never, properly speaking, be ordered. A legal body might exercise a supervisory role, which would give it the authority to determine when a decision to secede has been fairly and properly made, and when it is morally permissible. But that is the logical extent of any legal jurisdiction over the question and the purpose of placing legal limits on the political process is merely to protect the individuals who may be victimized by the process.

At the same time, it strains credulity to suggest that the outcome of such struggles can be left completely to the political process. Even in relatively peaceful conflicts, such as the democratic contest in Québec, the possibility of violence presents a real danger to the well-being of the community. It is therefore a mistake to argue that secession occurs entirely in the political realm, outside the legal order. On a philosophical level, the present dissertation inclines to the argument that there are no lawless regions, since moral injunctions will always apply, to any political actor. This does not mean that morality and law coincide: in point of fact, the dissertation adopts a rather conservative notion of legality, which only extends to the more egregious violations of morality.

This kind of project inevitably challenges the historical view of international relations, which has been premised on the importance of international comity. The cardinal feature of the Westphalian system has been that individual states, the actors in the international community, will not interfere in each other's affairs. The existing international system is a bargain with the devil: states have theoretically accepted an abundance of evil and injustice in the domestic sphere, in return for international stability. The practical failures of documents like the *Universal Declaration of Human Rights* are sufficient to illustrate the point. No one, other than senior diplomats and the more cynical members of the international political elite would try an argue that the *American Convention on Human Rights* of 1969, which was passed at an Inter-American conference on human rights in Costa Rica, had a serious effect on the intervening events in El Salvador and other Latin states.

This will help to explain why the ordinary legal tradition seems more equipped to deal with the exigencies of secession than international law. Although it is a rough comparison, it is helpful to draw on an analogy between individual persons and sovereign states in this context.

That is because the ordinary courts, in a realistic vein, operate on the assumption that individuals are obliged to obey the law. This is contrary to the reigning premise in much of the moral and philosophical literature, which often seems to imply that the legal order derives its legitimacy from the fact that the individual consents to the legal order. Be that as it may, the present dissertation takes a more practical and less theoretical perspective. This would place some legal restrictions on the exercise of the authority of the state, albeit in a manner which preserves the ordinary powers of government.

This runs counter to the position adopted by the United States, for example, which occasionally seems determined to reject any development that might move us towards world government. Although this kind of concern is understandable, it is impossible to bring secession under meaningful legal constraints unless there is an international legal system with authority over the parties in question. It is ironic that the Security Council and the United States have begun to assert themselves in this area, on an *ad hoc* basis, in spite of the reservations of individual states. It has already been accepted in spirit at least that any international solution to the violence of internal ethnic conflicts must be underwritten by the threat of force. There are any number of possibilities as to who should have the authority to supply that force and how it might be deployed.

There are numerous instances, now, where the international community has intervened in the internal affairs of independent states, in order to defend the rights of the individuals living in those states. The present *modus vivendi* is not enough, however. The Security Council has few if any of the properties of a court or tribunal and is not in a position to rule on the legality of its own actions. There is no reason to ignore the fact that the decisions of the Council are based on power and political interests, as much as anything else. This is a crucial factor: force without

law, in the *dictum* of Aquinas, is violence. The most important attribute of a court that decides a question like secession is that it needs some form of inherent jurisdiction, which gives it the capacity to act independently of any political actors. The failure of the international community to give legal bodies this kind of authority has seriously hampered the development of the international law.

The important point is that the efficacy of the legal process in the context of secession depends on the independence of the courts. This is a moral independence, and the early chapters of the dissertation rest on the view that the courts derive their authority–and ultimately their legitimacy–from the exercise of moral judgement. This is not a moral judgement in a narrow sense and is more aligned with the Aristotelian virtue of prudence, and *phronesis*, than with ethical decision-making. It is concerned with process, and the parameters in which power can be legitimately exercised, rather than with the moral rectitude of individual decisions. One of the purposes of the dissertation is to identify this particular mode of reasoning, which lies in the process of inference, and put it to use in solving political conflicts.

Some observers would undoubtedly argue that it is premature to proceed on the basis that a legal theory of secession must bring states within the compulsory rule of a court. This might seem unrealistic, in light of the existing international order, which seems to have entrenched itself in the minds of so many political leaders. This mistakes political for factual realities, however, and merely prevents us from entering into a serious analysis of the question. There are developments, moreover, like the evolution of the European Economic Union and the development of an International Criminal Tribunal, which have moved us closer to some form of regulation of the sovereign state. There is always a need to explore such questions in advance of events and it is important to set out a philosophical framework before inquiring further into the

practicalities of the matter.

The present discussion is pragmatic in a philosophical sense, since it adopts an instrumental view of theory. This may be a product of the legal concerns expressed in the dissertation, since the two theories which it elaborates are intended to provide a suitable basis for a viable jurisprudence. As a result, it is subject to a standard of utility which is unusual in philosophical work. From a pragmatic perspective, the major obligation of normative theory is to set out a theoretical framework which can actually be applied to specific circumstances which arise in the world. In the instance of secession, this calls for some form of legal machinery to regulate conflicts between governments and minorities in a fair and peaceful manner.

The impetus behind the dissertation may be as much a matter of temperament as anything else, and if there is a choice between views, it sides with those who feel that the primary obligation of legal and political theory is to ameliorate those injustices which arise in the course of human life. In the instance of secession, these injustices extend all the way from discrimination in the provision of public services to genocide, forced migrations and the full range of human rights abuses. The purpose of a theory of secession seems simple enough: ultimately, any theory of secession must be tested by the contribution which it makes, in theory or practice, to the resolution of the conflicts which precipitate such claims.

Argument

The subject of secession raises a variety of questions with respect to the jurisdiction of a state over a particular territory. The present inquiry deals directly with the right of government, however, and only deals incidentally with the territorial issues. Since the dissertation is ultimately concerned with the creation of a right of action, it focuses on the ontological issues concerning the origins of any right to secession and leaves most of the technical issues regarding

the territorial question for another discussion. The origins of the right to secede can be traced to the existence of the minority, which possesses rights by virtue of its existence as an identifiable community. These rights include the right to some form of self-determination and it is minorities, in some guise, which would have the right to bring a legal action. Most of the references to a minority in the dissertation can be taken as a reference to a minority with an appropriate territorial claim within a larger state.

The specific legal question which arises on secession is whether the state has a valid title to the right to govern. The courts have generally refused to rule on such an issue and the common law still holds that a unilateral act of secession, like an act of revolution, creates an *interregnum* in which there is no legal order. On the traditional view, this is because the legal order is entirely domestic and has its source in the sovereign power. The international law is mere convention, which may be accepted or rejected by individual states. This reflects the historical notion that states occupy the position of persons in a state of nature, which is not subject to positive law.

This is the basic theoretical problem that must be dealt with, if we are to recognize a legal right of secession. The important observation is that it is impossible to rule, legally, on the question whether a given state has a valid title to the sovereign power without postulating a legal order that extends beyond states. If we accept that there is such a legal order, it would mean that individual states are subject to an extra-constitutional law, from which the domestic legal order ultimately derives its legal force. A domestic legal order which did not respect the tenets of such a law would lose its own legitimacy.

The first part of the dissertation accordingly introduces a notion of legitimacy, which argues that states and other international actors are subject to extraconstitutional legal restraints.

A state which fails to respect these restraints is illegitimate and no longer possesses the legal rights of government. It is accordingly possible for a court to refuse to apply and enforce the law of such a state. This provides a standard of legitimacy, which can be used to identify the kinds of situations in which a minority might be legally entitled to secede from a larger state. The second part of the dissertation sets out a legal theory, which sketches the outlines of a cause of action in oppression and introduces the possibility of lawful and unlawful acts of secession.

The extraconstitutional notion of legality goes against the formulations of legal positivism and the common law, which locates the source of the law in the political power of a sovereign state. There are challenging philosophical issues here: since the law comes from the sovereign, on such a view, it cannot be used to regulate the sovereign power without subverting its own authority. The legal order owes its existence entirely to the state–the metaphysical state, essentially, in which civil authority originates–and cannot exist outside it. From a practical perspective, this kind of conception has been offset by the development of independent courts, which regularly overturn the actions of the legislative and executive branches of government. This does not deal with the theoretical problem, however, and these courts enjoy a domestic jurisdiction, which derives from the authority of the state.

The other side of the historical formulation is that the attempt to secede is a domestic matter, which occurs entirely within an existing state. This might seem to be changing, with the recent events in Iraq and Kosovo, but the use of Security Council Resolutions to police internal conflicts is a political rather than a legal development. Nor does it affect the concept of state sovereignty. Although states have accepted that they have obligations to the individuals in other states, they have not accepted that international courts and tribunals have the authority to regulate such matters.[2] The character of the international "law" reflects the historical state system and the

enforcement of international treaties is still a matter of convention. It follows that secession currently stands outside the reach of the compulsory law, inside and outside the state, and lies entirely within the political realm.

The dissertation postulates a body of extraconstitutional law which provides an independent source of legal authority. The important factor is that this authority has its origins in moral principle and does not derive from the state. It would accordingly provide an international court with the authority to rule against individual states. This is crucial, in the instance of a question like secession. Although there is no theoretical reason why domestic courts could not exercise a similar power, there are practical reasons why domestic courts will rarely be in a position to uphold a finding of oppression. Many of these reasons are political and involve the relationship between the different branches of government.

The dissertation takes a stricter view of the distinction between the legal and the political process than most of the theoretical literature. The legal process is presided over by a neutral third party, like a judge, who exercises an independent moral judgement in deciding the case. This is significantly different than a process of arbitration or mediation, which proceeds on the basis of an agreement between the parties. The legal process, in this sense of the term, is designed to deal with a situation in which the parties are in disagreement. This explains the formality of a trial, and the concern with a fair process. It is essential that all the parties be given an ample opportunity to present their case and the right to answer the case presented by the other side, since the outcome of the case is entirely in the hands of a third party.

The dissertation accordingly makes a distinction between a legal and a political resolution of a minority's claim that it has a right to secede. It implicitly subscribes to the view that the political order and the relationships within it are based upon some measure of agreement between

the parties. This is meant in the broadest sense, and is not restricted to democratic states, though the argument may be more compelling in such political systems. The argument is that the political process is governed by social rather than strictly moral forces and resolves the issues of state through a process of consent. This is problematic, where there is an ongoing history of conflict, mistrust or enmity between the parties, since the level of goodwill needed to reach a satisfactory agreement will usually be unavailable.

The legal process, in contrast to the political process, derives its legitimacy from its compliance with moral principles. The difficulty with leaving the more grievous cases of secession in the political realm is that the dynamics of such conflicts run against the possibility of a settlement and usually exacerbate the tensions between a minority and a majority. As a practical matter, this often creates a situation in which the two sides feel that the only realistic method of dealing with the claim for secession lies in unilateral action, either in the form of political repression or insurrection. In such cases, the decision to leave secession in the political realm merely provides a prescription for the kind of ethnic conflicts which have ravaged the former Yugoslavia.

The legal and political processes rely on two distinct principles of legitimacy. It is significant that the existing literature envisages two situations in which the question of secession arises, each of which seems to call for the application of a different principle of legitimacy. The first is the situation where a minority has been oppressed, in a manner which raises serious concerns with respect to human rights. The second is more theoretical and exists where a minority merely seeks to exercise a right to self-determination. It is the former situations which seem to call naturally for legal resolution, and only in those cases where the parties are unable to reach agreement on the question. As long as there is a reasonable prospect of settlement between

the opposing parties, there is no reason to take the matter out of the political arena.[3]

Allen Buchanan has already raised the possibility of entrenching the right to secede in a constitutional framework, and it might be thought that this provides a legal alternative to a political right of secession. There are practical problems with such a suggestion, however, since it is the coercive power of the state which is used to enforce the decisions of the courts, and the courts are relatively powerless if an administration refuses to enforce its orders. Nor is it likely that a domestic court will be inclined to rule against its political masters, who control the process of appointments. There is also the fact that the word "secession" is susceptible to a variety of interpretations. At the very least, however, it suggests that a minority with some claim to self-government wishes to dissolve its constitutional relationship with a larger state. The present inquiry deals primarily with the troubling situations, however, which arise when these wishes go against the will of the larger state.

There are more theoretical issues which arise in this context. The first is that this kind of constitutional arrangement contemplates some means of referendum, or ratification, to decide the issue. It would accordingly provide a minority with a political rather than a legal right of secession. The litigious issues, in the instance of an amending formula, would either arise in the process of interpreting such a provision or deciding the specific terms of any secession. I have already remarked that the legal process is designed to deal with the conflicts which arise between different parties. These are the situations which call for the recognition of a legal right, which compels the larger state to accede to the wishes of the minority.

The suggestion of amending a constitution to permit secession is relatively dubious in a legal context. This is because an amendment modifies or varies a constitutional statute: it has a relatively limited scope in law and cannot replace a statute or institute a new enactment. The

effect of an amendment regarding secession, on the other hand, nullifies or rescinds the constitution insofar as it applies to the territory occupied by a particular territory. As a result, the previous constitution can no longer be seen as the source of the legal and political orders within the seceding state. The whole point of secession is to create a new constitutional order, which derives its authority from the fact of its own existence, independently of the previous constitutional order.

The validity of the new constitutional order cannot be determined by reference to itself and a court facing a question like secession must derive its authority from another source. The obvious argument is that such a body would derive its authority from a moral order which exists above the legal or political order. This would create an extra-constitutional legal order, which requires that the sovereign power be exercised in accordance with certain fundamental moral principles. These principles would include guarantees of individual rights, although the extent of such guarantees is difficult to gauge in the abstract. There are practical issues which arise in this context, as well as philosophical ones. Both the court and the parties need to know where they can find the rules and principles which should be consulted in deciding a claim.

This brings in the legal principle of legitimacy. A minority which claims a legal right to secede is claiming that the jurisdiction of the original state over the minority is illegitimate. It is important to be specific in this context: this kind of claim does not necessarily throw the political legitimacy of the state into question, since that is a democratic question, that can only be determined through the political process. The contested cases of secession generally arise when the large majority of a population opposes the right of a minority to secede. The state may be entirely legitimate, in the political sense, since it has the support of a large majority of the population. That does not decide the legal question, however, which must be determined by a

neutral court, in accordance with generally accepted moral principles. The consent of the majority has no necessary bearing on such a question.

The purpose of introducing the legal concept of legitimacy into the relationships between states is to place the principle of territorial integrity under moral constraints. The legal question is accordingly whether the state's treatment of the minority is morally oppressive. In order to be effective, a court which decides such an issue would need powers in the international sphere. This would place limits on the notion of sovereignty and extend the full notion of legality, with all of its coercive implications, into the sphere reserved for convention. The practical issue is whether a state's jurisdiction over the territory occupied by a particular minority should be transferred to another state.

There is a technical issue of some significance here. From a legal perspective, a minority's claim that it has a right to secede presupposes the existence of the state and asks us to consider whether the existing state should continue to exercise its jurisdiction over a particular territory. There is little doubt that analogous forms of relief may be called for in situations where the existence of the original state is in question, but from a legal perspective, this raises different issues. There is an analogy, in this context, between secession and divorce. That is because the primary assumption, on a petition for divorce, is that there is an existing marriage. A petitioner may raise any number of issues with respect to the conduct of the other spouse, but none of these issues will throw the existence of the marriage into doubt.

The primary impetus of the dissertation, then, is to place legal constraints on the person, as it were, of independent states. The introduction of a broader concept of legality also requires a re-evaluation of the relationship between the legal and political orders within the state, however. This is because the legal principle of legitimacy places the political actors in the state under the

scrutiny of a legal principle, which governs any actions in the political realm. This does not mean that the courts should be deciding political issues, which are beyond the abilities of the courts. But neither does it suggest that the courts should not be determining the legitimacy of the actions taken in the political realm. On the contrary, it is the separation of the two processes which guarantees the independence of the courts and puts them in a position to decide whether the political actors have exceeded their authority.

If the legal right to secede arises when a state acts illegitimately, outside the moral norms which govern the conduct of states, we need some account of the positive obligations of the state. This can be found in the principle that the actions of the state are legally legitimate when they meet the requirements of justice. This is a legal rather than a political conception of justice, which determines whether the state has a valid title to the right to govern. As a legal matter, the requirements of such a conception of justice are not capable of precise definition and can only be established by jurisprudence in the area.

The animating legal principle in such a theory seems relatively simple, in spite of the open-ended nature of the concept of justice. It is that the actions of the state become illegitimate, at least in the instance of secession, if they clearly contravene the principle of substantive equality. From the perspective of rights, and the perspective of the law, it is the conduct of the state which seems significant in deciding whether it is entitled to exercise the prerogatives of government, rather than its political legitimacy. It is the failure of the state to respect the limits parameters of its moral jurisdiction which gives a minority the legal right to secede.

The principle of substantive equality could be seen as an integral part of the historical concept of the common good, but that is a political rather than a legal concept. The historical concept of the common good is a teleological notion, however, and is not amenable to legal

analysis. A court is not in a position to examine or evaluate the purpose of the state: if that is a matter to be considered by anyone, it is a matter to be left to an act of the political will. A court may rule on the legitimacy of a constitution or the political order which it contemplates, but it has no capacity to create a new constitution. This is analogous to the principle in the common law of contracts: a court may vary or rescind a contract, but it has no power to make a new contract, which can only be constructed by the parties.

The principle of substantive equality gives rise to a general proscription against discrimination, which obliges the state to treat different individuals equally. This is a proportional rather than a simple concept of equality, which holds that individuals and groups with similar characteristics should be treated in a similar manner. The more difficult side of such a principle lies in the implication that groups which are different in a material respect should be treated differently. As Ronald Dworkin once observed, rather wryly: "Sometimes treating people equally is the only way to treat them as equals; but sometimes not."[4] Although discrimination does not serve the common good, the question whether there is discrimination in a particular case will often be open to interpretation. It is only, moreover, when discrimination interferes substantially with the fundamental rights of a particular group that it can be said to give rise to a right of secession.

The dissertation makes at least two assumptions with respect to the legal concept of justice. The first is that the political actors within the state will accept that they are obliged to respect the principles of justice. The second is that those actions which disregard the rights and interests of a minority will not serve the aims of justice. This means that they will not serve the interests of the majority, which has a cardinal interest in living within a peaceful, well-ordered community. It therefore calls for the formulation of subsidiary principles, which provide the

machinery needed to determine whether the actions of a particular state towards a minority give rise to a corresponding right of secession. This is the essential purpose of a legal theory of secession.

The dissertation still makes use of a restricted concept of the common good, in the legal arena. This is a methodological principle, however, which is primarily needed for the purposes of adjudication and is already an integral part of the judicial process, which is reflected in the fact that courts naturally consult the broader public interest in deciding constitutional issues,. It is impossible for a court to resolve difficult constitutional questions impartially without a principle that subordinates individual rights, group rights and the prerogatives of government in some larger good, which recognizes the legitimacy of each set of prerogatives. This is briefly illustrated by references to the Canadian jurisprudence, which assumes that the right ruling in a constitutional case serves all of the interests before the court.

The methodological principle of the common good is not entirely procedural. In spite of its methodological character, the adjudicative principle includes substantive moral propositions, which traverse cultural and religious boundaries. In this respect, it shares some of the characteristics of the conception of procedural justice in the current ethical and political literature, since it rests on moral principles that are held in common by people with differing moral views. This is very much in keeping with the actual practice of constitutional courts, which decide cases on the basis of broad moral principles, which are generally accepted in society.

It follows that a court with the authority to decide a question like secession will be forced to measure the competing interests before it on the basis of a common standard. This inevitably requires that the interests of the original state and the minority be subordinated to some larger

good, which recognizes the legitimacy of both sets of interests. This is a question which goes to the legal principle of legitimacy, however, and does not ask the courts to determine whether secession is in the best interest of either side. On the contrary, the dissertation argues that such an issue should be left within the political realm, as the Supreme Court of Canada suggests in the *Secession Reference*, cited *infra*. The natural role of a legal body, in deciding the legality of political actions, is only to determine whether the political actors have stepped outside the legitimate parameters of the political process.

This is said without detracting from the observation that the scope and substance of legal decisions is inevitably determined by the evidence which comes before a legal body. As a consequence, these subsidiary principles will not be sufficient to determine the outcome in a given case without a proper finding of facts. The general question in an evidentiary arena should be whether the state has disregarded, seriously and substantially, the common interests of those within the legal jurisdiction of the state. For that reason, it might be more accurate to describe the theory in the dissertation as a theory of oppression, which establishes the general conditions under which a state loses the legal right to exercise its authority over a minority.

It is important to separate the legal conclusion needed to justify a ruling in favour of a claim to the right to secede from the factual underpinnings of such a ruling. On the theory advanced in the dissertation, the legal question of legitimacy will only arise in those circumstances which can be characterized as oppressive. This calls for an exercise of moral judgement, in accordance with the rules and principles that govern the existing fact finding process. The common law and civil law traditions provide an ample source of received wisdom, which would assist any court in making such decisions.

The question of oppression cannot be decided in the abstract. Nonetheless, the concept of

human rights provides the most significant consideration in identifying those circumstances in which the actions of a particular state can be characterized as oppressive. The rights commonly described as human rights are usually seen as individual rights, which give rise to the collective rights of minorities. Although some rights clearly belong to groups, rather than individuals, it is individuals who enjoy the benefits of these rights. It is accordingly the state's treatment of individuals which is of primary importance. It is the breach of these rights which gives other states and the international community the warrant to suspend the Westphalian contract and intervene in the domestic affairs of other states.

The theory of sovereignty set out in the first part of the dissertation does not do away with the possibility of secession in an instance without oppression, which may still take place in the political realm, with or without the supervision of a court. Such a process would be subject to any legal constraints within the existing constitutional framework and would be lawful as long as it respected those constraints. It may seem ironic, as a result, that the dissertation primarily sets out the limits on a court, in setting out a legal right to secession, but that is entirely in keeping with legal tradition. There will be a point, moreover, where a state's refusal to accept the results of the democratic process will constitute oppression, and throw the legitimacy of the state's authority into doubt.

The principle of legitimacy set out in the dissertation accordingly prevents a court from recognizing a legal right to secede unless there is oppression. There is a second source of jurisdiction, however, which is ancillary to the power to award a legal right to secede. This is a supervisory jurisdiction, which allows any court to rule on the procedural disputes which arise between different political actors. This might range from the legality of voting procedures to the validity of the question used in a referendum. It would include the authority to determine the

legal validity of the results in any referendum and decide the many questions which would arise in determining the appropriate remedy.

All of this raises a narrower question with respect to the general legitimacy of courts and other legal bodies. The legal principle of legitimacy set out in the dissertation would vest the legal order in moral principles which have a higher authority than the state. This means that the authority of a court which decides a question like secession derives from the validity of the overarching moral principles to which it subscribes. Although this does not do away with the need for international statutory instruments, the dissertation argues that a court would need inherent powers which go beyond those that it might acquire by virtue of the acquiescence of the actors in the political realm. This raises a number of philosophical questions with respect to the role of any court which deals with constitutional issues.

The notion of legality introduced in the first part of the dissertation has broader moral, social and political implications. Nevertheless, its principal purpose is to provide the conceptual framework needed for a legal theory of secession. Since it is intended to serve the needs of a legal theory, and the jurisprudence which would be required to adjudicate such conflicts, its major purpose is to identify the kinds of circumstances in which a legal right of secession might arise. As the second part of the dissertation demonstrates, this calls upon us to set out the grounds on which a group might rely, in asking for an order in favour of secession. The more general implications of such a theory are acknowledged, in passing, but the real test of the theory is whether it provides a satisfactory basis for the legal machinery envisaged in the second part of the dissertation.

The second part of the dissertation reviews the literature on secession. It then provides the philosophical framework for a theory of secession that might bring contested claims within

the purview of an international court. It also examines the difficulties which might be encountered in the event that a conflict over secession was brought before a legal authority like a court. This is in keeping with the overriding objective of the dissertation, which is to set out the precepts needed to adjudicate specific claims. This requires the formulation of criteria which might be used to determine when a claim of secession gives rise to a legal right of secession, and how such a claim can be satisfied. There are a variety of ancillary concerns. There will be claims regarding property and legal status which arise in the course of implementing a decision in favour of secession.

There is also a need for a legal standard, which determines the legality of any actions taken in any interval between the dissolution of the original state and the inception of a resulting state.[5] This would include the formulation of criteria that would allow a court to determine the legality of the actions undertaken by a seceding government. There are additional difficulties in determining how the legal order is reconstituted and what parts of the existing law survive an act of secession. The subject is of pressing importance in Canada, where a unilateral claim of sovereignty by Quebec could be viewed as the assertion of a nation's natural right to secede or an illegal revolutionary act. The Canadian situation is of particular interest from the perspective of developing a jurisprudence on secession, since the Supreme Court of Canada has now ruled on the matter.

The essential problem which arises in developing a legal right to secede is the same as the one which arises in the instance of revolution. This comes from the fact that a revolution theoretically overthrows the sovereign. This ruptures the continuity of the legal order, which has its source in the sovereign power, and extinguishes any claims arising out of the previous legal order. This is a legal doctrine in the common law, at least, which sees a revolution as a hiatus in

the continuity of the legal order. The legal problem is to find a way in which the integrity of the legal order can be maintained, in spite of the transfer of the sovereign power from one political authority to another.

This would seem to require that the legal order vest in an authority above the sovereign power. It will be evident that this is paradoxical on the traditional view, since it places the legal order above the power from which it derives. It accordingly seems necessary to fall back on a conception of law which vests some of the essential aspects of the legal order in moral or political circumstances which have superiority over the sovereign power. It has already been suggested that this can be found in the legal principle of legitimacy. This takes us back to the argument that the legal principles which apply in the case of secession come from moral principles, widely accepted in human society, which guarantee certain human rights.

The dissertation argues that the authority of a court to make rulings with respect to secession should be found in a moral rather than a political source. Since the actual decision to secede remains a political decision, a court with the authority to decide such questions will need to have the authority to supervise the political process. This is particularly true in the present system of sovereign states. There are political issues which arise, however, on an extra-constitutional level, outside the confines of the individual state. These issues concern matters like the establishment of a court, the appointment of its administration and members, and the means by which its orders might be executed. Although these are crucial questions, from a practical perspective, they are only indirectly related to the present inquiry.

Plan of the dissertation

The plan of the dissertation is essentially as follows. The introduction discusses the general objectives of the dissertation. It stakes out a pragmatic position in political theory,

reviews a number of methodological issues, and sets out the parameters of the subsequent discussion. It also sets out the essential argument of the dissertation and provides a plan of individual chapters.

The first and second chapters review the history of the concept of legitimacy and argue that there are two distinct concepts of legitimacy. The first chapter reviews the history of the concept of legitimacy, and discusses the political concept of legitimacy, which is predominant in the contemporary literature. This concept of legitimacy essentially holds that the state derives its authority from the consent of the governed. This consent can commonly be found in the agreement of the majority of individuals, as determined electorally, to the political authority of the state.

The second chapter reviews the legal concept of legitimacy, which has not received significant attention in the academic literature. A state is legally legitimate when it governs in accordance with essential moral principles, which have been agreed to by society at large. The legal principle of legitimacy, like the political principle, derives from the consent of the governed. This can be found in ordinary constitutional principles, which express the consensus of nearly all the members of society. This includes the members of minorities.

The third chapter examines the transfer of title from one state to another and sets out the historical problem of secession. This requires an examination of the relationship between the legal and political orders, and the sources of legal authority. The traditional view vests the title to the sovereign power in the political legitimacy of the state. Any questions regarding the political legitimacy of the state–and the validity of this title–can only be decided by the people, in concert, outside the constitutional order. This kind of decision is exclusively political and takes place outside the ordinary legal and political orders.

The historical view, then, is that a principle of political supremacy governs questions regarding the validity of the state's title to the sovereign power. This principle holds that the such decisions are exclusively political and can only be made outside the legal order. It is only the people who have the right to determine, outside the constitutional order, whether they will revoke or accept the social contract. This leaves no room for a legal solution to the problem of secession.

The chapter accordingly introduces a notion of legality that extends into the realm above the state and takes priority over the political will. The notion is significant because it would give the courts the authority to rule on the validity of actions that are entirely political. This is a departure from the historical theory of international relations, which allowed states to pursue their domestic policies without interference from other states. Although the concept of state sovereignty has been progressively weakened, it still presents the major difficulty in regulating secession.

The fourth chapter reviews some of the developments in the notion of sovereignty and provides a solution to the historical problem of secession. The deficiencies of a simple conception of political legitimacy are evident in the right of revolution envisaged by John Locke. This kind of political right does not deal with the problem of an oppressive majority, which provides the most obvious derivation of a moral right of secession. The question of legitimacy that arises in these circumstances cannot be remedied by an appeal to the popular will, since it is the popular will which requires scrutiny.

This demonstrates the purpose of a legal concept of legitimacy, which would set out the circumstances in which a minority is legally entitled to question the state's jurisdiction over a particular territory. The chapter argues for a new theory of the state, which holds that the legal

and political powers of the state are vested in the legal and political attributes of legitimacy. A legitimate state exhibits both forms of legitimacy. It is the question of legal legitimacy which would give the courts jurisdiction over events which occur exclusively in the political realm.

The principle of legal legitimacy places moral constraints on the state and determines when a minority has a legal right to raise the political question. The fundamental issue in deciding this question is consent. The political question only raises itself, however, after a court has found that a state is legally illegitimate. It is nonetheless the crucial issue in secession, which always remains in the political realm and can only be decided by determining the wishes of the relevant minority. The political right of a minority to secede is usually thought to derive from the right of self-determination and the principle of democratic rule.

The chapter also argues that there are practical restrictions on domestic courts, which limit their ability to deal satisfactorily with such issues. As a result, we probably need an international court, with inherent moral authority, to rule on issues of legitimacy. There are a number of developments in international relations which have made this a more feasible project than it was in the past. The international community has already recognized that the obligation of individual states to protect the rights of individuals and minorities in other states takes precedence over the Westphalian doctrine of non-intervention.

Chapter 5 reviews the contemporary literature of secession, which generally consists of theories based on self-determination or theories based on a remedial approach. The literature has overlooked the fact that these kinds of theories can be classified as theories of secession which are based on the legal and political concepts of legitimacy.

Chapter 6 reviews a number of the legal and institutional issues which need to be considered in setting out a legal theory of secession. There are at least three different areas of

concern. Donald Horowitz criticizes the philosophical literature for its failure to take account of the sociological dynamics which give rise to a minority's claim to the right of secession. Allen Buchanan, Wayne Norman and a number of other authors have argued that it fails to address the realities of the international law. It is apparent, finally, that existing theories have yet to deal with the limitations of the legal or institutional process in deciding a question like secession.

The chapter then reviews a number of legal and institutional issues which need to be considered in setting out a legal theory of secession. This includes a review of the relevant international law, in an effort to determine its significance in the context of secession. The immediate problem is that the international law does not give a minority an inherent right of self-determination. The institutional limitations of the legal process are also considered.

There are additional problems in asking a domestic court to rule on events which occur outside the ordinary legal order. These concerns are evident in the common law tradition, which contains a significant caselaw on revolution and secession. Although it is the judiciary which has the prerogative of deciding whether a new political order has legal force, domestic courts have generally declined to rule on the source of their own authority.

The rest of the dissertation discusses the legal question of legitimacy and the development of a legal doctrine of secession. Chapter 7 argues that the legal and constitutional orders rest on an elementary principle of justice, which gives the courts the authority to regulate the relationships between competing parties in society. The chapter also examines the decision of the Supreme Court of Canada in the *Secession Reference*, and the specific criteria which would be needed to determine whether the state has oppressed a minority. The case is helpful from a philosophical perspective because it illustrates the manner in which the legal inquiry proceeds.

The theory set out in the dissertation premises the legal right of secession on the failure of the state to act in accordance with the principle of justice and respect the rights of minorities. These rights rest on a legal principle of equality, which requires that the state treat all individuals and groups with an equivalent moral deference. It is this subsidiary principle, of legal equality, which provides the source of individual and group rights. The state has an obligation to act in the good of all its members: although there is considerable room for disagreement on the means of achieving such a goal, it does not permit serious violations of minority rights.

There is enough in this analysis to give us the general outlines of a legal theory of secession, which would recognize a right of secession when the state fails to govern in accordance with the principle of justice and the subsidiary principle of equality. This brings in the question of discrimination, which is essential in the context of secession, and calls for some means of determining when the state has contravened the legal standard of equality. That in turn requires the development of specific criteria, which can be used to determine whether a state has acted justly in a particular situation. The concept of human rights, which has already received wide international recognition, provides a major source of these criteria.

The ninth chapter sets out the basic framework of a legal theory of secession. It is the remedial theories in the literature which provide the natural source of such a theory. This is because the remedial approach recognizes that we have an interest in maintaining the integrity of sovereign states, which can only be challenged in circumstances that draw their legal legitimacy into question. There should be a presumption in favour of existing states, in the interests of international stability, and the necessary legal standard can be found in the concept of oppression. The legal right of secession is essentially a right to exercise the prerogative of self-determination and any legal model would probably have to make provisions for a referendum, in

order to resolve the political question.

The analogy with the law of contracts is helpful in this context: if the state breaches its fundamental obligations to a minority, the minority has a right to revoke the existing contract. It is apparent that secession is only one of the possible remedies, in dealing with situations where the state has acted outside the scope of its legal mandate, and the substantive cause of action in secession is oppression. Indeed, the moral and legal force of the argument for secession would suggest that minorities are entitled to other remedies in situations where secession is not a practical alternative.

The last two chapters set out a cause of action and consider some of the technical, procedural and evidentiary issues that would arise in the context of any cause of action. This is intended to provide a basis for the adjudication of individual claims. Chapter 9 reviews the three stages of any application, and discusses legal issues like forum, standing, the requisite burden of proof, and the question of enforcement.

The last chapter discusses the substantive issues that would arise in the trial of an action and comments on the ancillary powers of a court. This would logically extend into the political realm, and give it some authority to decide legal issues which arise out of a political campaign for secession. One of the primary concerns is the question of justiciability, which has been neglected in the theories of secession in the academic literature. The chapter also comments on the legal meaning of the term "oppression", which is used to regulate the relationship between minorities and majorities in corporate law.

Chapter 1. Legitimacy

Introduction

The present chapter inquires into the concept of legitimacy. It begins by tracing the etymology of the word and its legal origins in the finding that a person was lawfully begotten. This essentially meant that the status of a person was in keeping with the natural order. In a more political context, where the question of heredity was paramount, the concept suggested that the law determined whether the social order was in keeping with the moral order.

The meaning of the word "legitimacy" has changed over time. Although the term has retained its moral implications, at least in popular usage, the modern notion has political overtones. There is a considerable literature devoted to the concept of political legitimacy, which is now seen as an essential attribute of a valid state. It is widely accepted that a legitimate state is a state which governs with the consent of the governed. The problem is that this usage of the term generally assumes that a state which is politically legitimate, in this sense, is morally legitimate.

The concept of political legitimacy in the academic literature appears to derive from sociology, where it has been used to describe the state's ability to justify its monopoly on the use of force. The problem in the instance of secession is that the success of such an endeavour in the political arena can only be measured on majoritarian grounds. This does nothing to guarantee the morality of the state's actions towards a minority and does not coincide with the original use of the term.

The contemporary philosophical literature has focussed on the question whether we are morally obliged to accept political authority. There are three major theories in the literature, which predicate the legitimacy of the state on individual consent, the agreement of the majority,

or the scrutiny of a moral authority like a court. The dissertation rejects the argument of the individualists, but accepts the majoritarian view as a satisfactory account of political legitimacy. The following chapter argues that the moralistic view provides a satisfactory basis for a legal concept of legitimacy.

Discussion

Allen Buchanan writes that it is possible to speak of illegitimate governments or illegitimate states. It is evident, however, that the legal question of secession presents itself primarily in the context of states.

> The international legal system recognizes states, not governments, as having certain powers, immunities, liberties, and rights. Governments are recognized only so far as they are regarded as the agents of legitimate states, not as entities possessing these juridical characteristics in their own right." (17)

It is true that a state will naturally take on the character of specific governments and there is probably a point where a government can be identified with a state, if its policies actually permeate the constitutional structure of the state. The Third Reich is an obvious example of such a development. In spite of this, it is equally true that movements for secession normally arise in the context of historical policies which extend beyond the duration of particular governments.

There is a distinction between the state, in this context, and the institutions which have the authority to perform its legal and political functions. There will be situations where courts and legislatures lose their legitimacy in much the same way that a state might lose its political authority. This calls for a different kind of relief, however. The military may seize the political apparatus of the state, in Nigeria, or Pakistan, or Fiji, but there is no reason why that needs to call the legitimacy of the state and its territorial boundaries into question. If a court or government is illegitimate, the appropriate remedy is to dissolve the government or court and replace it. This does not require the division of the state or the termination of the existing political order.

It is the legitimacy of the state which accordingly concerns us in the instance of secession. Although the prevailing concept of legitimacy is primarily political, it has its origins in the law. The Oxford English Dictionary traces our use of the word "legitimacy" to the notion of a legitimate child, which was "lawfully begotten" and "entitled to full filial rights". Thus, David Hume wrote that it "had been formerly usual for the civil courts to issue writs to the spiritual, directing them to inquire into the legitimacy of the person." This was naturally applied to those in a sovereign position, since the title of the monarch and nobles rested on hereditary principles.

The historical question of legitimacy isolates the adjudicative role of the courts, since it is the courts which have the authority to decide questions like paternity. This was significant because our natural obligations to other people came were believed to come from our membership in the family. The moral implication was that the identity of the sovereign was determined by the ordinary laws of succession, in spite of the fact that the sovereign was above the legal order. It is the law which accordingly determines whether the political order is in keeping with the natural moral order.

The term "legitimate" originally referred to "the action or process of rendering or authoritatively declaring (a person) legitimate", and by extension, to the act which rendered something lawful or legal. Webster's goes so far as to list the word "lawful" as a synonym of "legitimate". It notes that the root of the word lies in the Latin "*lex*", or law, and characterizes "a *legitimate* government" as one which is "accordant with law or with established legal forms and requirements".[7] The word was also used, by analogy, to indicate that a proposition follows logically from a given set of premises. It is from this usage, apparently, that the term came to express the notion that an assertion is in "conformity to rule or principle".

It is from here that the word "legitimacy" made its way into popular speech, occasionally in a debased form. Benjamin Disraeli wrote sardonically in 1847 that "in these days a great capitalist has deeper roots than a sovereign prince, unless he is very legitimate." "It is not in irony", we find the Saturday Review stating on April 14, 1860, "but in sober earnest, that we express our belief, that any throne is, in practice, called legitimate which has not had the consent of the nation . . . to its existence."[8] The latter usage is interesting because the use of the term in the academic literature is predicated almost entirely on consent.

General Usage

The general usage of the term "legitimacy" reflects two different currents in the history of the concept. The legitimacy of a medieval government came from its claim to be in keeping with the moral order established by the natural law. The medieval conception was eventually pushed to the side by the concept of natural or inalienable rights, however, which rejects the idea that we derive our individual rights from our membership in society. On the modern view, it is society which derives its authority from the powers granted to it by individual persons.

This inevitably shifts the focus of any inquiry into the legitimacy of the state. The question is no longer whether the political order is in keeping with the moral order established by divine authority. It is now the democratic one, whether the individuals within a state have consented to be governed. The division between these two uses of the term is not as clean as it might be, and the word still confers the speaker's moral approval on the use of power or authority. Martha Crenshaw, for example, writes that the "legitimacy of the Red Brigade", however limited, derives from the failures of the Italian government.[9]

Although the term "legitimacy" is used in a wide variety of contexts, the moral sense of the term is still evident in its general usage. Rudolph Barnes, for example, has written about

"military legitimacy", in suggesting that something more than the chances of military success are necessary to justify the use of force in peacetime conflicts. This is apparently an official American view, which is endorsed in military documents.

> Legitimacy derives from the perception that [military] authority is genuine, effective and uses proper agencies for reasonable purposes.[10]

The indiscriminate use of force, without regard to human rights and the rule of law, may compromise the moral effectiveness of military intervention in a conflict.

The moral and political questions of legitimacy are commonly combined, however. A related document, "Military Operations in Low Intensity Conflict", expresses the concern that the

> . . . legitimacy of the actions of an armed force, or even individual members of the force can have far-reaching effects on the legitimacy of the political system that the force supports. (62)

And the same issue arises, domestically, for a military which intervenes in a foreign conflict.

> Public support has proved to be both a requirement and a measure of military legitimacy from the jungles of Vietnam to the deserts of the Persian Gulf, even to the killing fields of Somalia. These contrasting conflicts had one strategic common denominator: the legitimacy of the US military in each conflict depended upon public support back home. (133)

The passage is revealing because it implies that an expression of democratic approval is sufficient to establish the moral legitimacy of military action.

This illustrates the difficulty of the current concept, which lies in the assumption that political criteria are sufficient to establish the moral legitimacy of the political order.[11] In a similar manner, Conor Cruise O'Brien argues that it is the question of legitimacy which determines whether violence can be described as "terrorism".

> The success or failure of political violence depends very largely on the extent to which it is perceived as legitimate. The use of the designation "terrorism" constitutes a declaration of the illegitimacy of the political violence referred to. (94)

O'Brien essentially argues that the violence used by a minority is illegitimate if there are other

means of seeking changes in the social order. This is a political judgement, as well as a moral evaluation, and rests primarily upon the agreement of the populace.

On the other hand, Paul Gilbert writes that those who describe terrorism as a "political crime" are commenting on its moral character.

> Such characterizations, more common among political theorists than philosophers, identify terrorist acts as breaches of the criminal law, rather than of the rules of war. These breaches are committed for political ends which ought to be pursued in accordance with the procedures permitted under a legitimate governmental authority. What makes terrorism wrong on this view is not only that it involves violence against citizens, but also that it by-passes constitutional procedures and thereby threatens the legitimate authority responsible for protecting citizens.[12]

What makes the existing government legitimate, on such a view, is that it follows moral norms in pursuing political ends, which exclude random violence against citizens. This is not a political standard.[13]

Most of the contemporary discussion of legitimacy refers specifically to the question of political legitimacy. The general use of such a concept often assumes that the moral and political standards of legitimacy come together in the question of consent. This is reflected in the general political literature, which tends to collapse the two uses. In King and Congress, for example, Jerrilyn Marston studies the "transfer" of political legitimacy from the British monarchy to the American Continental Congress of 1776. There is a sociological tone in her discussion of the concept, which she uses to describe the perception that a government is entitled to the authority which it enjoys.[14]

Marston readily observes that a wide variety of principles have served as legitimating principles:

> . . . as another student has observed, "in some time and place, almost every conceivable political arrangement–feudalism, monarchy, oligarchy, hereditary aristocracy, plutocracy, representative government, direct democracy–has acquired so much legitimacy that men have volunteered their lives in its defense." (3f)[15]

There is a sense in which historical principles like heredity were sufficient to establish whether a ruler governed with the consent of society at large. But the issue is ethical, in each instance, and it was generally believed that these principles provided a means for determining whether a government or state had the moral right to the jurisdiction which it enjoyed.

In spite of this, Marston's understanding of the term "political legitimacy" is implicitly democratic:

> Political legitimacy, as the term is used here, refers to the belief of the governed that their government rightfully exercises authority over them. It is, as [Carl J.] Friedrich notes, the belief of the ruled in the "just title of the rulers to rule." Thus for Friedrich, the basic question of legitimacy "is a factual one, whether a given rulership is believed to be based on good title by most men subject to it or not."[16] (4)

Marston takes the position that the shift in the allegiance of the American public was based on the perception that the King's right to govern came from a social contract, which the people were entitled to revoke. This leaves no room for disputing the popular will and the conception that Marston is using fails to recognize that the political and moral standards of legitimacy may diverge.

In The War Against Authority, a book with a more popular tone, Nicholas Kittrie adopts a similar conception of legitimacy. "A complex term," he writes,

> . . . *legitimacy* encapsulates the citizens' feelings, attitudes, and trust toward their rulers and political institutions. In new as well as in older nations, political, religious, and cultural traditions help determine the populace's sociopsychological commitment to authority and to the person who hold the reins of power. (75)

Like many contemporary authors, Kittrie expresses a general concern that contemporary society is too pluralistic to sustain a single standard of legitimacy.

There is a practical side Kittrie's concerns, which seem to have manifested themselves in a wide range of social and political crises.

> The recent and unprecedented growth of political turmoil and disorder worldwide,

> coupled with familial, religious, and other institutional declines, compels us to face the continuously haunting questions: Is the current global unravelling of authority indeed a manifestation of the chronic and long-predicted crisis of legitimacy, or is it the product of passing . . . factors? In either case, what, if anything, can be done to help restore the legitimacy of authority and begin the reconstruction of public order? (228)

Kittrie offers no solution to the substantive problem at the root of the instability, however, other than to argue for the "practice" of procedural justice.[17] This would require some vesting of legitimacy in a principle like fairness, but this is a weak suggestion, which seems unlikely to reconcile the diversity of views which he considers.

It will be evident that this usage of the term "legitimacy" begs the question of morality, since it assumes that the views of the majority will decide the issue. A state is legitimate, on such an analysis, if the general public believes that its actions are legitimate. This leaves the question of minorities out of the analysis. The matter is crucial, in the instance of secession, since a minority's claim to the right to secede usually arises out of those situations where the majority of the populace support the actions of an existing state.

Sociology

The shift in the academic use of the word "legitimacy" seems to have its origins in the work of Max Weber, who gave it currency in sociology. Rather than adopt the historical use of the term, Weber argued that the legitimacy of a state derived from the successful exercise of force:

> . . . we have to say that a state is a human community that (successfully) claims the monopoly of the legitimate use of force within a given territory. . . . Specifically, at the present time, the right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it. The state is considered the sole source of the 'right' to use violence.[18]

Weber argued that the legitimacy of the state derived from three sources: from mores which have acquired authority as a result of ancient usage, from the charisma of a leader, or from the

statutory warrant of "rationally created rules". (33f) These criteria are entirely descriptive, however, and it is a mistake to think that they provide any substantive criteria which would establish the moral right to govern.

Weber's concept has been refined by other social scientists, who have generally seen legitimacy as a measure of the capacity of the state to justify itself. Seymour Martin Lipset, for example, has written:

> The stability of any given democracy depends not only on economic development but also upon the effectiveness and the legitimacy of its political system. Effectiveness means actual performance, the extent to which the system satisfies the basic functions of government as most of the population and such powerful groups within it as big business or the armed forces see them. Legitimacy involves the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society.[19]

This is a clinical view, which has many limitations. Nonetheless, it is this aspect of the contemporary concept which has led to the "legitimation crisis" in the academic literature .[20] This crisis has been progressively generalised, to the point where the legitimacy of the state, as a political institution, seems in doubt.

This was probably inevitable. As John Scharr has written, the older definitions of legitimacy

> . . . all revolve around the element of law or right, and rest the force of a claim . . . upon foundations external to and independent of the mere assertion or opinion of the claimant . . .[21]

The newer definitions, in contrast,

> . . . all dissolve legitimacy into belief or opinion. If a people holds the belief that existing institutions are 'appropriate' or 'morally proper', then those institutions are legitimate.

This dissolution of the original concept of legitimacy which has found its way into the general academic literature and often seems to have deprived us of any basis on which we can form defensible moral judgements as to whether a particular state is entitled to enforce the law.

There are criticisms of Weber's concept of legitimacy in the sociological literature. William Connolly has suggested that a theory of legitimacy which accepts that "belief in the legitimacy of the order is equivalent to the order's legitimacy"misconstrues the way in which social relations are constituted. The limits imposed by the political order are tolerable to most of us, he suggests, "because they are thought to be necessary to the common good it fosters."[22] The impetus behind such a criticism is readily apparent: a notion like the common good would at least provide us with an independent basis on which to judge the legitimacy of political authority. It is the capacity for moral evaluation which provides us with a means of judging political institutions, whether they enjoy the consent of the majority of the populace or not.

David Beetham also criticises the sociological concept in The Legitimation of Power, where he writes that Weber's influence on the use of the concept of legitimacy in the social sciences "has been an almost unqualified disaster."

> For a social scientist to say that a given power relation is legitimate, Weber argues, is not to make a moral judgement in the manner of the philosopher; it is rather to make a report (which may be empirically true or false) about other people's *beliefs*. Power is legitimate where those involved in it believe it to be so; legitimacy derives from people's belief in legitimacy.[23] (8)

Beetham distinguishes between the philosophical and sociological concepts of legitimacy. The philosophical view, on his account, falls back on "independent, external standards or criteria", in assessing a given relationship of power. It is this kind of concept which characterizes the legal notion of legitimacy.

Beetham argues that Weber's views are inadequate, even in the context of the social sciences.

> What such an account leaves out is obvious to all but the most hardened exponents of the theory: that people are also moral agents, who recognize the validity of rules, have some notion of a common interest, and acknowledge the binding force of promises they have made–all elements involved in legitimate power. (27)

On the other hand,

> . . . normative grounds or reasons are not the only reasons people have for obedience. . . . power relations are almost always constituted by a framework of incentives and sanctions, implicit if not always explicit, which align the behaviour of the subordinate with the wishes of the power. (26f)

The problem is that this has led to the "fashionable" view that our obedience to social and political norms are determined by nothing more than the "rational choice" of individuals, who merely consult their self-interest in deciding whether to accept the rules of power.

Beetham argues that the two views should be amalgamated in a more sophisticated concept, which would take us outside the "self-confirming cycle of legitimation" expressed in the sociological standard. (246) Although Beetham tries to base this concept on consent, he does not set out any mechanism which can be used to provide the kind of independent standard which he is seeking.[24] Still, he seems to be right in arguing that there is no means of evaluating the specific concept of legitimacy employed by a particular society, unless we adopt a perspective outside the norms of that society.[25] Historically, this was found in a moral or religious order like the natural law, which existed independently of the political order and the wishes of any of the participants.

Philosophy

The question of legitimacy is less prominent in the philosophical literature, which seems to have lost itself in the debates concerning the nature and extent of our obligation to obey political authority. This is a different issue. Nonetheless, the sociological concept seems to have found its way into the philosophical literature, which has focussed principally on consent. Sergio Cotta, for example, writes that the term "legitimacy" originally suggested that a *de facto* political power is "in conformity to the law" and has become a *de jure* power. Nonetheless, the modern term, in "accredited political language", has lost something of its original meaning and

now refers to a principle or criterion which justifies the existence of power.[26] This justification is necessary because power can only be maintained if it is accepted by those who are required to obey it.

It is possible to distinguish at least three major theories in the philosophical literature. There are a number of authors who take the view that legitimacy is based on the personal consent of the individual and trace the legitimacy of the state to natural rights. The most prominent difficulty with the view of such individualists is that it does not distinguish satisfactorily between the political and legal conceptions of legitimacy. This is discussed in greater detail in the following chapter.

The second theory is more overtly political. It premises the legitimacy of the state on a notion of individual and collective consent, where the real strength of the contractual thesis appears to lie. This is a social concept, which retains the need for some degree of individual consent but recognizes the authority of the social order. This provides a convincing basis for a theory of political legitimacy, since any state will have difficulty maintaining its existence without the agreement of the larger community. There is, in this sense, a democratic rider on every state, a *consensus ad idem*, which places moral and practical limits on the prerogatives of the state.

There has been little scrutiny of other theories of legitimacy in the philosophical literature. Nonetheless, it is possible to discern a third theory, which holds that political legitimacy derives from some form of moral authority, akin to the authority exercised by courts in the constitutional arena. This moral authority has some of the attributes of a legal concept of legitimacy, but has not been explored at any length in the existing literature.

Individualism

In an article entitled "Individualism and the Problem of Political Authority", Tibor Machan writes that the question of political legitimacy is crucial for individualists.

> The question is whether even the best of human communities, with their myriad of official elements, possess moral underpinnings so that what they require of their members may be enforced by some of their members.[27] (500)

Machan sets out a theory of natural rights, which derives the authority of the state from "an individualist moral framework". (501) This holds that "objective" self-interest is an inherent part of moral decision-making and significantly restricts the authority of the state.

Machan's theory of political authority rests on the view that the state derives its legitimacy from the personal consent of the governed. This neglects the fact that the sources of the law seem to be found in the conservative belief that people require some form of moral regulation, in the interests of the common good.[28] This kind of assumption is essential in justifying the legal order, which is necessary to maintain peace, justice and stability in society. This may reflect the political discourse in the United States, which often seems to be preoccupied with a narrow conception of individual rights and overstates the significance of the individual to the detriment of group rights and the larger public good.[29]

In any event, Machan's mistrust of political authority is evident in the work of other authors. In the same issue of The Monist, Craig Carr offers a limited justification of the authority of state. He seems unwilling to go any further than the statement:

> . . . that political authority cannot be dismissed as inherently illegitimate because it compromises the autonomy of the individual.[30]

This defence of political authority is very weak and Carr ultimately adopts the argument that the state cannot legitimately pass laws on "hard moral questions". (483) This forces him to adopt the rather strained view that states routinely act outside the proper scope of their authority.

The notion of personal consent runs into many difficulties. Machan takes the position,

for example, that we cannot consent "to institutions which are in violation of basic rights."

> Nor can one consent to the authority of enforcing principles of community organization which are in violation of the rights to life, liberty, and property, for that would mean consenting for others without the authority to do so. (511)

At the same time, he argues that "the consent to be governed need not be made explicitly but can be implied, even in ignorance of the consenting party." This undermines the whole notion of individual consent and introduces a hypothetical individual, who may or may not share the attributes of real individuals.

The question of consent seems less important, in this context, than the parameters in which the individual can exercise his autonomy. As a result, the decisive issue for Machan and others in his camp is whether the political limits on personal freedom can be justified. This raises the need for constitutional restraints on political power and forces us to turn to neutral actors, outside the political realm, to determine the extent of those rights. This is the kind of approach taken by Ellen Frankel Paul in an article "On Three 'Inherent' Powers of Government", where she argues that a natural rights approach offers "the best hope" of resolving the issue of political legitimacy. (530) This takes us into the kind of analysis carried on in the American legal tradition.

The problem is that Frankel Paul's concept of individual rights is entirely out of keeping with the judicial tradition to which she is referring. As a result, she is left to argue that the power of eminent domain, the "police power" and the power of taxation--"three supposedly inherent attributes of political power"-- "vitiate the legitimacy of any government which exercises them." (542) This is problematic, since it is out of keeping with the ordinary practices of government and places important areas of legislation beyond the reach of the political process. It also contradicts the legal view, since the American courts have recognized that all three powers are

fundamental attributes of sovereignty.

Frankel Paul complains that the courts have often taken the position "that government is the original grantor of all rights, and that individuals enjoy these rights only at the instigation, sufferance, and on the conditions attached to it by government." (538) This confuses moral rights and legal rights, however, and in spite of her protests, it remains something of a truism to say that the law derives from society rather than the individual. The problem here is not with the courts: on the contrary, the problem lies in setting out a theory which attempts to derive the powers of government from individuals rather than society at large.

The problem is apparent in Frankel Paul's discussion of the police power, which she describes as the power of the state to regulate private property "to protect and promote the 'health, safety, morals,' and, since the turn of the century, the 'general welfare' of its citizens."

> In an early case, *Gibbons v. Ogden*, Chief Justice Marshall wrote about the police power, giving it broad sweep, and simply assuming that such a power naturally inhered in the states . . . Chief Justice Taney, too, considered the police power as tantamount to sovereignty itself. (537)[31]

The limitations of Frankel Paul's argument are evident in her observation that the police power:

> . . . has been stretched leagues beyond its legitimate boundaries to justify such governmental tampering with the market as minimum wage and maximum hour laws, workmen's compensation acts, zoning, usury laws, etc. (539)[32]

This merely shows the inadequacy of her formulation of political legitimacy, which cannot account for the accepted powers of government.

The majoritarian view

The attempt to base the legitimacy of the legal order on a broader, more democratic notion of consent is more convincing. In "What is the Basis of Political Authority?", Harry Beran argues that the legitimacy of political authority lies in the consent of a group to that authority. Thus,

> . . . rules for conferring authority cannot confer authority if they are not accepted by the group to which they are supposed to apply. On the other hand, it is clear that authority can be bestowed by a group following rules for bestowing authority which they have undertaken to follow. (492)

Unless we take the position that the state must have the consent of all of its members, an impossible position, this gives rise to a concept of legitimacy which is based on the rule of a majority. It follows that consent means the consent of the majority--in Beran's view, the consent of the "vast majority of residents"–to the political authority of the state. (495)

Beran's position reflects the practical reality that, in some sense at least, the right to secede is a group right.[13] Allen Buchanan puts it in the following manner:

> If an individual right is one that . . . can be exercised independently by an individual, then the right to secede . . . is not an individual right. Its exercise requires collective action, even though we can speak of the individual rights that members of the group have to participate in that collective action. The same holds true for collective property rights and robust minority language rights. All of these are group rights in the sense specified above: they are ascribed to groups and must be exercised collectively, through political mechanisms, on behalf of the group.[14]

Beran's notion of political legitimacy upholds the contractual thesis, but contemplates a contract between the state and the group of individuals, collectively, who come under its jurisdiction.

Beran's argument rests on the agreement of the individuals within the relevant group, rather than a strict notion of consent. The political legitimacy of the state is guaranteed by democratic criteria, which contain a certain degree of moral force and deserve to be respected. This is not sufficient to deal with the problem of secession, however, which generally arises when a majority within a state oppresses a minority. And the fact that the moral problem lies in the wishes of the majority, who feel that it is in their interests to act in an oppressive manner, deprives the democratic process of any broader claim to legitimacy.

It is true that a referendum may be necessary to ascertain the wishes of a minority, if the majority permits it, and there may be ways of correcting the problem of majority rule by

democratic means. Even if a minority is consulted, however, there is a question as to who is properly included within the minority. In the more troubling circumstances, moreover, where there is a history of enmity between different groups, it is the moral elements in the question of secession which come to the fore. It is naive to think that these elements can be adequately addressed by consulting the wishes of one side or the other.

James Fishkin considers the discrepancy between moral and democratic standards in Tyranny and Legitimacy, where he reviews a number of political criteria which have been advanced as principles of legitimacy.[35] It is enough to mention the principles of consent and equality : Fishkin argues that these theoretical principles will justify tyranny--rather awkwardly defined in terms of "severe deprivations"--if they are applied too rigorously.[36] One of the examples that he uses is from recent history:

> In August 1972, President Idi Amin ordered the expulsion, within ninety days, of approximately 50,000 Asians in Uganda. Those who considered staying were threatened with detention in military camps. There were strange disappearances, beatings, robberies, and apparent murders. Tens of thousands of Asians, who had built up a position of hard-won prosperity over several generations, were forced to leave the country virtually penniless. (5)

The important factor is that "Amin's treatment of the Asians was resoundingly popular among black Ugandans."

The question, then, is whether the agreement of the majority of Ugandans was sufficient to establish the legitimacy of the actions of the state? Would the government's actions have been justified, if it won a fair plebiscite on the issue?[37] The answer is that the actions of the Ugandan state were inherently illegitimate, whether or not they passed the practical test for political legitimacy. The problem which Fishkin identifies seems simple enough: while the democratic principle may provide a reasonable basis for political action, it is not sufficient to determine the

morality of those actions. This illuminates the purpose of the more traditional concept of legitimacy, which subjected the political order to some form of moral scrutiny outside the political process.

This does not mean that there is any reason to reject the basis of Beran's view, which emphasizes the importance of agreement in determining the legitimacy of a particular action by the state. It is a matter of recognizing its limitations. Elsewhere in his book, Fishkin quotes Joseph Schumpeter, who writes that "there are ultimate ideals and interests which the most ardent democrat will put above democracy." (66f) Democracy is merely a political "method", a means of determining the policy , which is "incapable of being an end in itself, irrespective of what decisions it will produce under given historical conditions."[38] The problem is not so much with the notion of consent, broadly construed, as with the fact that political criteria are insufficient to capture the full meaning of the concept of legitimacy.

Moralism

There is another argument in the literature, which may make up for the deficiencies in the majoritarian view. Norman Barry sets out two kinds of theories of legitimacy, for example, one which is based on consent and one which is based on authority.[39] The latter view, which borrows from the thought of G.W.F. Hegel, provides a counterpoint to the views of the individualists. It rests on the ascendancy of the state and the community over the individual. Barry argues that a cogent theory of authority "must be rooted in specific historical experience and in [the] traditional structures of rules: and these must precede the notion of individuality."[40] (200)

The problem with this kind of theory is that it collapses the state, the law, and the normative obligations of the state. "Since no real distinction is made between state and law", Barry writes, "there can be no theoretical limits" on the actions of the state. (202) This reveals

the real problem, which lies in the notion of state sovereignty. Barry solves this difficulty in much the same way as the present dissertation, by arguing for the development of an independent legal tradition, such as we find in the common law, which cannot be seen as "a function of the state's coercive authority". (203) This leads him to argue in favour of "the constitutional state", which is governed by the neutral provisions of a procedural constitution and does not favour any "substantive political and economic creed" over any others. (204)

Barry's arguments are convincing, though his argument that a constitution must be exclusively procedural seems to ignore the reality of constitutional litigation. He also fails to consider the need for a court with the authority to rule on the validity of the domestic political order. This is necessary because a state that is politically and constitutionally legitimate may still be legally illegitimate. Nonetheless, the standard of legitimacy which Barry sets out recognizes that the courts provide a separate source of moral authority, which might be sufficient to regulate the political order.

There is a related argument in the philosophical literature, which calls for a substantive concept of legitimacy. This would hold that the legitimacy of political authority ultimately derives from its derivation in moral values and principles. Jeffrey Paul, for example, takes the position that a theory of consent must derive its account of political legitimacy from moral principles "which have no contractual origins".[41] Paul's position is unassailable, if only because the existence of consent is insufficient, in itself, to provide the necessary basis for a social contract. This is a contractual matter: the point of an agreement is that it binds the parties, even if they change their minds, and cannot be revoked unless the other party has repudiated it.[42] It follows that consent must rest on moral principles which take precedence over the mere acquiescence of an individual.

If we accept this reasoning, the answer to the question whether the political contract is legitimate will depend upon whether it is morally defensible. This means that it must be justified on the basis of moral principles and sentiments. As Patrick Riley writes, in the context of Jean-Jacques Rousseau:

> Perhaps a species of moral *à priorism* is essential to genuine and full contractarianism: after all, if society must be legitimized at its outset, the source of that legitimacy–the wills of individuals–must in some sense be prior to society. But this is exactly the point on which Rousseau had his doubts, sometimes treating the capacity to make moral judgments and decisions as something all but innate, sometimes treating it as a learned ability that comes from the political education afforded by great legislators.[43]

The truth is probably that our capacity for moral judgments can be traced to both sources, but the important observation is that there is some divergence between our moral and political sensibilities.

Riley's book, published in 1982, complains that the contemporary contractual tradition fails to address the issue of "voluntarism" in the contractual tradition. Although the work of Michael Walzer, John Rawls, John Tussman, and A.J. Simmons, have all addressed the issue of consent at length, and occasionally in a critical vein, they have not investigated the nature of willing.[44] Riley suggests that Rawls and other authors have not investigated the full source of our contractual obligations, and argues that "a metaphysic of morals" is needed to "shore up social contract theory" and take us to the limits of moral inquiry. (214) But the more interesting aspect of his argument, in the context of legitimacy, is that it recognizes the conceptual priority of our moral faculties.

This comes to the fore in considering a question like secession, since it suggests that a standard like consent is only significant if it has a moral footing, and is not decisive when it diverges from a moral standard. It is significant, in this regard, that the more recent debate in the academic literature has passed on, beyond the question of consent. Christopher Wellman, for

example, argues that a state's right of coercion is legitimate because we have "samaritan duties" to each other.[45] This reasoning is somewhat convoluted: because we have samaritan duties, the state has the authority to coerce us, in order to secure stability for other people in society. (219) We are morally obliged to accept legal and political constraints, in order to provide for others.[46]

The significance of Wellman's argument, in the immediate instance is that it recognizes the moral origins of the state's political authority. If our samaritan duties are augmented by our membership in an ethnic or national group, his argument begins to take on the properties of the communitarian thesis. Wellman's account is more universal, however, and takes the morally appealing view that our political duties

> . . . are due to all *humans*, not just fellow *citizens*. This is in stark contrast to most theories which view a citizen as having political duties to only her own state and/or compatriots (since only *it* has benefited her or because only *they* partake in the same political association as she, for instance). Because samaritan duties can be owed to anyone, however, the samaritan model of political legitimacy can ground a duty to imperiled foreigners just as it generates a justification for one's own country. (233)

This is of crucial importance, in setting out a legal theory of secession, because such a theory needs to derive its authority from a source which exists above the level of individual groups.

Wellman's argument only goes so far, however: it essentially sets out the reason why individuals must accept the authority of the state and does not investigate the possibility of other sources of authority. Nor does it address the source of legal authority, other than to suggest that it is a necessary part of human life. Still, Wellman's view is significant because it ultimately traces the political authority of the state to its moral sources. The most cogent reason to accept the authority of the state can be found in the moral intuition that we have an obligation to help others. This is not decided by consent, in the usual sense: it is premised on the moral feeling that we should help other people, in the absence of reasons to do otherwise. This is nevertheless a matter of consensus and derives much of its cogency from the fact that most of us agree with

such a position.

Allen Buchanan falls back on a similar mode of reasoning when he argues that we have a "natural" duty to promote justice for other people. This is a "simple, intuitive idea", which holds that:

> . . . the same basic moral considerations that require us to respect person's basic rights also require us to help bring about a situation in which their rights will be respected.[47]

The notable feature of these kind of arguments is that they rest the nature and extent of political authority on a moral rather than a contractual foundation. The question of legitimacy aside, this is important because it envisages a moral order which might provide the foundation of a legal order that extends beyond the state.

The interesting issue is whether the argument from moral authority might be sufficient to make up for the deficiencies in the contractual thesis. This offers the possibility of a remedial jurisdiction, which would provide some form of relief in those situations where the normal political process results in serious unfairness to a minority. As a practical matter, a majoritarian process cannot correct itself, and a political system needs another source of authority to deal with its excesses, which does not deprive the political actors of the right to determine the course of public policy. The question posed by the present dissertation is whether the courts can correct the weaknesses in the political process and protect the rights of minorities.

This requires some delicacy, if the different branches of government are to respect each other's roles. The political process provides us with one means of determining the morality and efficacy of the state's actions in a given set of circumstances. The legal process provides a means of assessing moral issues, complete with its own strengths and weaknesses. The difficulty, in the instance of secession, is that this may require the dissolution of the existing political order, which is usually thought to be the source of the legal order. The following

chapter accordingly examines the legal conception of legitimacy, which is based on the moralistic thesis, in order to determine whether it would provide the necessary corrective to the political process.

Chapter 2. The Legal Concept of Legitimacy

For one reason or another, the academic literature has neglected the fact that the courts do not derive their authority solely from the political order. This is an essential factor in any attempt to use legal mechanisms to regulate a political question like secession.

The previous chapter accepts that the idea of a social contract provides an adequate explanation of the source of the political order, which derives its authority from the agreement of the majority to the measures adopted by the state in its pursuit of public policy. The present chapter argues that the legal order derives from a different source, which can be found in the need to preserve peace and justice in society. One of the problems of the individualism in the philosophical literature is that it traces the source of the law to individual rights, rather than the common interests of society.

The authority of the legal order, like the authority of the political order, can ultimately be traced to the collective consent of the governed. This is evident in the failures of a political standard of legitimacy in the legal arena. These failures can be seen in the legal positivism of the school of "plain fact" adjudication which developed in apartheid South Africa. This diminishes the role of the judiciary and gives the political branch of government complete authority over the affairs of the state. The problem, in the instance of secession, is that it prevents the courts from intervening when a group with political power oppresses another group in society.

This is a problem in the classic instance where a minority claims a moral right of secession. It also goes against the existing jurisprudence, since the American and Canadian courts have recognized that the legitimacy of the legal order has a moral source. The Supreme Court of Canada, in the *Secession Reference*, sets out a moral principle of legitimacy which holds that political actors are bound by substantive constitutional principles. These principles take

precedence over the principle of majority rule, which is subject to the restrictions of the rule of law. It is necessary to distinguish between the nature of the judicial task and the nature of these principles, since the judicial task in constitutional cases is preeminently procedural and judges are never charged with commenting on the specific morality of the legislation which comes before them.

The moral issue that arises in this context has been discussed, albeit obliquely, in the philosophical literature. Arthur Applbaum and Thomas Nagel have discussed the kinds of issues that arise in applying a legal principle of legitimacy in the broader context of a general discussion of moral legitimacy. Nagel is particularly concerned with the problem of reaching a moral consensus that would justify political action on divisive moral issues. This leads him to postulate a "universal standpoint" which is similar to the position adopted by the courts in deciding constitutional issues.

The constitutional order derives its authority from a larger agreement, which rests in the moral consensus in society on the essential tenets of the constitution. This agreement provides the foundation of any legal mechanisms that might be used to regulate the political order. The criterion of consensus is important because it prevents a majority from legally acting against the interests of the minority without its implicit consent.

The derivation of the legal order

A minority which claims the right to secede is claiming the right to free itself from its obligation to obey the existing legal order. This is a difficult issue, philosophically, because the legal order is inherently compulsory. The question of secession accordingly raises a question as to our moral and legal obligation to accept the authority of the state. This is usually seen as an issue which goes to the legitimacy of political authority and calls for an explanation of the source

of political power.

John Locke canvasses the question in The Second Treatise on Civil Government, where he argues that man is "naturally free" and can only be subjected to the power of government by his own consent. This is a problem, since it runs against the empirical fact that we are obliged to obey the law, whether or not we have consented to it. Locke accordingly retreats, in a famous passage, to the position that "tacit consent" is sufficient. This is not entirely satisfactory:

> The difficulty is, what ought to be looked upon as a tacit consent, and how far it binds--i.e., how far anyone shall be looked on to have consented, and thereby submitted to any government, where he has made no expressions of it at all.[48]

Although this is a political question, it is pressing in a legal context, since there is nothing in the law to suggest that our obligation to obey the legal and political order rests upon whether we agree with it or not.

In spite of the position he adopts, Locke has no hesitation in applying a compulsory rather than a consensual legal standard.

> And to this I say, that every man that hath any possession or enjoyment of any part of the dominions of any government doeth hereby give his tacit consent, and is as far forth obliged to give obedience to the laws of that government, during such enjoyment as anyone under it, whether this his possession be of land to him and his heirs forever, or a lodging only for a week; or whether it be barely traveling freely on the highway; and, in effect, it reaches as far as the very being of anyone within the territories of that government. (§119)

This reflects the common law principle that the jurisdiction of the courts extends to any action which occurs within the territory of a state.

It will be apparent that Locke seems to stretch the notion of consent beyond its breaking point. If we are bound by the mere fact that our actions occur within the state, it is evident that an individual has no practical right to question the authority of the legal order. As Jerrilyn Marston writes, this became an integral part of the discussion of a social contract in the

eighteenth century:

> The idea of an uncomplicated, mutually binding contract was so essential to Whig theory that the terms of the contract became an eighteenth-century political cliché reiterated by Whigs on both sides of the Atlantic. Thus "Cato" laid down as a political maxim "that Protection and Allegiance are reciprocal." "A true Whig is of the Opinion," [Robert Viscount] Molesworth asserted, "that the *Executive* Power has as just a Title to the Allegiance and Obedience of the Subject . . . as the Subject has to *Protection*."[49]

Much of the modern discussion of the social contract seems to have lost sight of this side of the relationship between government and the governed.

The contemporary inquiry into our obligation to obey legal and political authority seems to have obscured the compulsory nature of such authority. The individualist strain in the contemporary literature clearly brings the inherent legitimacy of such authority into question. In a collection entitled On Political Obligation, for example, Tom Campbell follows the lead of Joseph Raz in arguing that "law as such has no moral authority" and it is only "good legal systems" which can claim our obedience.[50] Paul Harris sets out three conditions, "under which there is a general *prima facie* moral obligation to obey the law".[51] This implicitly suggests that the legitimacy of the social order derives from the concept of the individual.

In much the same vein, Rex Martin argues that

> . . . some laws may establish ways of acting or ways of being treated that are not in the interest of each and all, and the citizen might use such a contention to justify his or her refusal to conform to such a law.

This, he writes,

> . . . might even license, conceivably, some cases of civil disobedience--where, for example, the citizen regarded an alleged rights law as . . . specifying a way of acting (or of being treated) that he or she could not endorse.[52]

Martin argues for a notion of civil responsibility and general "allegiance" which seems to neglect the reality of our obligation to obey the law.

There is a collectivist response, which is in keeping with the majoritarian view discussed

in the previous chapter. Leslie Green, for example, identifies "two faults" in the theory of consent. The first is that it fails to recognise the fact that political life is essentially public, and not private. The question of consent accordingly raises a social or collective issue and the political contract is more properly seen as a contract between the state and some majority of individuals in the state, willing and acting in concert with one another. This rests the legitimacy of the state, much like Beran, on the existence of an agreement rather than consent, narrowly construed.

The second fault is that the individualists fail to recognise the role of "communal traditions" in establishing moral relations in the state. More importantly, it is evident that

> . . . these two faults in consent theory are not merely incidental: they are intimately connected with its main feature, the analogy between life in a state and a voluntary association.[53]

This is a fundamental error:

> Descriptively, states are not like that, for the scope of their authority is maximal and their jurisdiction compulsory.

It is the descriptive issue which captures the nature of the legal order, even as it identifies the difficulty in regulating the conduct of the state.

The same error has made its way into the commentary on the derivation of the law. In The Ethics of Legal Coercion, for example, John Hodson provides a theoretical framework for an analysis of legislation. (xi) His theory starts with the principle "*of respect for persons*":

> . . . all action must be consistent with recognition of the supreme moral importance of each person's having control over his or her own life in accordance with his or her own unencumbered choices. (129)

He then sets out a "*primary exclusionary principle*", which states that the state can only use coercion if it is authorized by this initial principle.

But the idea that the function of the law is to free us, to make "unencumbered choices", is

dubious at best. Although the legal regimes under which we live are increasingly complex, and cannot be reduced to a simple set of imperatives, the ordinary law is only incidentally consensual. This is an empirical rather than a theoretical observation, but it has deep philosophical implications, since the judicial inquiry rests on the assumption that the legal authority of the state over the individual is inherently legitimate. Nowhere does Hodson acknowledge that the state possesses an inherent authority, which gives it ascendancy over the individual.

The notion that the law is inherently compulsory does not negate its contractual aspect. The legitimacy of the legal and political orders appears to rest, in point of fact, on our general acceptance of the fact that it is compulsory. In an essay on the "original contract", David Hume writes that there is a sense in which the source of all political authority is consensual.

> When we consider how nearly equal all men are in their bodily force, and even in their mental powers and faculties . . . we must necessarily allow, that nothing but their own consent could, at first, associate them together, and subject them to any authority.[54]

There is something right about the contractual position, since it is probably impossible to govern a country without some degree of consent from the populace.

On the other hand, it is a mistake to suppose that the individual members of society have consented to the rule of government. Hume argues that we could not enjoy the benefits of society

> . . . without laws and magistrates and judges, to prevent the encroachments of the strong upon the weak, of the violent upon the just and equitable. . . .
>
> If the reason be asked of that obedience, which we are bound to pay government, I readily answer, *because society could not otherwise subsist:* And this answer is clear and intelligible to all mankind.[55] (456)

If we rest our obligation to obey the law upon a promise, that only raises the question: "why are we bound to observe our promise?" The answer, which turns the idea of a promise inside out, is

that we have no choice but to obey the law, since the social order could not persist without it.

Hume ridicules the suggestion that an individual consents to government by living within a particular territory:

> Can we seriously say, that a poor peasant or artizan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day, by the small wages which he acquires? We may as well assert, that a man by remaining in a vessel, freely consents to the domination of the master: though he was carried on board while asleep, and must leap into the ocean and perish the moment he leaves her. (451)

This might be compared to the situation of a minority which finds itself within a state dominated by another group, since the same logic appears to apply in either case. But of course people may continue to live within a particular state, for any number of reasons, without accepting the legitimacy of the state in which they live.[56]

This is not entirely fair to Locke, since there is no disagreement between the two philosophers on the fundamental issue. While the fact of consent creates moral obligations, it is on the legal basis that we are not entitled to enjoy the benefits of a political society without accepting its authority. Locke essentially sees the "tacit consent" of the populace as a condition precedent, in legal terms, which interposes itself between a person's decision to make use of a public benefit and his subsequent act in doing so. This is in keeping with the normal rules of social intercourse: in using a public highway, we agree to observe the speed limit and it is irrelevant whether we have addressed our mind to the issue.[57] And many of the circumstances in life are similar: when we rent a car, or take a ferry, or open a bank account, the law assumes that we are bound by a multitude of restrictions, whether we have considered them or not.

The essential argument in Hume and Locke is that we are bound by the social contract, merely by virtue of living in a particular society. This is a common theme in philosophy. Emmanuel Kant argues, for example, that we are obliged to enter into the civil contract and

accept the legal order. This does not compromise our autonomy because we cannot exist independently of the society and can only exercise autonomy within the social contract.[58] It follows that questions regarding the legality of the political order and the positive law can only be answered by determining whether the social contract is in keeping with the moral order. It is the moral issues which are uppermost, and it is a mistake to think that our failure to consent to unconstitutional provisions in a statute deprives them of legal force. On the contrary, it is the fact that the terms which the state has imposed terms upon us are demonstrably unfair.

In another essay, on the origins of government, Hume takes the position that "all men are sensible of the necessity of peace and order for the maintenance of society". Faced with the "incurable" weakness of human nature, and the inevitable conflict between self-interest and justice, society

> . . . must institute some persons, under the appellation of magistrates, whose peculiar office it is, to point out the decrees of equality, to punish transgressors, to correct fraud and violence, and to oblige men, however reluctant, to consult their own real and permanent interests. In a word, OBEDIENCE is a new duty which must be invented to support that of JUSTICE . . .[59]

The existential premise of the law is that the citizen is obliged to obey it: there may be exceptions to such a principle, and restrictions on the authority of the state, but the legal order is compulsory.

From a legal perspective, there is little reason to decry the compulsory nature of political and legal authority, which is a necessary facet of any social order.[60] Who would suggest that taxes or the criminal law are voluntary? There will inevitably be situations where our *prima facie* obligation to obey the law is superseded by moral considerations, which call for civil disobedience or other forms of political protest. It is nonetheless contrived to suggest that an individual's general duty to obey specific laws derives from his voluntary assumption of that

duty.

This goes a long way towards explaining the coercive nature of the law and suggests that the authority of the law derives from its moral character rather than from individual assent. It is irrelevant whether we are speaking about the criminal, civil or administrative branches of the law. The courts have no interest in whether individuals have consented, implicitly or explicitly, to the legislative schemes that they are asked to interpret and apply. The disjunction between the legal and the academic arenas could hardly be more stark, but the purpose of the ordinary law lies more in enforcing some established view of what is right than in protecting individual liberties.

Laws usually have a political source, but they do not derive their authority from the fact that they reflect the wishes of a democratic majority. They derive their legal authority from the fact that they reflect the wishes of a democratic majority as to the right course of action in government. Whether we are speaking about the substantive law or regulatory regimes, the law encapsulates a particular view of the good, which cannot be divorced from moral judgement. This is a practical feature of the system that will not go away, in everyday life, and the normative force of the law has its basis in the right of government to act in the common good. Although the courts strike down laws which infringe individual rights and freedoms, these rights and freedoms function as concessions carved out of the existing legal order.

Hume entrenches our obligation to obey the law in its moral authority, which expresses an ethical necessity and is justified by the social order that stands behind it. The legal order is justified because it is necessary to secure the benefits of human society, which are morally advantageous, since they secure justice. This is probably sufficient to provide a moral justification of the state, and justify its authority over the individuals within a particular territory.

It follows that there is a moral presumption that we should, as a general rule, obey the legal and political authorities within society.

This raises the major issue with respect to the question whether a minority has a right to secede, since the essential issue is whether the members of a minority are obligated to respect the jurisdiction of the state over the relevant territory. This cannot be decided, legally, unless the legal order exists outside the political order and derives its authority from principles which take priority over the usual presumption that we should obey the law. We accordingly need to locate a court's authority to compel our obedience to the law in something outside the state.

This kind of reasoning goes directly against the positivist reduction of the law that has created such a pressing doubt as to the legitimacy of the state's exercise of legal authority. Kai Nielsen is borrowing from Weber, when he argues that the legitimate *de jure* authority of the state may simply derive from its successful claim to a monopoly on "the *de facto* legitimate use of violence".[61] This is only true if the courts abandon their moral jurisdiction and accept that their authority derives completely from the political order. The salient issue is whether the members of a minority should be freed from their obligation to obey the laws promulgated by the existing state.

The legal concept of legitimacy

A legitimate legal system, like the political system, must be legally and politically legitimate. The political legitimacy of the courts derives from the consent of the governed, who agree to accept the authority of the courts. At least part of this legitimacy derives from the duty of the courts to apply the law enacted by the legislative branch of government. This positivism leaves most of the law-making power in the hands of political actors, who are accountable to the governed.

The courts must also be legally legitimate, however, and the inadequacy of the political standard is reflected in the positivist view that the law is merely the command of the sovereign.[62] David Dyzenhaus illustrates the poverty of such a view in an article dealing with the provenance of the "plain fact" school of adjudication in apartheid South Africa. The example is interesting, since there is a question whether the South African government was politically legitimate, and the failure of the Appellate Division to deal with the question of legal legitimacy prevented it from dealing with that fact.

The source of the positivist tradition can be found in Thomas Hobbes, Dyzenhaus argues, who was wary of the common law.

> Hobbes . . . says that the sovereign should not be subject to any power in the social order and that his commands as to that order should be in the form of positive law, so that they can be understood without courting the dangers of moral argument. It is this last consideration that explains Hobbe's contempt for the common law. He regards the common law as a bog of moral values which gives a license to lawyers and judges to impose their views about right and wrong on the social order.[63]

This translates itself into the view that judges should leave their moral views at the doorstep of the courthouse and apply the law in accordance with the wishes of the sovereign.

It may be ironic that this kind of view had a profound effect on the subsequent development of the English common law, which restricted the judiciary to an interpretation of the "intentions" of Parliament. There were notable exceptions to such a tradition, and the criminal law, the most overt of all moral jurisdictions, was left to the common law courts.[64] In spite of this, it seems fair to say that the recent historical tradition traces the authority of the courts to the political order, as it manifests itself in the statutory powers of an elected Parliament. The philosophical defence of such a position can generally be found in legal positivism, in the English tradition, and Dyzenhaus is primarily interested in refuting the arguments of H.L.A. Hart and Joseph Raz.

The difficulty with this legal and philosophical tradition is that it diminishes the role of the judiciary and fails to recognize the moral independence of the judicial decision to apply and enforce the law. Dyzenhaus takes the position that a judge has a moral obligation to apply the law, which introduces a normative element into the judicial task and vests at least part of the legitimacy of the law in the moral provenance of judicial decisions. The problem with legal positivism, in this context, is that it fails to distinguish between the legitimacy of the law and the legitimacy of the judicial decision to apply and enforce the law. This corresponds, to some extent, to the distinction between the notion of political and legal legitimacy.

There is no difficulty in saying that a law derives its legitimacy, generally speaking, from the authority of the political order under which it came into being. This is only one side of the issue, however, and the actions of the judiciary derive their legitimacy from a different source, which can be found in a common set of moral principles. The one issue that Dyzenhaus leaves to be explored is the impersonal nature of a judge's obligation to obey the law, which is approximate and procedural, even when it finds its source in substantive principles. That is a separate issue, however, and it is this aspect of the question of legitimacy that explains the moral warrant of the courts, which stands conceptually outside the political process.

It is the moral question of legitimacy which arises in the context of South Africa, where the Appellate Division of the Supreme Court upheld legislation delegating wide powers to executive officials, who carried out the racial policies of the government outside the scrutiny of the courts. Dyzenhaus suggests that three conclusions from can be drawn from the failure of the judiciary to intervene in such a development:

> These are, first, that the process of adjudication is a central element of legality, a central element, as it were, of the (read "our Western") idea of law. Secondly, in order to make sense of that central place, we have also to see that such adjudication is not merely formal–it is adjudication in terms of some substantive moral values that are also legal

> values. Finally, there is, therefore, an intimate connection between legality and legitimacy. (93)

Even if the laws in apartheid South Africa could be considered politically legitimate, there is a question as to whether the courts could legitimately apply them.

This runs directly against the positivistic contention that the legal order derives from the mere existence of political power. The substantive question goes to the heart of the court's jurisdiction and the courts have an inherent authority to rule on the morality of legislation. This is putting the argument mildly, since the thrust of Dyzenhaus' argument is that the courts are obliged to inquire into such issues and lose their legitimacy when they fail to do so. The problem with the positivist view in this instance is that it does not permit a court to rule on the legitimacy of the political order. This is because a court cannot question the command of the sovereign, on the traditional Austinian formulation, and cannot overturn the political order without overturning its own authority.

The effect of the positivist and majoritarian theses in the instance of secession is to prevent the courts from censuring an immoral state, in which the majority oppresses a minority. It follows that a court with the jurisdiction to decide the question of secession accordingly needs another source of authority to overturn the political order.[65] This can be found in the moral jurisdiction of the courts, which supplies the legal corrective needed to supplement the political legitimacy of the state. There is an element of moral discretion in the courts' exercise of its obligation to interpret and enforce the law, which secures the independence of the courts from political institutions.

The significance of the legal concept of legitimacy is borne out by the jurisprudence in the area, which recognizes the moral sources of the legal process. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), for example, the United States Supreme Court was asked to

overturn its decision in *Roe v. Wade*, 410 U.S. 113 (1973), where it found that a law against abortion was unconstitutional. The majority refused to overturn the earlier decision, on the basis that it contravened the principle of *stare decisis* and would imperil the court's legitimacy.

The majority in *Casey* referred to both aspects of the concept of legitimacy in its reasoning:

> The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands. (11)[66]

"The underlying substance of this legitimacy", it continues,

> is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. (11)

The argument is essentially that the political legitimacy of the court rests on the moral legitimacy of its decisions.

In the view of the *Casey* court, judicial decisions derive their legitimacy from the use of principle and the process of rational justification. "The Court", the majority wrote,

> . . . must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. (11)

All of the judges rejected a democratic standard. Although Chief Justice Rehnquist and three other judges dissented, they took the position that the legitimacy of the court does not derive from "following public opinion", but from deciding "by its best lights" whether the legislative actions of the popular branches of government "comport with the Constitution".[67] This is a different standard of legitimacy than the standard in the political literature.

There is an incidental philosophical issue here. As Margaret Moore argues, the claim that

rationality provides us with a neutral means of arbitrating between different conceptions of the good is far from convincing.[68] There are many examples of judicial reasoning which display moral or political bias and there is nothing inherently impartial in the "practice of reason-giving".[69] This undermines the efficacy of the judicial process, however, and does not eradicate the differences between political and legal reasoning. A legal decision which does not follow from its premises is fallacious, even if it attracts popular support, and a legal process which is governed by political considerations runs the danger of losing its own legitimacy.

This still leaves a question as to the source of the courts' moral legitimacy, which is an integral part of a valid judicial process. The answer lies in constitutional principle, which represents the moral consensus on which the state is premised. This consensus takes precedence over the ordinary policy-making processes of government and rests on the agreement of society at large. This includes minorities and other groups who may not form part of a majority. Both sides in *Casey* recognized that, in many instances, a court derives its legitimacy from the fact that it refuses to conform to a democratic standard.

As the Supreme Court of Canada recognizes in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, the question of legality and legitimacy are linked. This is evident in the make-up of constitutional principles, which are not restricted to the provisions of a written constitution.[70]

> Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations . . . which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. (249)

It is significant that the Supreme Court saw these principles as an integral aspect of any valid legal or political process.

> The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments. (249)

This is enough to give the courts a moral jurisdiction over the actors in the political realm.

There are underlying constitutional principles, of a normative character, which place substantive limitations on political actors and the question of legitimacy is not confined to formal issues. "A political system", the Canadian judges held,

> . . . must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. (255)

These restrictions apply to an elected government, as much as any other, and the court stressed that "consent" is only one aspect of legitimacy.

The emphasis in the *Secession Reference*, like *Casey*, is on principle, and at the level of constitutional practice, these principles are substantive. They have moral content and go beyond the requirement that the parties follow certain rules or procedures. This was important, in the *Secession* case, because the court was dealing directly with the need to regulate the morality of the actions in the political realm. It is the democratic process which is procedural and the Supreme Court was reserving its right to determine the legality of the contents of any agreements negotiated in the political realm.[71] An agreement between Canada and Quebec might be illegitimate, even if the two governments followed recognized protocols, because the agreement treated a third party unjustly.

The court accordingly found the political conception of legitimacy insufficient and held that a political system must be legally legitimate.

> The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. . . . To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. . . . (256)

It is this which brings in a moral and substantive conception of legitimacy:

> Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values. (256)

This requires the moral approval of the courts, which have the authority to subject the actions taken within the political realm to legal scrutiny.

The moral issue of legitimacy

This seems to call for a further investigation into the substantive moral principles on which the courts might rely in deciding the question of legal legitimacy. One of the problems in this area is that the philosophical literature deals with epistemological concerns that have no place in a legal setting. The conventions of legal practice do not coincide with the views in much of the political and ethical literature, which does not accept the substantive nature of moral values. The idea that the law of negligence, or contracts, or human rights, is procedural rather than substantive is a rather implausible notion and the assumption in the courts, at least, is otherwise.

This leaves ample room for a certain scepticism as to the veracity of such principles, which can be seen in the work of a jurist like Oliver Wendell Holmes. The old comparison between mathematics and the practice of law is probably more accurate than we usually think, since the work in both disciplines depends upon the use of axioms. These axioms, in the instance of the law, have a moral component, which includes substantive moral values. There are a multitude of examples. The prohibition against cruel and unusual punishment, or the principle that we should respect an individual's bodily integrity, and the rights of natural parents, all have a substantive component.

The courts are motivated by more pragmatic concerns than the philosophical literature and the reasoning of the courts in particular cases are governed by the facts before them. If the

needs of justice in a particular case requires the employment of substantive principles, there is no doubt that courts will feel compelled to use them. It is a mistake to try and enumerate the substantive principles which might apply in secession on a speculative basis, but the legal argument is undoubtedly that minorities have a right to substantive justice. Perhaps it is enough to say that the courts reserve the right to consult substantive moral principles, in determining the question of legitimacy. This is said in full recognition of the fact that it is probably impossible to draw a clean distinction between substantive and procedural principles in the law.[72]

It is also true that the procedural arguments are more convincing in a legal context than in the ethical literature. This goes to the nature of the judicial act, however, rather than the nature of legal principles. The real philosophical issue lies in the kind of claim that we are making when we say that a given exercise of legal or political authority is legitimate. The answer to this question is bound up with the question of jurisdiction. The issue in constitutional cases is usually whether the relevant political actors have acted within the scope of their authority, rather than whether they have chosen the right policy or followed the best course of action.

Some of the concerns in philosophy of law come from the more recent positivist tradition and H.L.A. Hart's insistence on the separation between law and morality. There is more room for opposing views than is usually acknowledged, since there is a sense in which the law is cleanly separated from its moral antecedents, and another, in which it seems essentially moral. This disparity is apparent in the moral reasoning of the judiciary, which is more impersonal and tentative than ordinary ethical reasoning. The same kind of "positivism" arises in the context of hard cases, which have achieved more prominence than they deserve in academic circles. The difficulty with these kinds of cases is that they represent those situations where judges turn, for one reason or another, to their private moral views. This often contravenes the legal legitimacy

of the system, which is based on the moral consensus in society.[73]

There is some discussion of the concept of moral legitimacy in the philosophical literature. Although this has taken place without a serious discussion of the role of the courts, it is helpful in explaining the nature of legal legitimacy, which has different origins than the political concept. In an article in Philosophy and Public Affairs, for example, Arthur Applbaum examines whether public officials can legitimately pursue their own views on matters of policy, when those views are not supported "by their superiors, by most legislators, or by most citizens."[74] This raises the same kind of issue that faces the courts: how should an official respond, when the actions of government are politically legitimate but morally suspect?

Applbaum's discussion is helpful because it makes a clear distinction between the concept of legitimacy and the ethical correctness of particular decisions.

> A finding by a dissenter that a political mandate has not been decided in the legitimate jurisdiction or on legitimate reasons is, of course, still a judgement. But it is a judgement about legitimacy, not a judgment about the good or the just. (257)

One is tempted to say that this is a matter of degree, since it seems impossible to justify some decisions, no matter how sincere or well-intentioned they may be. But the important point is that the question of legitimacy raises a second kind of moral issue, which asks us to consider the parameters in which a legislature exercises its prerogatives, rather than the simple ethics of his decision.

This takes us into legal terrain: when assessing the conduct of an entity like a state, it is not the moral accuracy of the decisions taken by the state which come under scrutiny. It is the process by which such decisions were made, and the substantive parameters in which they were made, that forms the proper subject of legal review.[75] There are decisions which are illegitimate because they stand outside the moral pale: nothing can justify genocide, and there are limits on

the substantive decisions which a state is morally and legally entitled to make.[76] On the other hand, there are decisions which are oppressive because they have been reached without any regard for the fundamental principles of a fair process.

As Applbaum writes, the question of legitimacy takes us beyond ordinary ethical considerations. A public official has more to consider than his own views, in deciding whether to act in a manner which is contrary to the spirit of a legislative scheme. The same is true of the courts, which have no mandate to impose their moral views on the rest of society. It is necessary to distinguish between two kinds of ethical analysis in this context, one which is in keeping with ordinary moral evaluation, and one which is distinctly jurisdictional. It is the second kind of analysis which provides the basis of a legal inquiry into the question of legitimacy.

The contractual analogy is helpful here and the moral issue for a court on the question of secession is whether a minority is entitled to revoke the social contract. This will usually depend upon whether the majority has exceeded its ethical jurisdiction and repudiated its moral obligations under the terms of the constitution. But the contract may also be oppressive, in itself, and stand outside the moral limits which constitutions must observe, like any legal agreement. The practical issue is whether the contract should be enforced by the courts and the difficult legal issue is that a cause of action in secession might require a remedy that annuls a constitution.

There are moral limits on the power of two parties to contract with each other, just as there are limits on the capacity of the state to pass binding legislation. It is when these restrictions are demonstrably and oppressively unfair that they become illegitimate and bring the moral discretion of a court into play. This discretion is primarily substantive, in the sense that the courts are ultimately interested in securing substantive justice for both parties. The questions that this raises are naturally different than the questions whether the parties have assented to its

terms. The courts are never in a position to affirmatively decide the contents of the social contract: that is a political matter for government and the governed, and the courts are not in a position to evaluate the precise morality of a constitution.

Thomas Nagel discusses the kinds of issues that arise in deciding the legal question of legitimacy in "Moral Conflict and Political Legitimacy", an article which appeared in 1987. This requires "something" like the position taken by John Rawls, who argues that there is a fundamental distinction "between what justifies individual belief and what justifies appealing to that belief in support of the exercise of political power." Nagel argues that this calls for a certain degree of impartiality in ethical decision making:

> Though it has to do with epistemology, it is not skepticism but a kind of epistemological restraint: the distinction between what is needed to justify belief and what is needed to justify the employment of political power depends on a higher standard of objectivity, which is ethically based. (229)

Nagel argues that we need to distinguish between appeals to our own beliefs and appeals to those "truths" which are open to the kind of "impersonal justification" more commensurate with public policy. (230)

There may be psychological questions as to whether people can dissociate themselves from their own views and impartially apply whatever standard of legitimacy is adopted. Nonetheless, Nagel argues that people with different views on specific issues may agree on the need to justify their opinions on "a common ground of justification". Nagel argues that this can be found in the substantive concept of impartiality, which nonetheless operates on procedural principles. (231) This is helpful but broad, and leads him to conclude that matters like "abortion, sexual conduct, and the killing of animals for food" are not subject to restriction. The problem is that this avoids many of the moral issues which arise in a regulatory context.

There is more room for consensus on matters like abortion, sexual practices and the

killing of animals than Nagel acknowledges. Few people would accept that the killing of animals for food is justified, if it is accompanied by unrestrained or unnecessary cruelty. And most of us would accept that some forms of sexual conduct (necrophilia, bestiality, sadism or self-mutilation) come within the normal range of legislative action. These are the kinds of areas where judicial opinions converge: few people would object to regulating abortion, for example, in the final trimester of a pregnancy.

Nagel's position reflects the robust individualism of the American tradition, and the standard of impartiality which he envisages would leave a good deal of moral territory outside the legitimate boundaries of government policy.[77] His discussion of the issue nevertheless draws our attention to the problems of postulating the "universal standpoint" that is needed to decide contested cases.

> The real difficulty is to make sense of this idea, the idea of something which is neither an appeal to my own beliefs nor an appeal to beliefs that we all share. It cannot be to the latter because it is intended precisely to justify the forcible imposition in some cases of measures that are not universally accepted. (231)

But this is where Nagel's analysis goes wrong and the central feature of legal and constitutional reasoning is that it rests on exactly those kinds of moral beliefs which we share in common.

There is no discernible issue as to whether individuals are entitled to freedom of expression, security of the person, or a host of similar rights and freedoms. It is universally accepted that individuals are equal in some substantive sense. The dimensions of such rights and values may be a matter of dispute, and the inferences which follow from them, but legal reasoning starts with premises which are held in common. We all accept that the courts should accord a great deal of value to personal autonomy. Nagel seems to miss the difference between the statement that we share these beliefs and the statement that we agree as to whether they justify a particular "measure" in a given set of circumstances.

The issue in constitutional courts is whether a measure or policy can be reasonably justified on the basis of the principles held in common in society. This is a fundamentally different question than the question that arises in the political realm, which is whether a policy is justified in fact. The issue can be relatively complex, but as a general rule, the courts have the responsibility of determining the proper parameters of government action. This is a familiar part of the judicial role. The standard in negligence is not actual but reasonable forseeability. The standard in a criminal court is beyond a reasonable doubt. A judge does not assess whether the parties should have negotiated a contested provision in a contract: he assesses whether it is "reasonable".

The same kind of standard raises itself in the constitutional jurisprudence: the *Canadian Charter of Rights*, for example, subjects the rights within the *Charter* to "reasonable limitations". The same kind issues arise with respect to the question of proportionality, which sets constitutional limits on legislation which curtails individual rights. This calls for an analysis of the relative importance of the purpose of legislation, the extent of its effect on individual rights, and its success in meeting that purpose.[78] This kind of analysis examines the context and impact of a particular legislative rule, and calls for an exercise of prudential judgement. The moral question in constitutional cases is more approximate and general than the questions that arise in making ethical decisions regarding personal conduct.

Although the passage of unconstitutional legislation does not render a political authority illegitimate, in itself, this is a matter of determining whether the legislature has acted within the legitimate confines of its moral jurisdiction. The test of legal legitimacy is something like plausibility: it is not whether the state is correct in its policies, but whether they are plausible and meet a reasonable standard. It is only when the actual decisions of the state become morally

implausible, and fail to meet a reasonable standard, that they lose their legitimacy. This is essential to any concept of legitimacy, which does not deprive the affected actors of the right to make the relevant decisions.

The constitutional role of the courts

The role of the courts in constitutional cases clearly derives from this moral jurisdiction, which places practical, procedural and constitutional curbs on the actions taken in the political realm. The courts have no obligation to apply or enforce laws that run against the judicial warrant, which only legitimizes laws that are in keeping with the principles from which the courts derive their own authority. The political legitimacy of a particular law, which receives the support of a large majority, is not sufficient to establish its constitutional legitimacy.

This does not mean that the courts can ignore the will of society, which ultimately licenses the political and the legal orders. The ultimate issue in the context of the legal and political concepts of legitimacy is the same. The question is ultimately consent, as it is generally understood in the philosophical literature, albeit a collective consent, expressed in the agreement of the members of society. This agreement will always be tacit and indefinite, for practical purposes, and require further exploration in a legal context. The court in *Casey* acknowledges the source of the legal concept of legitimacy in holding that the principles which justify a legal decision must, in the court's words, be "beyond dispute".

This is in keeping with the observation that courts base their decisions on principles which have been accepted by society at large. This means that legal principles have a more authoritative political source than ordinary political decisions, since they rest on the consensus of society. Properly understood, this provides a solution to the problem of majorities in a democratic state, since the relevant standard is something close to unanimity. This naturally

includes minorities. Jürgen Habermas writes that "laws count as legitimate only if their *addressees* can jointly regard themselves as their *authors*", and there is a sense, at least, in which this kind of standard seems entirely in keeping with the practices of the courts.[79]

It is not particularly relevant whether constitutional principles are thought to be morally valid because of their substantive content, because they meet with general agreement, or for other reasons. The reasoning in constitutional matters proceeds on the basis of a moral consensus, which extends to the principles that are applied by the courts, though it does not reach as far as the specific rulings of the courts. This gives the courts the capacity to judge the actions of political actors by consulting moral standards that are separate from the wishes which determine the preferences of the public in the political realm. There is a recognizable sense in which the good judge gives up personal wishes, as a means of determining the appropriate course of action in a given circumstance.

It is this independence which gives the courts the right to judge the legitimacy of the political order, since it leaves room for the courts to develop moral inferences which are out of keeping with the popular view. We might envisage a state, for example, in which the majority adopts a prejudicial attitude to a racial, religious, or sexual minority. Although there is little doubt that such attitudes will infiltrate the reasoning of the courts, this is a matter of degree and does not require that the courts assume the attitude of the public. Legal reasoning proceeds by inference and legal actors are forced to justify the actions of the state on the basis of established principles, rather than popular opinion. The reasoning of the courts is rooted in our agreement with constitutional principles, rather than the outcome of specific cases.

The courts are not merely entitled to disagree with the public: they are often obliged to do so. This opens up the possibility of ideological struggles between the legal and political

branches of government. This may consist of rear-guard skirmishes by a conservative judiciary or progressive forays into the moral debates of the day. These forays come at a price, however, and a court which enters too far into the political arena will lose its own political legitimacy. This is an indispensable attribute of any legal system, which cannot function meaningfully without popular support.

The ideological problem raises an important issue, nonetheless, with respect to the limits of such a jurisdiction. Although constitutional principles are capable of continual elaboration, it is only the most fundamental principles which will serve as legitimating principles. The next chapter accordingly considers the source of the legal principles that would provide the basis of the court's moral jurisdiction. It also considers the legal question that arises in the instance of secession.

Chapter 3. The Historical Problem

Introduction

The previous chapters identify a legal concept of legitimacy, which would provide the courts with a conceptual jurisdiction over the actions of political actors. The legal concept is relatively empty, however, and merely enshrines the principle that a state's enjoyment of the prerogatives of sovereignty are subject to limitations.

The present chapter accordingly provides a legal analysis of the problem which arises on secession. This concerns the ownership of the sovereign power and requires an account of the way in which the title to the political and legal powers of the state are transferred from one state to another. The chapter examines two fundamental legal questions, both of which are related to the notion of sovereignty. The first is how the sovereign power is transferred from one state to another. The second is what body of law, if any, regulates that transfer.

The chapter adopts a historical approach and reviews the development of the concept of the sovereign power, which contains the coercive powers of the state. This includes the power to make laws. The chapter focuses on the theoretical issues which took any question regarding the ownership of the sovereign power out of the ordinary legal realm and does not discuss the recent developments in the concept of sovereignty. These developments, which are more in keeping with the argument of the dissertation, are considered in the following chapters.

The idea of the sovereign power as the repository of the powers of the state appears to derive from the conception of the state developed by Francisco de Vitoria and his successor, Francisco Suárez, who separated the sovereign power from the personality of the ruler. The advantage of such a concept is that it permits the law making power of the state to be passed from one ruler to another, without disrupting the continuity of the legal order. Thomas Hobbes

extended the historical position by recognizing that the people have a right to overthrow the sovereign power. The important shift is in locating the title to the sovereign power in the people.

John Locke's *Second Treatise on Civil Government* takes the argument a step further, in suggesting that the people may take on the sovereign power themselves. This solves the problem of hiatus, since it would permit the transfer of the sovereign power from one authority to another without any disruption in the continuity of the state. Although Locke's explanation of political legitimacy is based on consent, he also postulates a natural law, which would provide an external justification for political authority. This suggests that there is a body of substantive principle, outside the positive law, which could be used to determine the legal question of legitimacy.

It is the historical development of the notion of sovereignty that gives rise to the principle of political supremacy, which removes any issues regarding the ownership of the sovereign power from the ordinary legal and political orders. Although it was widely accepted that the ownership of the sovereign power was governed by the natural law, which determined the validity of the social contract, it was not a part of the natural law which was accessible to the courts. The validity of the title to the sovereign power could only be decided politically, outside the positive and constitutional orders, in an unregulated realm where the popular will was free of moral or legal constraints.

The development of the political notion of sovereignty may have reached its height in the work of Carl Schmitt, who argued that the sources of sovereignty lay in the constituent power of the state. This is a political power which exists above the constitutional order. The essential argument is that there is a political authority, over and above the ordinary political and legal orders, which takes priority over the constitution. The fundamental point is that the authority which holds the law-making power is a political authority, which stands outside the reach of

legal constraints.

From a legal perspective, the major problem with institutionalizing a right to secession accordingly lies in the principle of political supremacy and the corresponding notion of political sovereignty, which holds that the legal order finds its source in the political authority of the state. As a result, sovereign states exist above the law and courts do not have the necessary extraconstitutional authority to regulate questions concerning the ownership of the sovereign power. If there is a law which governs secession, it must therefore be found in some larger notion of legality, which extends the law into the unregulated political realm where states exist. This would permit the extension of minority rights into the international realm, where the only actors are states, and provide some recourse against states which are politically legitimate.

There is also a limited body of jurisprudence, in the common law tradition, which deals with the transfer of the sovereign power. This jurisprudence has generally arisen in revolutionary circumstances, when the courts are forced to decide whether they will obey a new head of political authority. The case law suggests that the courts have a limited authority to decide whether to transfer their allegiance to a new political order. This authority comes from the exclusive jurisdiction of the courts, which gives them the prerogative to decide whether they will apply and enforce of the law. This is a prerogative that is held exclusively by the courts, and stands on its own, independently of the political order.

Discussion

It has become customary to remark that the term "sovereignty" has its difficulties. Daniel Philpott, for example, observes:

> Lassa Oppenheim wrote in 1905 that it is "doubtful whether any single word has caused so much intellectual confusion," and Richard Falk has more recently suggested jettisoning the concept altogether.[80]

The historical sense of the term can be seen in F.H. Hinsley's definition of sovereignty as "the idea that there is a final and absolute political authority in the political community" and that "*no final and absolute authority exists elsewhere*".[81]

The older conception of sovereignty has lost ground to a more qualified concept, which seems more in keeping with the current state of international affairs. Philpott, for example, holds that the concept of authority underlies the different meanings which have been attached to the notion of sovereignty in the course of its development. He then quotes R.P. Wolff, who writes that "authority" is "the right to command and correlatively, the right to be obeyed."[82] This leads him to describe sovereignty as "*supreme legitimate authority within a territory*". (357)

Philpott writes that authority "is legitimate when it is rooted in law, tradition, consent or divine command, and when those living under it generally endorse this notion." (355) This opens up a variety of possibilities, but the argument that sovereignty is only "legitimate" if it is assented to, or "regarded as part of the normal, proper state of affairs" rests the authority of the state on its political legitimacy.[83] This neglects the legal aspects of the concept.

The law making power of the state was historically traced to its political legitimacy. In the international arena, at least, the legitimacy of a state in the political sphere was usually measured by the fact of its rule. This is a question of certainty, which explains the derivation of the legal order. It does not matter where the source of the law is found, whether it is in military force, a political process, or fundamental moral principles. The simple argument is that the legal order ultimately derives from a state's capacity to decide the norms which are imposed by the state and followed by the people.

This may or may not be a matter of the prerogatives of brute force, but the essential issue is whether the state has effective control of the population and territory inside its borders. This

represents a serious obstacle to the development of a legal right of secession. This is important because the legal order cannot function satisfactorily without the certainty provided by a sovereign government, which guarantees the stability of the legal order. The state is the guarantor of the legal order, which cannot be maintained without a sovereign authority to determine, finally and without contestation, what constitutes the law.

This is an essential aspect of the concept of a state, which has historically been seen as the source of positive law. In the view of the 16th century Jesuit, Francisco de Vitoria, for example, the state protected and preserved the common good. As John Doyle writes, this justifies the existence of a "public power", much like the legal prerogative that David Hume describes in his essay on the original contract.

> For if the good condition *(incolumitas)* of men requires their association and gathering together, it is also a fact that no society can persist without some force *(vis)* and power *(potestas)* governing it and providing for it . . .[84]

It is the sovereign power which contains the coercive authority of the state and generates the legal order. The possession of this power provides a state with the resources to require that the people obey the law. Since the legal power is unlimited, it guarantees the independence of the state.

There is an extensive literature which vests the "sovereignty" of the state in its claim to the legal jurisdiction over a particular territory. Thomas Biersteker and Cynthia Weber write that Hans Morgenthau, among more recent authors, "defined sovereignty in legal terms as 'the appearance of a centralized power that exercised its lawmaking and law-enforcing authority within a certain territory.'"[85] This again reflects the fact that the law has its source outside itself, in a political power that invests the legal order with the certainty that gives it the compulsory character of law.

As Daniel Philpott writes, the modern concept of sovereignty is usually said to derive from the Peace of Westphalia in 1648:

> Westphalia set new standards for each of sovereignty's three faces. It made the sovereign state the legitimate political unit. It implied that basic attributes of statehood such as the existence of a government with control of its territory were now, along with Christianity, the criteria for becoming a state. Finally, as it came to be practised, the Treaty removed all legitimate restrictions on a state's activities within its territory. (364)[86]

The Treaty of Westphalia established the principle that foreign powers were obliged to respect the religion of the state, as determined by the ruler.[87] This led to the general principle that states are not entitled to intervene in the affairs of other states.

In Natural Law and the Theory of Society, Otto Gierke argues that the evolution of the concept of the state is determined by two conditions:

> One is the existence of a society (*societas civilis*), directed to the objects which compel men to live together: the other is the existence of a sovereign power (*majestas, summa potestas, summum imperium, supremitas*, etc .), which secures the attainment of a common end. Both of these attributes recur in every definition of the state. (40)

It is the second attribute which is the more significant, historically, and Gierke informs us that the "philosophical theory of the State . . . becomes increasingly, and essentially, a theory of sovereignty". (36)[88]

This gives rise to a question regarding the creation of new states, or political events like the annexation of one state by another? How is the title to the sovereign power transferred from one state to another? This is important because any legal right of secession will place limitations on the ownership of the sovereign power and subject the state to legal restrictions. There are historical precedents for such an explanation in the development of the concept of the state, and Vitoria makes a significant distinction between the sovereign and the state. This permits him to hold that while the sovereign derives his power from God, the warrant to exercise it comes from the people. As a result, the Indians in the new world had the right to transfer their political

allegiance to the Spanish King. Such a transfer, endorsed by the consent of the majority, would grant the Spanish King "lawful title, even by natural law". (54)[89]

Vitoria's successor, Francisco Suárez, provides a more detailed account of the genesis of the state. In becoming a political society, the people of the state become a "mystical body", from which the power of the state derives.[90] It is the possession of this power which characterizes the emergence of the state. As Carlos G. Noreña writes,

> . . . God created human nature in such [a] way that once humans decide to congregate into a political body, they are invested with a sovereign power which they are free to transfer or not to transfer to a king or to an assembly. (265)[91]

This brings in the notion of a contract. Although Suárez argued that this act of will transferred all of the power within the state to the King, the people as a whole were entitled to reclaim their liberty "according to the conditions of the original contract or according to the requirements of natural justice". (266)

This recalls the position taken by Hobbes, who appears to have been familiar with the work of Suárez and gives the people a similar right to defend themselves against an oppressive sovereign. As Richard Tuck writes, however, Hobbes does not take a view which gives the people the right to take on government themselves.

> In all his political works, Hobbes distanced himself from the republicans by insisting that 'the people' could not withdraw their collective permission from their sovereign to act as their agent and take government into their own hands. His argument here rested on the subtle point that the unity of the people was constituted by the initial agreement to follow the sovereign's judgement and could not be retained if the sovereign was repudiated - the people would become what he termed a 'multitude' rather than 'a people'. . .[92]

There is no people, without a state, and the sovereign power can be dissolved and recreated. This kind of argument would permit the break-up of one state into a number of states, since the "multitude" can be refashioned as a number of peoples. It does not, however, provide for the transfer of the sovereign power–and the legal continuity that goes with it--from one state to

another.

There may be historical reasons for Hobbes' position, since it might have justified the execution of Charles I. John Locke, on the other hand, was writing under the shadow of the events which culminated in "the glorious revolution" of 1688. These events called for a theory which explained how at least some moral and legal norms could survive the dissolution and reintegration of the state. Locke deals with this problem by holding that society survives the dissolution of the government. As a result, the people retain a residual authority over the government and the legal order created by the constitution, which preserves the continuity of the state.

This is an important step towards the recognition of an extra-constitutional order that might provide the norms which govern any decision as to whether a state has a good title to the sovereign power. Although Locke's position is sufficient to provide a feasible theory of revolution, which takes place outside the legal and political orders, it retains a political character. Locke essentially locates the source of political power in the people, and argues that the sovereign power exists in the popular will, above the constitution and the state. The people constitute something like a political personality, outside the political order, which can transfer the coercive power of the state to another state. This political personality only emerges in the act of revolution, however, and is not subject to any legal regulation.

Locke was arguing against the views of Robert Filmer, who argued that political authority was based on the relationship between a father and his children. People are never free, on such a view, and have no right to choose a government. "Contrary to Filmer's 'great position,'" Joshua Cohen writes,

> . . . Locke held that human beings are naturally free *because* such natural human obligations as those of children to parents are not political obligations nor do they imply

the existence of political obligations (I.6; 2.6).[93]

The argument is that these "natural human obligations" are moral rather than political. This is important because it places the question of legitimacy in the political rather than the moral arena, where it can only be decided on a contractual basis.[94]

On the other hand, Locke's position acknowledges that there are moral obligations outside the political realm, which are essential to the maintenance of society. It therefore raises the question whether the political order and the contract on which it rests can be externally justified, on the basis of the natural law. As Patrick Riley writes, this law:

> . . . is not instituted by consent, even by a Groatian "universal" consent, as Locke explains best in his *Essays on the Law of Nature*. Nor does it merely define "certain privileges in this or that place." It is rather the law "which God has set to the actions of men," and it is "the only true touchstone of moral rectitude." (64)

It is the existence of this kind of moral jurisdiction which raises the conceptual possibility, at least, of a legal ruling on the question of legitimacy.

This reference to consent is misleading, since there are two separate questions of consent which arise in this context. The natural law may be a product of divine authority and apply whether or not we agree to it. By its very definition, however, the natural law is accessible to anyone through the exercise of the faculty of reason, and it is impossible to escape the question of consensus in identifying the body of principles which comprise it. We accordingly need to distinguish between our consent to political authority, which provides the basis of the political order and our consent to the kinds of general moral principles which justify that order. It is the second form of consent which provides the possibility of an independent standard of legitimacy, outside the political arena.

The significant observation is that the natural law contains the force of law, in spite of its extraconstitutional character. This is evident in the *Second Treatise*, where Locke distinguishes

between the source of a magistrate's authority to punish a native and an alien offender. As Riley writes,

> . . . since the alien offender is in a state of nature with respect to the host state, and since the state of nature has a law of nature to govern it, those magistrates can certainly, as executors of the law of nature, enforce that law against the offender. A native offender, however, would be punished under the civil law to which he had in some way consented, and this law would be merely "regulated" by the natural law. (68)

It follows that the courts are entitled to fall back on the natural law in the exercise of their judicial functions.

Riley goes so far as to argue that Locke believed that the moral legitimacy of authority derives from a divine or theocratic order. This emanates from his belief that the divine order contains the moral law:

> A little later in the sixth *Essay* [in the *Essays on the Law of Nature*,] contractarianism is left out of account altogether, and Locke defines legitimate authority simply in terms of a delegation of power by the will of God: "all that dominion which the rest of law-makers exercise over others . . . they borrow from God alone, and we are bound to obey them because God willed thus, and commanded thus, so that by complying with them we also obey God. (70)

There is a sense in which Locke rests the validity of the state's title to the sovereign power in its legal legitimacy, since it is the natural law which gives the people the right to rebel in an appropriate set of circumstances.

There are two important aspects, then, to Locke's account of the transfer of the sovereign power. One is that his right of revolution instantiates the sovereign power in the people, who can transfer it intact from one sovereign to another. The second is that Locke's view of the natural law extends the notion of legality well beyond the positive law. It accordingly provides a conceptual basis for a body of law that could be used to determine whether the state possesses a valid title to the legal power. The provocative question is whether there is some body of substantive principle like the natural law, outside the political order and the ordinary law, which

could be used in deciding issues regarding the ownership of the sovereign power.

The practical failing with Locke's view is that it does not provide for any adjudication of the conflict between the people and the sovereign. There is no independent authority which can determine whether the people's cause is just. For Locke, there is only God. This may not be a problem in a simple case of revolution, where the interests of the people converge in a common desire to remove themselves from the social contract. It is exactly the problem, however, in the more pressing cases of secession, which arise when a majority oppresses a minority. Locke's theory does not provide for an impartial judge to adjudicate disputes between the majority and a minority and he does not address the problem of an immoral majority.

Locke's view is much in keeping with the historical account. In Natural Law and the Theory of Society, Otto Gierke writes that the traditional sources of the public law, the *jus naturale*, the *jus gentium*, and the *jus positivum*, were simplified in the period leading up to the middle of the seventeenth century.

> . . . the category of *jus gentium* inevitably proved itself to be inapplicable to public law. The result was–in the sphere of the philosophy of law and of political theory as well as in the legal treatises of jurists who included public law in their scope–that the tripartite division of law yielded more and more to a simple division between the categories of natural and positive law. (38)[95]

This is a broad concept of the natural law, which needs to be distinguished from the restricted concept which provided the basis of the obligations of the state at international law.

The irony of this development lies in the fact that the natural law took priority over other forms of law, even as the developing notion of political sovereignty left legal institutions with no means of enforcing it against the state. As the "theocratic idea" waned, the natural law "was no longer derived from the divinely ordained harmony of the universal whole . . . it was simply explained by itself."

> The starting-point of speculation ceased to be general humanity: it became the individual and self-sufficing sovereign State; and this individual State was regarded as based on a union of individuals, in obedience to the dictates of Natural Law, to form a society armed with supreme power. (40)[96]

The essential assumption was that the State was formed "in obedience to the dictates" of the moral order, which ultimately licensed the state, and provided the obvious means of evaluating its legitimacy.

At the same time, however, the separation of the natural and the positive law gave rise to a conception of the state which enjoyed the *potestas legibus soluta*, the absolute plenitude of legal and political power which is associated with later conceptions of the sovereign state. As Gierke writes:

> The original negative conception–the conception of a power which is not externally subject to any *Superior*–is made to assume a positive form by being as it were turned 'outside in', and used to denote the relation of the State to everything which is within itself. From the quality of being the 'supreme' earthly authority [i.e., the quality of being simply the *highest* authority], there is deduced the whole of that absolute omnipotence [i.e. the quality of being the *only* authority, and therefore unlimited and all-powerful] which the modern State demands for itself. (41; Barker's interpolations)

This is presumably explained by the historical and economic processes which concentrated secular power within individual states, even as it undermined any competing religious or moral power.

Be that as it may, it was the natural law which provided the historical justification of the State.

> Positive law being denied any capacity to affect or disturb the foundations of Natural Law, the solution of every fundamental problem in regard to the relation of the community to the individual, or that of the Ruler to the People, was accordingly left to the scope of a Law of Nature which sat high enthroned above the whole of historically established law. (39)

This is where the concept of legal legitimacy can be found, historically, outside the system of ordinary positive law. The natural law has a constitutional significance, which provides a source

of legal authority that overrides the positive law and the political will.

Gierke's larger argument is that the increasingly unrestricted power of the state ultimately led to the conceptual division of the sovereign power. This placed moral boundaries on the state: political authority "was by its nature divided", so that the state, the individual and groups all retained some inalienable aspects of the sovereign power. (138)

> The truth is that a contract between king and people is the basis of their relations (§§17-20); and in interpreting this contract we must start neither from Hobbes' view that the people necessarily devolved the whole of its rights, nor from the view of Althusius that the people could not in any way alienate its supreme authority, but rather from the assumption that there is at one and the same time a real alienation of majesty and a reservation of popular rights which limit its exercise.[97]

Gierke suggests that the purpose of the law is to regulate these relationships and rights, in accordance with the moral order.[98] This requires the appointment of an umpire and is in keeping with the development of the notion of a constitutional democracy, which sees the courts as the final arbiter of any conflicts between the different parties who exist within the state.

The legal problem which arises with respect to the transfer of the sovereign power lies outside the constitutional realm, however, in the international realm. Secession requires the annulment of a constitution. It follows that another source of authority was needed to decide who owned the sovereign power.

> . . . the more sovereignty was exalted, the hotter raged the dispute about its 'Subject' or owner. Here again the ultimate decision was sought on the basis of Natural Law. Though there was a general agreement that a variety of constitutional forms had been produced by positive law, the fundamental issue of the ownership of sovereignty was none the less regarded as prior to the historical differentiation of constitutions.(42)

It follows that any questions regarding the validity of the state's title to the sovereign power could only be answered by applying to the natural law. The problem is that this is a part of the natural law which stands outside the legal and political orders.

This gives rise to the problem of secession, which lies in the principle of political

supremacy. Although an act of secession occurs within the state, on the Westphalian analysis, it occurs outside the legal and political orders. The validity of the state's title to the sovereign power can only be decided politically, in some inchoate realm which exists outside the ordinary legal order. As a practical matter, this means that the extra-constitutional norms which govern the state's title to the sovereign power can only be enforced by the people, in the unrestrained exercise of the popular will.

The jurisdiction of the courts, even in a constitutional democracy, does not extend into this realm. This means that there is nothing to prevent a democratic majority, for example, from oppressing a minority. If the courts take on such a jurisdiction, moreover, they will have to do so on the basis that substantive principles outside the positive law have the compulsory force of law. This requires the recognition of a new body of moral law, like the natural law, which governs the conduct of states. This is a difficult and delicate task, if we are to respect the democratic principle and the legitimate prerogatives of the state.

As Gierke recognizes, the same kind of problem repeats itself whenever we try to enter the extra-constitutional realm. As a result, he is forced to fall back on the argument that states are obliged to respect moral conventions:

> . . .the fact that a supreme power is needed, in order to realise fully the compulsoriness demanded by the nature of Law, does not prevent Law from still being Law even though, in a particular case, compulsion is lacking, or can only be imperfectly applied, or is altogether impossible for want of a higher power which is capable of using it–provided only that there really is a common conviction that compulsion would be right if it were possible, or if a competent authority were in existence. (225)

This is determined but extremely weak. Gierke struggles with the fact that there is nothing compulsory in the moral order, and his arguments are evasions, which only call attention to the moral deficiencies of the modern state system.

The historical development of the political notion of sovereignty may have reached its

apogee in the work of Carl Schmitt, who believed that there are aspects of government beyond the reach of any constitution. As Renato Cristi writes, in Carl Schmitt and Authoritarian Liberalism:

> According to Schmitt's *Politische Theologie*, the state had 'the monopoly of the ultimate decision' . . . This meant that the essence of sovereignty, which he defined 'not as the monopoly of domination or coercion, but as the monopoly of decision' . . . was the ability to lift its subject above the legally constituted order.[99] (108)

The importance of Schmitt's concept is that sovereignty is an exclusively political attribute, which exists above the legal order.

The sovereign power is found in the *pouvoir constituant*, in Schmitt's view, which sustains the constitutional order and maintains its continuity. This creates a level of government policy or practice which exists outside constitutional restraints.[100] "Constituent power", Cristi writes:

> . . . cannot be destroyed, changed or altered in any way; it perseveres as the extra-constitutional ground of constitutions and constitutional laws. It is not exhausted by its exercise and "retains the ability to persevere in its existence". The positive constitution, as an accident supported by constituent power, may be born, suffer alterations and eventually die, but alongside and above it the *pouvoir constituant* continues to exist. (199)

Schmitt held that the National Constituent Assembly formed after the Kaiser's abdication, was, in Cristi's words, "animated by the constituent power of the German people." As a result, it possessed a completely unrestricted authority and could be described as "a sovereign dictatorship". (197)

The title to the sovereign power is accordingly found in the popular will, unhindered by any constraints.

> According to Schmitt, this power, the demiurge or *natura naturans* of a constitution, 'remains always outside the realm of the rule of law' . . . . The distinction between constitutional liberal and political elements finds here its ultimate foundation. All attempts to situate sovereignty within the constitution itself remained abstractions that

missed the reality of the political. (132)

There is no obvious obligation on the personality which possesses the constituent power to act in accordance with moral norms. As a result, the ownership of the constituent power is free of legal and moral regulation, and exists in the unregulated political realm where the original contract between the people and the ruler was formed.[101]

There are elements of Schmitt's view in other authors. Sergio Cotta suggests that there are four sources of legitimacy in the historical evolution of the term: the first is consent, deriving from the notion of a social contract; the second is hereditary succession; the third is republican, expressing the tradition of a political community; and the fourth is a written constitution. All of these, he suggests, express the political will, and implicitly reverse the classical conception.

> This is of course a radical reversal of the classic relationship between the juridical order and the political order, since it is the latter that from then on would be superior to the first. . . . We thus arrive at a purely political theory of legitimacy, freed from its dependence on juridical theory.[102]

Cotta goes on to argue that the origins of the political theory of legitimacy can be found in the "classic idea of the *common good*" and propose a phenomenology of the common good, which expresses the will of the people.

The problem in all these accounts of the title to the sovereign power is the same. There is nothing in the act of willing which necessarily keeps it within moral bounds, and the manifestation of the collective will which transfers the ownership of the sovereign power to a new state is free of regulation. The historical view is that the transfer of the title to the state's powers is exclusively political and can only be decided outside the ordinary legal order. As a result, there is no legal machinery to regulate the actors in this area and it is impossible for the courts–which stand historically inside the constitutional order--to decide the validity of such a title. The extension of legal authority into this area would recognize that the moral obligations

on the sovereign actors in the inchoate political realm are compulsory.

These statements come with an important reservation, since common law courts have occasionally exercised a provisional authority to determine whether a particular political order is legitimate. The issue has arisen, historically, in the context of revolution. And while Allen Buchanan recognizes the connection between revolution and secession, there is a stronger affinity between the two events than his comments would suggest.[103] That is because the essential facet of a revolution is that it annuls the constitutional order and dissolves the legal personality of the state. The same is true for secession: although movements for secession are geographically restricted, the legal significance of secession derives from the fact that it replaces the sovereign and brings the existing legal order to an end.

The problem of secession, legally, is therefore one of transition. In the view of the common law, a unilateral act of secession constitutes a revolutionary act, which creates a hiatus in the legal order. As Peter Hogg, Canada's foremost constitutional scholar, writes with regard to the prospect of Quebec's secession:

> In assessing the legality of a regime established by revolution--meaning any break in legal continuity--the issue for the courts is simply whether or not the revolution has been successful. As de Smith says, "legal theorists have no option but to accommodate their concepts to the facts of political life."[104]

In this century, the courts in South Africa, Pakistan, Cyprus, Uganda, and what was Rhodesia, have all ruled on the legality of political actions which disrupt the existing constitutional order.

This may be as simple as a ruling as to the legal efficacy of a *coup d'etat*, or a more complex decision with respect to the status of Imperial and colonial statutes. In 1952, to cite one example, the South African courts ruled that the ordinary legislation creating the apartheid regime was invalid.[105] The legislation explicitly repealed provisions of the existing constitution and could only be construed as an extraconstitutional measure, which stood outside the ordinary

legal and political orders. It will be apparent that the South African government eventually succeeded in its original aims, through a variety of legal and political strategies.

The case is nonetheless significant, since it illustrates that the extraordinary political realm where the title to the sovereign power exists is subject to some degree of judicial scrutiny. S.A. de Smith, to whom Hogg is referring, writes that this kind of decision contains a moral element:

> . . . although, for anybody living within that legal order, the attitude of the judges in office must be conclusive for the time being, it does not follow that the judges ought to regard themselves as having an arbitrary discretion in deciding what view to take. Judges are no more exempt from moral obligations than other officers of state in revolutionary situations. Indeed, moral obligation may weigh more heavily on them than on any other group of officers. For on the one hand, if they resign in protest their successors may be of so low a calibre that justice may not be done in the courts; whilst on the other hand, if they continue in office their real or apparent acknowledgement of the authority of the new regime will clothe it with the valued prize of legitimacy. (104f)

This takes us to the doorstep, at least, of the legal question of legitimacy. In spite of this, the instincts of the judiciary seem to lie in the direction of preserving the social order and courts have used the doctrine of necessity to preserve the continuity of the legal order in revolutionary situations.

Smith argues that doctrines like necessity merely obscure the fact that the courts are making a political rather than a legal decision in such circumstances. The obvious historical example is the American revolution. How, de Smith asks,

> . . . did the thirteen colonies achieve sovereign independence as the United States of America? The answer, from the point of view of those judges and magistrates who remained on the bench throughout the War of Independence, was that the colonists, the People, had accomplished a successful revolution which untied the apron strings binding them to Britain. The new legal order, from which the sovereignty of Parliament was eliminated, was grounded on political facts.[106]

The people had accordingly annulled their contract with the state. This occurred outside the reach of the judiciary, in the unregulated political realm outside the legal and political orders, and

the courts could only obey.

As de Smith notes, this kind of legal argument has a natural corollary:

> . . . the English revolution of 1688 legitimised the Bill of Rights 1689 and all that followed because it was successful and because the judges (actuated in some cases, no doubt, by a keen sense of self-preservation) accepted Bills assented to by the usurper, William of Orange, as authentic Acts of Parliament. The revolution of 1642-49 was accepted by those judges who remained in office after Charles I's execution as legitimising Cromwellian legislation; but with the Restoration of Charles II in 1660 all became null and void. Nothing fails like failure.[107] (102)

These are political rather than legal decisions, which cannot be explained by the ordinary canons of judicial reasoning. They nonetheless recognize that questions regarding the ownership of the sovereign power can only be decided, outside the constitutional order, by the principle of political supremacy.

This is an extra-constitutional principle that exists outside the ordinary legal and political orders. It therefore takes precedence over a principle like parliamentary supremacy, which would arguably prevent any authority–and that includes Parliament–from annulling the legal order.[108] H.W.R. Wade negotiates a way around this difficulty by arguing that the principle of parliamentary supremacy is merely a political principle which prevents one Parliament from binding its successors. The principle, moreover, has its origins in a unique legal rule, which differs from all other legal rules by virtue of its political character. This is the rule that the courts must enforce the Acts of Parliament:

> The rule of judicial obedience is in one sense a rule of common law, but in another sense--which applies to no other rule of common law--it is the ultimate *political* fact upon which the whole system of legislation hangs. Legislation owes its authority to the rule: the rule does not owe its authority to legislation.[109]

This is a discretionary rule, which gives the judiciary the right to transfer its allegiance to a new political order, in contravention of the principle of parliamentary supremacy.

The rule of judicial obedience recognizes that changes in the ownership of the sovereign

power can only take place in the extraordinary political realm, outside the constitutional order. This gives the courts the confirmative right to decide whether the ownership of the sovereign power–and the legal powers of the state-- have been transferred from one political authority to another.

> What [Sir John William] Salmond calls "the ultimate legal principle" is therefore a rule which is unique in being unchangeable by Parliament . . . it lies in the keeping of the courts, and no Act of Parliament can take it from them. This is only another way of saying that it is always for the courts, in the last resort, to say what is a valid Act of Parliament; and that the decision of this question is not determined by any rule of law which can be laid down or altered by any authority outside the courts. It is simply a political fact. (189)

A court which rules on an act of secession is accordingly in the position of deciding whether the political order is politically legitimate. This, in turn, decides whether it is binding on the populace. If we accept the position urged by authors like Wade, "the seat of sovereign power is not to be discovered by looking at Acts of any Parliament but by looking at the courts and discovering to whom they give their obedience." (196)

The revolutionary jurisprudence accordingly recognizes that the validity of the state's title to the sovereign power is governed by the principle of political supremacy. The primary role of the courts in secession or revolution is to determine whether a new political order has actually arisen. The case law goes further, however, and implicitly subjects the state to internal legal constraints, in spite of its sovereign status. The significant factor is that there appears to be a moral element in such constraints. This is not enough to decide the legal question of legitimacy, and there are practical reasons which make it difficult for domestic courts to make satisfactory decisions in the area. The major problem is probably that domestic courts do not have the necessary independence from the political order to determine its moral validity. This is a matter of practice, as much as political influence, since the views expressed in domestic courts

generally reflect the existing constitutional order.

The principle of political supremacy also has a corollary in constitutional theory, which has traditionally recognized that there is an extralegal realm in which the exercise of the sovereign power cannot be subjected to constitutional restraints. Locke, for example, attributes a discretionary "prerogative" to a sovereign, under which he has the right to act outside the law. Pasquale Pasquino writes that this prerogative "is deployed predominantly in the domain of foreign affairs," where prudence and wisdom must govern instead of the law.[110] The English common law contains a number of similar immunities, some of which apply to a head of state, the private communications of cabinet, and suits against the crown, on the basis that the crown cannot be subjected to legal restrictions.

The important issue is whether the exercise of this sovereign power is subject to legal constraints. Although the prerogative has limits, Pasquino writes that these limits lie outside the formal political and legal processes.

> . . . if the discretionary power of the modern prince is not a legal power, since it is a power *extra et contra legem*, it is neither an arbitrary nor irresistible power. . . . And, in fact, the relationship between the prince and the people is, like that which exists between the people and their legislative representatives, a relationship of *trust* and not one of subordination or slavery. If the king makes use of his power of prerogative against the common good, the people may take up arms, "to appeal to heaven."[111] (205)

This raises the same issue as Schmitt's conception of the *pouvoir constituant*, since the appeal to heaven takes place outside the law and the political order, as a naked exercise of force. In both cases, it is the consent of the public, and the concept of political legitimacy, which ultimately decides the issue.

The state's ownership of the sovereign power accordingly rests on its political legitimacy and the state can only preserve its title by maintaining the confidence of the people. This is particularly true in a democratic context, which introduces many dangers in a political context.

The ownership of the sovereign power simply vests in those who obtain the consent of the majority, by any means available to them. This may include the pursuit of policies which single out the less powerful in society, who provide a convenient target for those in power. There are many situations, for example, where national politicians find it in their interest to vilify the members of minorities.

The difficulty with the principle of political supremacy, in conjunction with the Westphalian doctrine, is that it leaves us with no real means of deciding questions with respect to the ownership of the sovereign power. The historical solution to an oppressive state, internally, is insurrection. The external solution is war. John Dewey, for one, complained that this has created a "war system" in international relations.

> Recourse to violence is not only *a* legitimate method for settling international disputes at present; under certain circumstances it is the only legitimate method, the ultimate reason of state.[112]

The essential problem, internally and externally, is that questions with respect to sovereignty can only be decided outside the legal and political orders.

There is a certain idealism in Dewey's argument for the "outlawry of war", under which war would be a public crime under international war. His idealism was shared by many of his contemporaries, however, and rests on a simple claim.

> Now to settle disputes *finally*, whether they are between nations or individuals, the experiences and wisdom of the world have found two methods, and only two. One is the way of the law and courts; the other is the way of violence and lawlessness. In private controversies the former way is now established. In disputes among nations the way of violence is equally established." (515)

The same comments could easily be applied to conflicts between a majority and a minority concerning the validity of the state's title to the sovereign power and the right of the minority to secede.

Dewey's argument is as compelling in a domestic context as it is in the international sphere. And who can disagree with David Copp, when he writes that the major argument for a legal right of secession is to avoid secessionist wars and the human suffering which comes with them?[113]

Chapter 4. Solving the Problem

Introduction

The present chapter reviews the previous discussion and sketches out a solution to the historical problem of secession. This lies in a more developed notion of legitimacy, which is more in keeping with the original uses of the term. The historical question of legitimacy appears to have originated in the medieval idea that a monarch ruled by virtue of a divine warrant from God. This gives rise to two distinct questions. One is whether the actions of the state are politically legitimate and have the consent of the populace. The other is whether they are legitimate, legally, and in keeping with the moral order.

The chapter argues that any decision as to the legitimacy of a state's claim to sovereignty over a particular territory should be subject to both standards. A legitimate state is a state which is politically and legally legitimate. This theory of the state would require fundamental changes in the international state system. Although the philosophical literature has tried to read a moral element into the international law, the idea of the state remains much as it was, without moral restrictions. The real issue is whether it is feasible to leave matters like secession to an unregulated political process, inside or outside the state.

The legal aspects of legitimacy come to the fore in the context of secession because the right of secession usually attaches to minorities. As a result, the question of political legitimacy cannot be decided by an ordinary vote, without permitting the majority to decide the rights of minorities. It follows that the validity of a referendum needs to be decided outside the political arena, by a court with the authority to determine the terms of any referendum and its ultimate effect. This raises the question of justice and the general question of legality, which takes moral priority over the political question of legitimacy.

This is not possible, without giving a court an authority above the ordinary legal and political orders. The immediate problem is that there is no legal body, outside the state, with the necessary authority to subject the state to effective legal constraints. The question of secession cannot be decided externally, if the state is sovereign in the traditional sense. Nor can it be decided internally, on the basis of the positive law, which receives its authority from the existing constitutional order.

Although national courts exercise a significant influence on the political norms within the state, it is a mistake to overstate the authority of the judiciary, which has little access to the brute powers of the state. There are practical limits on the ability of domestic courts to rule on an issue like secession and any domestic restraints on the political branch will be subject to the usual powers of government, which appoints the judiciary and generally has authority over the military.

This leaves the possibility of deciding questions regarding the ownership of the sovereign power under the regulation of external constraints. The major problem, in modern times, is that the only compulsory solution in the international sphere seems to lie in war. This is an *ad hoc* measure, which is not the same as a legal use of force, pursuant to a decision from a competent legal body. The problem of secession accordingly calls for the development of an international court, with the authority to regulate the moral conduct of individual states.

There are a variety of developments in the international arena, which have made such a project more feasible than it was in the past. The primary development is the recognition among the international community that individual states have a responsibility to protect the rights of individuals and minorities in other states. This is evident in the literature on international legitimacy, which holds that states are only entitled to international recognition if they respect

the fundamental rights of individuals. The academic literature has already suggested that the historical concept of sovereignty is of limited value in analysing contemporary developments in the international arena.

Discussion

In order to solve the problem set out in the previous chapter, we need to return to the question of legitimacy. The modern understanding of the conception is simplistic and neglects the need for a standard that can be used to determine whether a ruler has a moral title to the sovereign power. This seems to have its origins in the medieval belief in the divine right of kings.

There are at least two aspects to the medieval standard. The first concerns the political restrictions on the state, which were historically expressed in the principle of the common good. This stems from the historical opinion that it is the sovereign who is charged with responsibility for the good of the entire community. The second concerns the moral restrictions on the state, which find expression in a legal concept of justice. Both of these concerns have a moral element, though the second concern is explicitly moral and finds expression in the legal use of moral principles.

The common good is a political concept. The decisions of the actors in the political realm are morally binding, on such a principle, when they serve the community as a whole. It is this aspect of the common good which manifests itself in Aquinas, who argues that laws should be established for the usefulness of all the citizens. "And on account of this, laws of this kind, *imposing proportionate burdens*, are just, and they bind in the court of conscience, and are legal laws."[114] This implicitly includes some protection for the rights of individuals and minorities.

Although it is based on the wishes of the people, the political concept of legitimacy has a

moral basis and the common good provides a means of regulating the moral capacity of political actors to commit evil. This is based on agreement, on the assumption that the populace will not agree to measures which fail to respect the rights of individuals and groups. There is a sense, at least, in which the political legitimacy of the state accordinlgy has its ultimate basis in substantive principles. It is when the King acts against the common good that the populace is entitled to withdraw its consent to the political order.

The legal aspects of legitimacy are found in the concept of justice, which places moral curbs on the authority of the sovereign. John Finnis writes that Aquinas

> . . . draws a distinction between tyrants who abuse an authority which they acquired legitimately and tyrants who are also usurpers. Tyrannical usurpers, at least until they have acquired a legitimacy through their subjects' acceptance {*consensum*} or through ratification by some higher authority, can be resisted and repelled by anyone able to do so effectively. But legitimate rulers who govern tyrannously should rather be suffered patiently, unless and until other officials or citizens who have public authority to do so put an end to the regime, if need be by trying and executing the tyrant.[115]

This distinguishes between a ruler that is politically legitimate and a ruler that is politically illegitimate. It also postulates a legal authority, however, with the independent authority to determine the moral legitimacy of a particular regime.

The medieval question of legitimacy arises in other contexts. In the Summa, Aquinas holds that a subject is not obliged to obey a secular authority who exercises his authority unjustly, unless that is necessary to preserve the public good.

> Man is bound to obey secular princes in so far as this is required by the order of justice. Wherefore if the prince's authority is not just but usurped, or if he commands what is unjust, his subjects are not bound to obey him, except perhaps accidentally, in order to avoid scandal or danger.[116]

Again, Aquinas is raising both issues of legitimacy: on the one hand, the commands of the sovereign are not legally valid unless they are politically legitimate. On the other hand, an unjust law is not a law, since it is legally illegitimate.

This undermines the view, *per* William Connolly, that legitimacy was not a significant issue in the medieval world.[117] Joseph Camilleri takes a similar stance in suggesting that the limitations on a sixteenth century sovereign were inconsequential:

> God, it is true, was above the prince, and the supreme power of the prince over his subjects was subordinate to the "law of God and Nature." But apart from this limitation, the practical consequence of which remained unclear, the sovereign was above the people, or, as Jacques Maritain has argued, "separate from and transcendent over the people."[118]

This misconstrues the significance of the medieval notion of legitimacy, which was more important for setting the legal and political parameters in which a ruler could function than in deciding the question of title.

The problem with a theory which abandons the legal principle of legitimacy, on the historical view, is that it frees the sovereign from his obligation to respect individual rights. This is compounded in a democratic state, since it is the majority which licences the sovereign power. The important observation is that there is nothing to prevent the sovereign–be it a King or a majority--from tyrannizing a minority unless the state is subject to moral restrictions which recognize the legitimate rights of minorities. This is a crucial factor in the instance of contemporary conflicts regarding secession, which have been accompanied by massive violations of the most basic rights.

Step 1: Separating the Political and Legal Questions of Legitimacy

The historical solution to the problem of a state which is politically illegitimate is simple and brutal. It lies in the right revolution, which gives the people the right to repossess the sovereign power and overthrow the established legal and political order. The question of legal legitimacy is more difficult, since the authority of the courts does not extend to questions regarding the ownership of the sovereign power. The transfer of the title to the powers of the

state is an exclusively political matter and a legal conception of legitimacy would merely bring it under moral regulation, without violating its political nature. This explains the response of common law courts to the problem of revolution, which is essentially to honour the political fact that the sovereign power has changed hands.

This does not dispense with the moral obligations of the state and it is generally agreed that states are subject to moral obligations. John Rawls' law of peoples, for example, treats nations or peoples as contracting individuals, and subjects them to the principles of justice on which they would hypothetically agree. This includes an obligation to honour human rights. The problem is that this is of little assistance, in the existing state system, unless states are willing to give such obligations priority over their own prerogatives. The choice is between the right of states to act as they wish, subject to the exigencies of the international order, and the recognition that they are subject to moral laws which require them to act against their own wishes in some instances. The historical record leaves no doubt as to the answer which states have traditionally given to such a question.

There is a question of compulsion here, which seems to require that the sovereignty of the state be subjected to legal limitations. Allen Buchanan essentially argues for this kind of concept in an essay on Rawls' conception of international law, where he argues that a notion of global justice is necessary, to supplement the concept found in Rawls' other work.[119] Buchanan argues for a "moral theory of the international law", which would ground the institution of state sovereignty in a moral rather than a political concept of legitimacy. This runs against the fact that the existing international law, which deals with the relations between states, is based on a political rather than a moral concept of legitimacy.

The impetus behind Buchanan's argument appears to be that a moral standard is

necessary, if the international law is to protect and promote human rights. The question whether the state has a valid title to the sovereign power accordingly raises both questions of legitimacy. The first is a political question, which calls for a decision from the relevant majority as to whether the state has lost the confidence of the people. The second is a legal question, which requires that the decision of the majority as to the ownership of the sovereign power be brought under the scrutiny of accepted moral tenets. This calls for an independent legal apparatus, with the capacity to place moral restrictions on the actors in the political realm.

The political question of legitimacy raises an issue of consent. It stands to reason that such an issue is best decided democratically, by means of a referendum or an election. In an appropriate situation, this gives rise to a political right of secession. This is a moral right to secede, by political means. It gives a recognizable minority the moral right to assert its right to independence, if it obtains the agreement of an appropriate majority among the members of the minority. This is a powerful and dangerous right, which has many limits, and is not exercisable by a bare majority. One of the purposes of a legal right of secession is to place moral restrictions on the exercise of such a right.

One of the problems is that there is a sense in which the political right to secede will always arise in the inchoate political realm, outside the existing constitutional order. There is, in addition, a sense in which the right to secede is always a political right, since a group cannot be required to form the political compact against their will. This is a matter of personal and collective autonomy. The legal right to secede is only a legal and formal recognition of the political fact that a given minority has a right to secede. It merely means that a minority with the necessary political right has a right to a legal ruling which implements that right and requires the opposing party to respect it.

It is helpful to distinguish between the purposes of a political and a legal process in this context. The democratic process determines whether the actions of the actors in the political arena are in keeping with the interests of a given group of people, as they perceive them to be. The purpose of a legal process is to determine whether the wishes of such a group are in keeping with the principles of justice. It might be thought that the use of a court goes against the position of Harry Beran, who disputes the suggestion that there are epistemological elites, which are in a better position to make ethical or political decisions than ordinary people. This kind of argument is blunted, however, by the fact that the principles employed by the courts in constitutional cases are basic moral precepts which are held by the people in general.

The major difficulty with the political question is that there is nothing to ensure that the wishes of the majority will be in keeping with the moral order. So that a majority in Kosovo, for example, might endorse or even applaud the unjust acts of the state with regard to a minority. This is the classic problem of secession, which takes us into the sphere of the natural law, historically, and gave rise to a medieval duty of self-preservation. This becomes a right, in the work of Thomas Hobbes and John Locke, where it takes priority over our obligation to obey the state. In the Second Treatise of Government, for example, the right of self defence provides the basis of a general right of revolution, which arises when a government puts itself "into a state of War with the People, who are thereupon absolved from any farther Obedience."

This does not deal with the problem of an oppressive majority, which provides the most obvious derivation of a moral right of secession. The question of legitimacy cannot be remedied by an appeal to the people in such circumstances, since it is the will of "the people" which requires regulation and scrutiny. This demonstrates the need for a legal concept of legitimacy, to make up for the insufficiencies in a simple conception of political legitimacy, which cannot

determine the moral rights of minorities without intervention by a third party.

There are many *Québecois* who argue that they have the right to form an independent state, on the basis that they are an identifiable people, with the right to determine their own destiny. This is a political rather than a legal right. Although it has a moral source, it differs from a legal right, which would only arise if the Canadian government breached their fundamental rights. The legal right of secession comes with substantive obligations and the legality of a unilateral act of secession would depend on the actions of the seceding state. There would still be minorities, whether it is the English in Montréal, the northern Cree, or French Canadians in the *Outouais*, whose rights need to be protected in the process.

There are procedural limitations which make it difficult to resolve an issue like secession solely on a political basis. In "Community and Civil Strife", for example, Paul Gilbert makes a convincing argument that the democratic process cannot provide a "criterion as to which groups should constitute separate states." (10)

> The legitimacy of the state as the proper body to maintain order in a particular territory is not something that can be established by a majority vote of the members of the state. For what such a majority cannot decide is who shall vote to decide who the members of the state shall be. (10)

Gilbert uses the example of Northern Ireland, where the traditional difficulty has been whether the population of the six counties or the entire island is entitled to participate in deciding on the future of the North. There is no way of deciding such an issue democratically, since the results of a referendum will depend on who is consulted.

Gilbert does not consider the possibility of separating the question as to who should be consulted in a democratic process from the substantive question of whether Northern Ireland should be a part of a larger Ireland. Still, the first question raises an issue of fair process. If it is con possible to determine the population which should be consulted in another forum, like a

court, the issue can be decided on a democratic basis, even if the result is a foregone conclusion. Gilbert argues that there are issues, however, outside the question of consent, which need to be considered by a satisfactory theory of secession.

> Gilbert's primary concern is with the "communitarian" purpose of the state.
>
> Vague as it is, the claim that a form of government is undermining communal identity is a common justification for separatist campaigns. Those in Scotland and Wales provide local examples. Independent government may, to an extent, protect communal identity... (12)

There is an issue of consent here, however, since these kinds of issues are always a matter of opinion and can only be decided by consulting the wishes of the minority. The stronger argument point is that this is not enough and it is the question of justice which will ultimately determine the moral issue of legitimacy, inside or outside the legal process. This does not dispense with the usefulness of democratic criteria: it merely establishes that it is insufficient, in itself, to decide the moral issue.[120]

This leaves an outstanding issue with respect to the priority of the legal and political conceptions of legitimacy. One of the questions that arises, in setting out the two standards of legitimacy, is that they may seem to conflict in a particular case. There are many questions which may throw the efficacy of a referendum into doubt and the results of a referendum are subject to legal scrutiny. But if a substantial majority vote in favour of secession in a fair referendum, it would normally render the existing state politically illegitimate. And the question naturally arises: what if the existing state was legally legitimate? Which conception takes precedence over the other?

This kind of question is problematic, since the legal issue lies in illegitimacy rather than legitimacy. Still, the best answer is that the political right takes precedence. A state that is politically illegitimate cannot claim to be legally legitimate, since it has already lost the moral

right to govern. There is some room for a legal finding in this situation, in the form of a legal ruling or a declaration. But this does not raise the legal question of legitimacy, and the two questions of legitimacy generally arise in the other order. The moral question on secession is whether a government that is politically legitimate is legally illegitimate. This is a prefatory issue, however, in a court, and the primary legal issue is whether a minority possesses a legal right to secede.

Step 2: Placing legal constraints on the state

The major problem in developing a legal theory of secession lies in the historical concept of sovereignty. This is because the purpose of any legal theory is to deal with the contested cases of secession, where the state is unwilling to accede to the wishes of a minority which claims some form of independence. As a result, the real problem of secession lies in dividing the state, against its will. It follows that a legal right of secession would bring individual states under some form of meaningful legal constraints. This is not possible in an international system that still harkens to the historical claim that the will of the state cannot be subjected to external constraints.

This would require at least two developments. One is the extension of the moral concept of legality into the extraconstitutional realm, in which states theoretically exist. This requires the recognition of a new legal order, outside the constitutional realm, which treats the state as an ordinary person under the law. This is against the interests of contrary states, be it Turkey, Iraq, Indonesia or any number of countries who believe that any recognition of the right to secede is inimical to their interests. In spite of this, there are comparable developments in the history of jurisprudence. The law ultimately has a pragmatic purpose and the concept of persons already extends to corporations, for example, which can sue and be sued in their own right.

It may be helpful to use Ernest Barker's distinction between "an individual legal person" and a "group legal person".[121] Barker sets out a teleological conception of groups and group entities which may leave contemporary philosophers uncomfortable. This is a legal necessity, however, more than anything else, which provides a legal standard of measurement. It is impossible to measure the actions of the state without postulating some overriding principle, to which the actions of the state must conform. This purpose may be extremely general, moreover, and may be as simple as the satisfaction of legitimate wants, or the pursuit of the common good.

The sticking point is that any extraconstitutional order must be compulsory, if it is to be effective. This is because the pressing moral issues arise in those situations where a state has no desire to act in keeping with the moral order. Secession is a case in point: the importance of a legal right of secession is that it would give an oppressed minority the right to secede, against the wishes of a recalcitrant state. The philosophical argument is simply that legitimate states are required to respect the rights of the individuals and groups within their jurisdiction. There is no choice in such matters.

The use of a legal standard of legitimacy would require the development of subsidiary principles, which set out the parameters in which the state is entitled to govern. At least some of these principles might be found in a concept of natural rights, some notion of majority rule, the principle of justice, or the common good, though these concepts mean little without further elaboration. In all of these instances, however, it is necessary to place some limits on the state's exercise of the sovereign power. There is an institutional issue here, since this will not be possible unless the law derives its authority from something other than the political authority of the state. It follows that a court with the authority to decide an issue like secession will have to find the authority to make such a decision in the moral sources of the law.

There is reason to believe that international courts will eventually assume this authority on their own, since a statutory document can never provide anything more than a skeleton of rules to govern such bodies. As many philosophers have recognized, there will always be situations in which executive actors must fall back on their own judgement in determining how to exercise the powers of government.[122] The courts are in much the same position. Since many of the questions which now come before international legal bodies, particularly in the area of human rights, are innately moral, it seems evident that they will be forced to base their decisions on substantive principles. This is particularly true in the case of criminal prosecutions, which call for a relatively refined exercise of moral judgement.

It is impossible to use moral rather than political sources of authority without some form of inherent jurisdiction, which guarantees the independence of the courts and gives them the authority to override the wishes of political actors. This is the ultimate basis of the compulsory jurisdiction of the ordinary courts, rather than statutory delegation, since it provides the source of any courts discretionary powers. There is a related distinction in the common law, which gives the superior courts an inherent jurisdiction, which does not derive from the political branch of government.

There is a natural analogy between the role of a superior court and a court which tries an issue like secession. This is because the substantive and procedural principles which come into play in deciding the legal question of legitimacy have the same authoritative character as the natural rights in the American constitutional tradition. The inherent jurisdiction of a global court trying an issue like secession would come from *les droits de les personnes*, which are universal and obligatory. This would place limits on the legitimate exercise of the powers of the state, at least in cases where a state contravenes fundamental human rights, with serious prejudice to a

particular minority.

One of the notable features of the *Secession Reference* is that it goes beyond the explicit provisions of the Canadian constitution. The court traced its decision to "underlying constitutional principles", but the decision enters into moral territory outside the constitutional order. This is inevitable, since the history of the law recognizes that secession and revolution take place outside the legal and political orders. It is of little consequence, in any event, whether we accept the court's reasoning. The crucial principle on which the Supreme Court relied was that political actors have an obligation to respect the rights of minorities. This is a universal principle which applies in any context.

This has implications beyond secession. An international court with an inherent jurisdiction would have an ancillary authority, for example, to regulate the conduct of parties in the hiatus between two legal orders. This is a conceptual problem similar to the question of receivership, in which a trustee is appointed to manage the affairs of a person or company which has become insolvent. The jurisdiction of a court with inherent jurisdiction extends as far as justice requires, and would inevitably give the court the power to deal with related problems in situations where the existence of the state has been questioned. This would give it some authority, at least, in the condition of war, or any inchoate or lawless condition in which there is no credible sovereign power.

Although a court would have an obligation to restrict itself to a legal role, which respects the proper boundaries of the political realm, a legal process would bring claims of secession under the direct scrutiny of moral rather than political principles. The issue in a legal forum is whether a given result can be independently derived from moral principles, on which there is general agreement, rather than whether there is general agreement on the results. Without such a

standard, it seems clear that the problem of states is similar to the more recent problem of corporations, which often seem to operate without moral restrictions.

None of this dispenses with the political aspects of the question of legitimacy. The issue on a minority's claim that it has a legal right to secede would be whether it possessed the right to secede and not whether it should do so. The fundamental point remains, however, and it is impossible to devise a meaningful process to adjudicate an issue like secession without curtailing the corporate prerogatives of the state. This calls, essentially, for some form of judicial independence, much like the independence enjoyed by domestic courts.

Incorporating the concept of legal legitimacy into the existing law

The most pressing question is how the legal conception of legitimacy can be formally incorporated into existing legal systems. The issues that arise in the context of the political question of legitimacy are relatively simple. Although there will always be political considerations that arise outside the state, the question of political legitimacy can only be decided by the populace at large. It raises an issue of consent, which can only be determined internally, in the notional realm that exists outside the political order. This runs into difficulties if the state does not accept that a minority has a right to secede and is unwilling to permit a referendum. This may accordingly require the use of external authority.

The legal question of legitimacy differs from the political question insofar as there is theoretically no law within the state, outside the constitutional order. As a result, the legal question of legitimacy raises an issue which is external to the state and the ordinary legal and political orders. While there is some scope for internal legal regulation, there are practical reasons which make it extremely difficult for domestic courts to decide a contest over the title to the sovereign power. The reality is that such a contest will usually be decided by forces outside

the control of any legal system.

This is a matter of degree. The scope of the legal conception of legitimacy has already been considered by a domestic court in the *Secession Reference*. The Supreme Court of Canada was not ruling on a purported act of secession, however, and the decision may well have been saved by the fact that it was an advisory opinion. This allowed the court to set out the parameters in which the political actors could legally negotiate the secession of Québec, without entering into the specifics of the case. Although the decision has already had an influence on the political debate in the country, it was given in relatively sheltered political circumstances, and it is quite another matter to rule on the legality of a political event like a unilateral declaration of independence.

The introduction of a jurisdiction over secession in the international sphere would place this issue in the hands of an international rather than a domestic court, which is in a better position to render an impartial decision. It is probably best to leave such matters to a judiciary who will not be personally affected by the success or failure of the parties before the court. The cohesion and discipline of a domestic court is much less likely to survive dramatic action on the part of the political authorities.

There is also the philosophical problem of a court deciding on the validity of the constitutional order from which it derives its authority. The logical difficulty is that the legal order rests on the assumption that the state has a valid title, since that is what gives the law its authority. In a sense, it is the fact that the state has the title to the sovereign power which gives it a valid title, rather than the merits of its claim. The common law jurisdiction over revolution does not go much beyond a licence to determine when the sovereign power has been transferred to a new political authority.

This leaves the possibility of subjecting the state to external constraints. On the one hand, it seems self-evident that the political power above the sovereign power--the ultimate power of the people who comprise the state--can only be regulated by a legal power which exists in the external order outside the confines of the state. On the other hand, there is no legal machinery outside the state, which possesses the authority to determine the ownership of the sovereign power or subject the decision of the majority to moral constraints.

The existing international law developed from the *ius gentium*, which derives from custom rather than a single political authority. This law is predicated on the sovereign authority of individual states, however, and has historically limited itself to the relations between states. As a result, it does not extend into the internal relations between the state and the individuals and groups within it. This is the area of sovereignty which needs to be brought under regulation in the instance of secession.

Although the international law developed from the idea that the state is a natural person, living in a state of nature, it is a mistake to think that this deprives it of moral imperatives. Fernando Tesón writes that both Hugo Grotius and the acclaimed Swiss jurist, Emmerich de Vattel attempt, at least implicitly, "to establish moral limits to the notion of sovereignty." (54) Grotius accordingly endorses a right of secession in those circumstances where a population "cannot save itself any other way."[123] Like Vattel, Grotius sees the right of secession as a remedy which arises in those circumstances where a sovereign fails to respect his fundamental obligations.[124] This sees a right of secession, like a right of revolution, as a form of self-defence which provides a morally legitimate mechanism for regulating the actions of the state.

Any right to secession therefore arises as a moral right under the natural law, which applies outside the positive law. This remains a political right, however, and Grotius argues that

it must be exercised in accordance with the common good. "I should hardly dare", he writes, to "indiscriminately" condemn a minority which "availed itself of the last resource of necessity in such a way as meanwhile not to abandon consideration of the common good."[125] The legal problem that this presents is one of regulation rather than simple morality: although a population has a moral and a political right of secession, there are no legal means of compelling states or minorities to respect their moral obligations.

The lack of legal constraints on the actions of individual states with regard to their domestic populations does not mean that there is nothing to assist an embattled minority. The modern alternative to a legal right of secession lies in the political actions undertaken by other states. Vattel, for example, argued that foreign states have a right to assist a people who have revolted against the "unsupportable tyranny" of a prince.[126] Although the reigning principle in the Westphalian system is that states are not entitled to intervene in the domestic affairs of another state, this has become an accepted means of forcing states to meet their humanitarian obligations.

One of the difficulties with Vattel's argument is that it only applies in the more flagrant cases, where there is a right of revolution. This differs from a legal right of secession, which would logically precede such a right and avoid the need for violence. There might still be a need for police action, but that is a different kind and quality of force, which occurs within the ambit of a legal order. It is important to distinguish this kind of action, within an extraconstitutional legal order, from the gratuitous action of individual states. The difference is that gratuitous action is governed by convention and agreement, rather than law, and is not subject to independent moral regulation.

There is a fundamental issue here. Tesón is remarkably sanguine, in posing the question

whether states have a right to intervene in the internal affairs of other states :

> May states unilaterally intervene by force in order to put an end to serious human rights violations? Or should states instead absolutely abide by the prohibition of the use of force embodied in article 2(4) of the United Nations Charter, and thus refrain from forcibly intervening in such cases? The first horn of the dilemma opens the door for [an] unpredictable and serious undermining of world order. The second horn of the dilemma entails the seemingly morally intolerable proposition that the international community, in the name of the nonintervention rule, is impotent to combat massacres, acts of genocide, mass murder and widespread torture.[127] (4)

This is a misleading statement of the issue, since the historical response of the international community to human rights violations is selective at best. It is not a matter of ruling out force: it would be naive to think that the question of secession, or the pressing violations of human rights which accompany it, can be remedied without some use of force. Nonetheless, the desire for a legal resolution of the claim for secession comes from the desire to mitigate such alternatives and keep the use of force within the compulsory framework that we associate with the positive law.

The argument against forcible intervention is that the existing state system prevents violence between states and places some limits on human conflict. "Humanitarian intervention" is something of a euphemism, after all, and Tesón's argument is an argument for war.[128] It does not seem excessive to say that this poses the real alternative to a legal right of secession. The choice is between unrestricted political decisions and a legal solution, which at least offers some hope of regulating the political process. Tesón's arguments are important, in the broader scheme, because they recognize the "humanitarian limits" of state sovereignty. This is the significant argument and not the argument that individual states have the right to use voluntary force, on their own initiative, against other states and governments.

One of the problems is that a legal right of secession might threaten the integrity of existing states. Antonio Cassese is pessimistic about any fundamental changes in the powers which sovereign states have traditionally enjoyed in international law.

> Since most sovereign States--the legislators responsible for the development of international law--are heterogenous, the international community undoubtedly will continue to reject any proposals . . . likely to empower individual sectors of their populations and to threaten their territorial integrity; secession is thus certain to remain an anathema.[129]

There is no escaping the "tenacity" with which existing states guard their territorial integrity and Cassese suggests that the only alternative is to narrow the concept of self-determination and use it as a means of protecting minority rights.[130] This would guarantee "internal" rather than "external" self-determination, and protect the right of national or ethnic groups to assert "autonomy" over their affairs while remaining within the jurisdiction of the larger state.

This is a more practical solution than most. But the real crux of the issue lies in the ability of states to act at will in their internal affairs, without regard for the rights of the people subject to their jurisdiction. The argument that this kind of problem can be solved by guarantees of "internal sovereignty" goes nowhere, if states have unlimited authority in their internal affairs. There are diplomatic considerations, to be sure, which encourage compliance with international norms. But they are not enough to protect people, within the state, when the conflict between different groups erupts in violence.[131]

In fairness, Cassese recognizes that there are "exceptional cases" where an internal principle of self-determination is insufficient.

> When, in a multinational State, armed conflict breaks out and one or more groups fight for secession, it may be that it is too late to plead for a peaceful solution based on internal self-determination. Similarly, when the central authorities of a multinational State are irremediably oppressive and despotic, persistently violate the basic rights of minorities and no peaceful and constructive solution can be envisaged, it seems difficult to imagine that those central authorities would be willing to grant autonomy, or participatory rights. (359)

In such circumstances, Cassese takes the position that the seceding group has a right of secession under international law.

This is a new development, but it neglects the reality. There is no legal machinery to decide the validity of state's title to the sovereign power and the question of secession lies entirely within the unregulated realm of international politics. There are reasons to be worried that there is a new and unpredictable world order, in which individual states take it upon themselves to decide whether they should forcibly intervene in the internal affairs of another state. This was apparently the basis on which American, British and French troops intervened in northern Iraq, to protect the rights of the Kurdish minority. Cassese minimizes such a development and dismisses the situation in Iraq as an "exceptional" case, but the North Atlantic Treaty Organisation has now adopted a similar role in the conflict in the southern Serbian province of Kosovo. (361)

The actions of NATO in Kosovo took place outside any legal realm, nationally or internationally. These kinds of actions are the voluntary responses of private states, which are not based on a discernible legal mechanism. This is equally true of actions taken under the auspices of resolutions passed by the United Nations Security Council, though those actions can certainly claim the wider political legitimacy that comes with the consent of the members of that body. The lack of judicial scrutiny is troubling, even when the actions seem justified, and subverts the rule of law.

There is a related question in the area. Although the issue of legitimacy which arises on secession may have its external aspects, it is the internal or domestic aspects of a state's conduct which are relevant in assessing whether it is entitled to retain its ownership of the sovereign power.[132] This question naturally separates itself from the question whether a state has legitimacy in international law, which has traditionally held that a sovereign state is legitimate--and theoretically acquires sovereignty--when it is recognized as a state by other states. The

question of legitimacy in this context is related, traditionally, to the positivist question whether a state has effective control over a territory. As we have seen, this is significant in determining, for legal purposes, whether the law is politically legitimate. It does not deal, however, with the question whether such control gives a state the moral warrant to enforce laws which are otherwise legitimate.

This is one of the areas where the traditional concept of legitimacy has been challenged by current developments in international law, under which the concept of international legitimacy has begun to acquire an ethical grounding. Allen Buchanan provides a moral account of "recognitional legitimacy", which would provide the appropriate criteria for the recognition of states in the international state system.[133] Although the concerns which inform Buchanan's account are essentially the same as those which motivate the present work, his paper is part of a larger attempt to develop an institutional ethics which might be applied in the context of the existing international law.

This differs from the present enterprise in a number of respects. For one thing, there is a fundamental difference between the question whether to recognize a state as legitimate after a minority has declared its independence, and the question whether a particular minority should be given a legal right to secede. It is true that the ultimate goal of a seceding minority is usually an independent state, which is fully recognized by other states.[134] But this only arises after a state has lost its capacity to govern, and a new state has installed itself. The whole point of a legal right of secession is to provide a mechanism which will avoid the instability that culminates in such changes.

In addition, there is a discretionary aspect to the process of recognizing states that is not in keeping with the moral imperatives which assert themselves in the instance of secession.

There is no reason why the question of secession should be left exclusively to the discretion of existing states, who have interests of their own to advance. Simply stated, the political arena is a partial forum in which to try such an issue. As a result, Buchanan's position fails to address the chief difficulty which stands in the way of developing a legal theory of secession, which lies in the political nature of the existing state system.

Nonetheless, there are similarities between the two accounts, which agree that the "moral goals" of the international legal system should be "peace and justice". (19) Buchanan describes his account as "justice-based", and defines "the minimal requirements of justice as being respect for basic human rights, both within the state and in the state's interactions with those beyond its borders." (1) This is a departure from international practice, but one which is necessary, if we are to subject the international state system to moral constraints. The compulsory principles of the ordinary law cannot be extended into the system of international law without a recognition that the jurisdiction and authority of international courts derives from moral rather than political sources. The philosophical argument is that a satisfactory solution to the problem of secession is not possible without such changes.

Buchanan's position is in keeping with the emergence of a moral element in the development of criteria for the recognition of new states. Historically, such criteria emphasized the capacity of a functioning government to control a territory and enter into relations with other states. There are "modern criteria", however, which hold that a new state "must not have breached a (basic) rule of international law" in coming into being. (3)

> There is evidence that international legal doctrine and practice are gradually adding moral content to the criteria for recognitional legitimacy, so that mere "effectivity" eventually may not be regarded as sufficient. For example, resolutions of the U.N. General Assembly refused to recognize Rhodesia on the grounds that its basic political and legal institutions systematically discriminated against non-whites. (4)

But this neglects the fact that the decisions of the international community to recognize a new state are motivated as much by political concerns as anything else. The problem does not lie in the principles used to make such decisions, so much as the partial and selective manner in which they are employed.[135]

Buchanan's arguments are in keeping with an increasing number of authors in the area. In an article in Millenium, for example, Samuel Barkin argues that sovereignty has always been subject to "legitimising principles", which now extend to human rights. This gives sovereignty constitutional attributes:

> Sovereignty tends to convey upon the state the authority to do as it sees fit internally, except when such action compromises the legitimating constitutional features of sovereign statehood. In the case of the Westphalian system, one such feature was religion; rulers had the authority to do as much as they pleased within their states, and had little authority to intervene within the domain of other rulers, except with respect to breaches of the religious settlement. (239)

Barkin wants to argue that this made other interventions unlawful, and created a legal order, over the state system, which constrained the actions of individual states. This is an external order, however, which does not affect the authority of states within their own territory.

Barkin's thesis rests on the argument that a state acquires sovereignty by virtue of its recognition by other states.

> An authority is only sovereign in a system of states if other authorities recognise it as such. In Janice Thompson's words, "sovereignty is not an attribute of the state but is attributed to a state by other states." (232)

Although this is an important aspect of sovereignty, it does not deal with the internal realities which come into play in the instance of a question like secession. It does not seem to matter, in such cases, whether the international community recognizes a particular state. Barkin acknowledges, for example, the existence of "illegitimate states" who possess the normal attributes of sovereignty in respect of their internal affairs, but are not recognized by other

states.[136]

These kinds of issues aside, Barkin's argument takes us into the international political arena and the principles on which states agree to recognize other states. Barkin's argument is that international recognition "is dependent in part on the features or institutions of the state that are believed to be the legitimate source of sovereignty." (232) This ties into his historical argument that nationalism eventually replaced religion as a legitimating principle in determining the sovereignty of states, under the Westphalian system. It is the conflicts which arose out of the use of such a principle that led to the "reification" of borders after World War II.

> National borders in this system, as agreed upon in the immediate post-war settlement, came to be sacrosanct in and of themselves, to be taken as prior to the operation of international politics. Except under the most extreme of circumstances, they could not be altered. (244)

In each case, it was the state's possession of the legitimating feature which gave it the right to claim recognition as a sovereign state.

There are many difficulties with such an argument. Barkin nonetheless suggests that the principle of borders is in the process of being replaced by a democratic standard which emphasises a liberal conception of individual rights.

> A norm that has begun to replace territorial legitimation as a defining feature of the constitution of legitimate sovereignty in international relations is the norm of human rights. This norm includes civil and political rights, a set of relations between the state and each of its individual citizens that guarantees to each citizen certain political rights against the state, but not to economic, social and collective rights. (246)

On this view, the legitimacy of a state depends upon "its ability to ensure the political rights of its citizens." (249) Although this is a decidedly optimistic view, there is no doubt that the international community has turned increasingly to the principle of human rights in justifying international actions against an individual state.

This brings in another kind of political legitimacy, since it is a matter of agreement

among individual states. The actions of individual states in concert–the "legislators" of international law, in Cassesse's terminology–is governed by political rather than legal considerations. The idea that individual states merely act on the basis of moral principles, rather than their own interests, is notable primarily for its naivete. The fact that a large number of states agree with a particular policy is no guarantee of its moral propriety. The problem with the standard of legitimacy which Barkin sets out is accordingly that it does not deal with the problems which arise from the application of a political standard.

This is a general problem with the literature in the area. For all the discussion of human rights, and the acceptance of international norms, there are many reasons to believe that states primarily follow their own interests in deciding whether to recognize other states. As Barkin himself acknowledges, one of the effects of the legitimating principle of human rights "is to make it easier to intervene in the affairs of states that fail to guarantee these rights."[137] And the international state system has progressed to the point, as a system, that "territorial adjustments *per se* are no longer thought of as inherently illegitimate." (250) There is little doubt that the rhetorical use of the concept of human rights has made it relatively easy for states to promote their geopolitical interests under the guise of larger humanitarian concerns.[138]

This concept of political legitimacy does not address the questions raised by a legal concept of legitimacy. Nonetheless, it illustrates the development of a concept of sovereignty which is amenable to legal constraints. This is apparent in Barkin's comment that sovereignty:

> . . . tends to convey upon the state the authority to do as it sees fit internally, except when such action compromises the legitimating constitutional features of sovereign statehood. (239)

This envisages a limited concept of sovereignty, which is subject to legal and political constraints in the international state system.

In a similar development, David Miller distinguishes between "two aspects" of sovereignty.

> . . . states are said to be sovereign internally in so far as they are recognized as the final authority on all matters that arise within their boundaries; and they are sovereign externally in so far as their decisions cannot be overridden by any other body, whether another state or an international institution.[139]

Miller argues that the "idea of national self-determination" does not require that states "rigidly demand complete sovereignty over their internal affairs". (99, 101) Although Miller is primarily concerned about nations, rather than states, this implicitly suggests that the state system may be able to survive without an unrestricted concept of sovereignty. It is open to debate whether matters like national defence can be dealt with by international treaties or alliances without depriving a state of the necessary elements of state sovereignty.

This would be in keeping with recent work in political theory, which suggests, primarily through John Rawls, that the justice of the relations between states is determined by the same kind of contract which exists between individuals. The comparison between states and individuals is interesting because it suggests that it may be more appropriate to speak of the autonomy of states rather than sovereignty in the traditional sense.

There are recent developments in the practice of sovereignty, in addition, which suggest that the international order is changing. There are many state practices which no longer seem to fit the traditional theory of state sovereignty and incipiently recognize the existence of a compulsory legal order above the level of the domestic law. This includes the formation of economic associations, like the North American Free Trade Agreement, and the increasing authority of organizations like the World Bank and the World Trade Organization.

There is also the evidence of an increasing number of states, who willingly attorn to the policies and practices of the various agencies of the United Nations. The Committee on

Economic, Social and Cultural Rights under the *International Covenant on Economic, Social and Cultural Rights* is a case in point, though there are many other examples. This includes immunization drives under the auspices of the World Health Organisation and relief efforts in a variety of countries. There are many incremental developments in international relations, which have considerably diminished the autonomy of individual states.

There are corresponding legal developments, which have accelerated this process. The creation of the European Economic Union has created a civil entity, other than a state, with considerable legal authority, which has given it a supervisory jurisdiction in the area of human rights. The competition between different political institutions, such as the European Parliament and national governments, will inevitably diminish the authority of individual states and create a need for a legal resolution of jurisdictional disputes.

There are also recent developments in international criminal law, concerning torture and crimes against humanity, which may indicate that a global jurisdiction is emerging. Antonio Cassese suggests that states are experiencing greater integration on an economic an political level, even while the ethnic and cultural differences become more pronounced in individual states. Daniel Philpott goes so far as to argue that the concept of sovereignty has itself been modified by the development of minority rights and the principle of national self-determination. is also evident that legal systems are changing, in a manner which will probably integrate the domestic and international jurisdictions. The remarkable prominence of international institutions is significant, in itself, as is the increasing acceptance of international law by domestic courts. It

Philpott argues that there is "a nascent norm allowing U.N.-sanctioned intervention for humanitarian purposes", which

> . . . actually gives individuals and peoples legitimate claims against state institutions, although these are only exercised in extreme disasters. The sovereignty of the state is

> becoming less than absolute, the Westphalia paradigm is being weakened and the state is again, at least to some degree, problematic. (368)

This is a contentious statement, since most of the actions in question are decisions taken by individual states, acting in concert, rather than an international body in its own right. This does not affect the legal status of the state: in point of fact, it increases the autonomous nature of its authority and gives the state a licence to act outside its domestic boundaries.

Many political scientists also take the position that the traditional concept of sovereignty fails to capture the development of capitalism and international systems of production. Joseph Camilleri writes that the idea of

> . . . national sovereignty in an international context has been greatly eroded by a web of mutually reinforcing dependencies and interdependencies. . . . The principle of state sovereignty can now be seen to have emerged and developed under conditions that are fast disappearing. . . . Everywhere the cohesion of national societies seems likely to diminish, and so too the mobilizing efficacy of national governments. Historically state sovereignty may turn out to have been a bridge between national capitalism and world capitalism, a phase in an evolutionary process that is still unfolding.[140] (38)

There are also strong religious and ethnic sources of identity, such as Islamic fundamentalism or "pan-Arabism", which seem to raise a challenge to the sovereignty of certain states.[141]

This is only side of current developments, however. At this point, individual states show no willingness to relinquish their sovereign powers. In spite of the many developments in international law, the legal status of the state has not changed, and individual states are still immune from ordinary legal constraints. There are contrary impulses in the current developments and many international actors subscribe to a narrow political conception, which holds that the reality of state power is sufficient to demonstrate its legitimacy.

Anne Bayefsky goes so far as to argue that relatively new arguments for "cultural sovereignty" in the international arena are part of a larger and relatively successful attack on the concept of universal human rights. The philosophical problem, she argues, can be found in legal

positivism, which has undermined the moral underpinnings of the international law.

> . . . while concepts inimical to human rights gain ground, legal positivism fails to provide the intellectual tools necessary to contradict them. It provides no help in constructing external standards of evaluation.
>
> The international legal framework is rendered essentially a moral vacuum. . . . In practice, law is discussed without moral signposts despite the theoretical space left for an independent inquiry [into the] law's moral validity, even under legal positivism.[142]

Morality has been kept "at bay" through the reliance upon concepts like "systemic validity", "institutional autonomy" and "background morality".

In the same article, Bayefsky discusses the passage of a General Assembly resolution which addressed the subject of United Nations action "in the human rights field through the promotion of international co-operation and the strict observance of the principle of non-intervention."[143] Bayefsky sees such measures as an attempt to reassert the territorial sovereignty of states, what she refers to as "the old keep-out strategy", which would essentially permit states to disregard international covenants protecting human rights. (49)

This is not entirely fair, and Bayefsky fails to deal with the political reality that states are more than willing to invoke "human rights" selectively, at the expense of their perceived adversaries. Her account of the process at the United Nations demonstrates the political nature of such a process, however, which is subject to the prevarications by states who find it in their interest to avoid serious moral issues. As a result, the international law has few resources with which to evaluate domestic legal systems that violate human rights, much less the states themselves.

This isolates the immediate problem in the international law. Although there are divergent tendencies in the current international community, this kind of separation between the law and morality cannot be sustained. This is not only because the international community and individual states do not have the resources or procedures to deal peacefully with problems like

secession. It is also because the Westphalian argument is no longer compelling. The world has changed and it is no longer tenable to argue that states should ignore the oppression within other states.

There are economic, political, social and technological reasons why the international order is changing. Antonio Cassesse may be right in arguing that we have not reached the point where it is possible to move human society beyond the bias in favour of state sovereignty. But it is time to deal with the contradictions in the conventions of the international law. It is impossible to move beyond the endless, rhetorical protections which the international law has afforded to human rights without subordinating the principle of territorial integrity to the principle of justice. There is no reason why this needs to deprive sovereign states of the administrative and legislative authority to govern.

When all is said and done, the moral argument in favour of introducing a compulsory principle of legal legitimacy in a formal, institutional forum, is exceedingly simple. The only other alternative, in the face of an oppressive state, seems to be insurrection or war. The choice is between legal regulation and some form of political anarchy. There will always be instances of bad faith and cases which go amiss, but standards of justice and fairness are meaningless if they have no legal force. We can choose to regulate the question of secession, or leave it unregulated, in which case it will continue to be decided in some lawless region outside the reach of the ordinary legal process.[144]

There are other forces at work, which may eventually change the institutional structure of the international community. There is increasing dissatisfaction, for example, with the fact that the international state system favours states over national communities, Non-Governmental Organizations, and individuals who share a common identity across the borders of individual

states. The use of a legal process to resolve issues concerning the possession of the sovereign power would at least mitigate the more alarming prospects of permitting states to intervene in each other's affairs. There is no mistaking the importance of such a development, which might finally corral the continuing spectre of human war.

Chapter 5. Existing Theories

Introduction

The theories of secession in the philosophical literature appear to fall into two categories, which Allen Buchanan describes as "remedial" theories and "primary rights" theories. The first set of theories traces the origins of the right of secession to the injustice suffered by groups or individuals. The second traces it to the right of self-determination. The literature has overlooked the fact that these kinds of theories can be classified as theories of secession which are based on the legal and political concepts of legitimacy. The present chapter reviews most of the theories of secession in the academic literature.

The chapter begins by discussing a number of theories of secession which derive the right of secession from the right of self-determination. Harry Beran, Christopher Wellman and Daniel Philpott have argued that individuals have a right of self-determination, which gives rise to a freedom of political association. This provides the origins of any right of secession, which rests on the political notion of consent. There are other theories of secession, based on self-determination, which restrict the right of secession to specific groups. Avashai Margalit and Joesph Raz, for example, restrict the right of self-determination to "encompassing" groups. David Miller argues for a right of secession based on nationality. These are all political theories, which implicitly trace the origins of the right of secession to the political concept of legitimacy.

In the course of reviewing these theories, the chapter discusses the merits of deriving a theory of secession from a right of self-determination, particularly in the instance of national or ethnic rights. There is considerable debate in the literature with respect to the status of national rights, and differing views as to whether nationalism is compatible with liberal principles. The most convincing argument in favour of such rights is probably that human society naturally

organizes itself into nationalities, which provide an elementary part of human identity. The major advantage to such a position is that there is an ontological sense in which the identity of the individual originates in the community. As a result, it is not possible to protect such an identity without some form of national rights.

The chapter then examines the remedial approach to secession, which rests the right to secede on the legal concept of legitimacy. Allen Buchanan is the most prominent exponent of a remedial theory of secession, though there are elements of such an approach in most of the theories in the academic marketplace. The remedial right to secede rests implicitly on the principle of justice, which places moral boundaries on the exercise of political power and prohibits the state from oppressing a minority. Buchanan argues that a minority has a remedial right of secession arises when: 1) an overholding state violates the fundamental human rights of its members, or 2) the minority has a valid historical claim to the territory of the seceding state. Per Bauhn has extended the scope of remedial theories beyond these kinds of injustices, to include cultural grounds, without retreating from the essential premise that the right to secede arises from the moral misconduct of the state.

It is evident that remedial theories of secession derive the right to secede from a moral or legal concept of legitimacy. The real difference between the two kinds of theories, on a practical level, is simply that theories of secession based on self-determination inevitably favour secessionists. This is evident in the theory put forward by Kai Nielsen, which essentially reverses the burden of proof in remedial theories and gives a national minority a *prima facie* right of secession. In spite of this, the distinction between political and moral theories of secession is less significant than is usually suggested and those authors who trace the right of secession to a political right of self-determination are forced to make concessions which recognize the

legitimacy of a variety of other moral interests. These interests extend well beyond the interest of an identified group in exercising some degree of self-determination over its own affairs.

Wayne Norman seems to be right in commenting that the difference between "choice" and remedial theories seems to dissipate in practice. Any review of the theories of secession in the literature demonstrate that there is less of a difference between remedial theories of secession and theories of secession based on a right of self-determination than is generally acknowledged. That is primarily because there are elements of the legal concept of legitimacy in all of the theories in the literature and theories of secession based on self-determination contain provisos which only bring them into operation in those circumstances which call for a remedial measure. All of the authors in the area appear to stipulate that any resulting state respect the rights of minorities and accommodate the larger needs of its neighbour states. This implicitly restricts the scope in which any state can legitimately exercise its prerogative and subordinates the principle of state sovereignty to the principle of justice.

It is notable that the political right of secession seems unaffected by this aspect of the question. Although moral considerations will affect whether a minority consents to government, the legal and political questions are severable, and the actual decision to secede remains within the political arena. It can only be decided by a referendum or some other means which determines the popular will, and cannot be made by a legal body. There is no reason, moreover, why a legal theory of secession needs to exclude the possibility of a political right of secession, which exists independently of any legal restrictions.

Discussion

Although there are many references to the question of legitimacy in the literature, there has been no attempt to classify theories of secession on such a basis. In spite of this, there is a

clear division between the theories of secession based on the legal and political concepts of legitimacy. This is evident in the distinction which Allen Buchanan makes between two kinds of theories which support the existence of a "general" or inherent right of secession.

> Remedial Right Only Theories assert that a group has a general right to secede if and only if it has suffered certain injustices, for which secession is the appropriate remedy of last resort.[145]

The second family of theories, which Buchanan describes as Primary Right Theories, premise the right of secession on freedom of association or the right of political self-determination. The important distinction is that primary right theories, as a result of this, "assert that certain groups can have a (general) right to secede in the absence of any injustice."

The same kind of dichotomy is apparent in the work of other authors. In Secession: The Legitimacy of Self-Determination, Lee Buchheit examines the theoretical basis of a minority's right to secede. After examining the historical development of international law, and a number of case studies, he suggests that there are two possible approaches to secession. The first approach sees secession as a means of protecting a group which has been oppressed by an overholding state.

> From the indications now available . . . the concept of "remedial secession" seems to occupy a status as the *lex lata*. The focus of attention here is on the condition of the group making the claim. Remedial secession envisions a scheme by which . . . international law recognizes a continuum of remedies ranging from protection of individual rights, to minority rights, and ending with secession as the *ultimate remedy*. (223)

This sets out a moral issue, which relates to governance and implicitly rests on the argument that a state which oppresses a minority loses its legitimacy. This raises a legal rather than a political question of legitimacy

At least part of the problem with the existing literature is that it fails to make a clean distinction between moral and political rights. Buchheit describes the second approach, which is

not accepted in international law, as a "parochial" model of secession.[146] "The underlying force" of such a view

> . . . rests upon the urge to be governed by those like oneself; it is unconcerned with the relative merits of the alien rule because, as in the colonial context, the mere *fact* of alien domination is the basis of the complaint. (223)

Although this approach has a moral foundation, it rests on a distinctly political right, which arises from the right of individuals to choose the people with whom they associate. This raises the question of political legitimacy, which rests on the consent of individuals.

The same kind of distinction surfaces within the political theories of secession in the more recent literature. Daniel Philpott divides the philosophers who subscribe to a theory of self-determination into two camps:

> The first . . . argues that a group attains a moral right to self-determination (to secession, in Buchanan's version) when it has suffered certain kinds of threats or grievances, including 'historical grievances', such as previous invasion or annexation . . . The other type of theory denies that threats and grievances are necessary to establish a claim to self-determination, and asserts self-determination as a basic right . . . that ought to be granted to any group the majority of whose members desire it.[147]

Christopher Wellman adopts a similar position, in arguing that the basis of a right of secession can be found in choice or justice, or some amalgamation of the two criteria, as the basis for a right of secession.[148]

Other authors take a similar view. Wayne Norman divides contemporary theories of secession into "nationalist", "choice" and "just-cause" theories, but recognizes the natural affinity between national and choice theories, since choice theories can be seen as "nationalist theories shorn of the moral complications of ethnicity."[149] Buchanan divides primary right theories into "Ascriptive" and "Associative" theories, on just this basis, but the same kind of distinction could be introduced into the framework of remedial theories.[150] Although most theorists include conditions relating to ethnic origins or territorial claims, there is nothing which restricts either

type of theory to groups of people who share a national or cultural identity.

Associative Theories

The simplest theory of secession based on a personal right of self-determination is probably what Buchanan calls "the *pure plebiscite theory*" (39), which simply gives a majority of the population in any region the right to secede. This raises the question of political legitimacy, which is so prominent in the sociological literature. From this perspective, a state becomes illegitimate and loses its title to the sovereign power when it loses the consent of an identifiable majority. That leaves open the legal question of legitimacy, which goes to the moral character of the state's actions.

The point is that theories of secession based on self-determination are political theories of secession and rest the right of secession on the wishes of an identified minority. Harry Beran sets out a modified version of a "plebiscite theory" The Consent Theory of Political Obligation, where he takes the position that individuals have a moral right to decide their political relationships. As a result, he writes,

> . . . any group is justified in seceding if (1) it constitutes a substantial majority in its portion of the state, wishes to secede, and (2) will be able to marshal the resources necessary for a viable independent state. (39)

Beran's position is unusually favourable to secession. "Democratic liberalism", he argues, "is committed to the view that any territorially concentrated group within a state should be permitted to secede if it wants to and it is morally and practically possible."[151] These are major reservations, however, which introduce a legal element of legitimacy into the question of secession, and seem sufficient to curtail most of the attempts to exercise such a right.[152]

Beran's theory provides an example of an "Associative" primary right theory, which simply holds that freedom of association gives rise to political rights like the right to secede.

This is the more basic claim, it would seem, and authors like Christopher Wellman and Daniel Philpott, see this freedom as the source of a political right to self-determination which extends well into the political realm. Those claims for secession which are "grounded in past injustices", as Wellman puts it, may give rise to claims which have all the hallmarks of a movement for self-determination. Nonetheless, that seems incidental to the deeper claim that individuals, acting collectively, are entitled to decide for themselves whether they are subject to the authority of the state. It seems clear that the issues which arise in adjudicating a claim for secession in order to rectify a past grievance are quite different than the issues which arise if a group of people are asserting a basic right to govern itself. In most cases, at least, the latter right is usually traced to the individual's right to act autonomously and choose his own relationships.

It is notable that there is an inherent tension between the academic and the legal views in this context. Wellman argues that the traditional legal view is too restrictive and curtails our political rights.

> The traditional view suggests that to be legitimate, a government need not function exactly as all citizens would want, but it must treat its citizens in a minimally just manner. If a state has a valid claim to the territory it occupies as long as it avoids injustice, though, it is difficult to see how an individual or group can have rights to political self-determination. (147)

And similarly:

> . . . the traditional account of political legitimacy, coupled with the standard interpretation of the principle of national self-determination, leaves no room for political self-determination as such, only room for a right to be spared political injustice and a derivative, remedial right of self-determination when the exercise of this latter right is the only way to redress this injustice. (149)

This might seem to raise a philosophical question as to the origins of the right to political association, or self-determination.

The answer to such a question may lie in the theory of political obligation which one

adopts and Wellman begins by canvassing the position that the state derives its political authority from the consent of the governed. Different theories see this consent as active, tacit, or hypothetical, but all of them seem to push us towards the "plebiscite" model of secession endorsed by Harry Beran and criticized by Allen Buchanan.[153] Wellman argues, however, that this does not provide a satisfactory conceptual basis for a theory of secession because it "allows a virtually unlimited right to secede from states not grounded in consent". (151) As a practical matter, these models of secession fail to respect the integrity of the existing international order and would at least implicitly deprive many existing states of their legitimacy.

The problem is not restricted to authoritarian states, however, since Wellman recognizes that the citizens of existing states have not, in any strict sense, consented to be governed. As long as we interpret such a requirement in a reasonable manner, however, he argues that the notion of consent remains sufficiently compelling to provide the basis of a state's legitimacy. This argument seems to rest on the implicit assumption that the citizens of a particular state will not arbitrarily withhold their consent, an assumption which makes it possible to place some limits on the right to secede. In his own theory, Wellman accordingly combines the fundamental aspects of the consent model with a "teleological" approach, which holds that a state "has a valid claim to its territory by virtue of the security and efficiency it provides". (157) The function of a state is to secure peace "without committing injustices", and a state which performs such a function in a satisfactory manner is entitled to retain its jurisdiction over its territory.

This would seem to have much the same import as the traditional view which Wellman criticizes. In spite of this, his view of secession is that the source of any right of secession is found in individual rights. It follows that his theory implicitly favours secession:

> We begin with liberalism's presumption upon individual liberty, which provides a *prima facie* case . . . *for* the permissibility of secession. . . . But if this is so, then the case for

> liberty is defeated only in those circumstances in which its exercise would lead to harmful conditions. (161)

And since

> . . . the liberal cannot justifiably restrict political liberty which is not sufficiently harmful, a secessionist party has the right to secede when its independence will not jeopardize political stability. In short, many groups have a primary right to secede even in the absence of past injustices. (170)

The argument on the other side is that this view, as an institutional theory, jeopardizes the political stability of states.

This may call for an assumption that such aspirations have some basis in facts which would justify secession, but the point in the political realm is that this is the very issue which must be satisfied by the political process. This does not dispense with the legal concept of legitimacy. While Wellman's essential argument is that people have an inalienable right of political association, he is immediately forced to introduce similar stipulations to protect the interests of other parties. This leads him to a more restricted position than one might expect:

> Therefore we can conclude that *any* group may secede as long as it and its remainder state are large, wealthy, cohesive, and geographically contiguous enough to form a government that effectively performs the functions necessary to create a secure political environment. (161f)

There are a number of related institutional questions. For now, it is enough to say that this would seem to put an onus on the seceding group to demonstrate that secession is not detrimental to the interests of the remainder state.

Wellman is not alone. There are other authors who see the right of self-determination as the basis of any right of secession. Daniel Philpott, for example, argues that

> . . . any group of individuals within a defined territory which desires to govern itself more independently enjoys a *prima facie* right to self-determination--a legal arrangement which gives it independent statehood or greater autonomy within a federal state.[154]

This principle is justified by the liberal democratic tradition. In Philpott's view,

> Self-determination--again, an actual legal arrangement that provides a group independence or more legal authority within a state--is rooted in moral autonomy . . . (353)

By moral autonomy, Philpott means "individual moral autonomy", a reasonably large concept which implies that political institutions should protect individual freedom, uphold democracy and guarantee a just distribution of goods.

Like Wellman, Philpott has no hesitation holding that "any group with a particular identity that desires a separate government is entitled to a *prima facie* right to self-determination." (361) This ultimately has a political justification and Philpott argues that such a right can only be defeated by "a manifestly illiberal principle", whatever theory of obligation we adopt. (368) Democracy is a matter of "exercising one's autonomy in the political realm" and it is the democratic aspect of the concept which justifies the principle of self-determination. He is immediately forced to place restrictions on such a right, however, since its exercise may interfere with the autonomy of the individuals in the remaining state.

Even the question of self-determination is open to question. Although Philpott suggests that self-determination will make the theoretical citizens of Utopia more autonomous, he takes this largely as a given.

> In sum, they may now more directly pursue their Utopian causes as Utopians, without outside interference or burden. Participatory Utopians now participate more effectually in Utopian affairs, their efforts no longer truncated or attenuated. (360)

But this cannot be assumed. The resulting dynamic may be the converse of this: the dissolution of a state into smaller states may always create puppet states, which fall completely under the influence of neighbouring states. It may create corrupt local governments or dictatorial regimes, dominated by clans. There is no guarantee that it will increase the autonomy of the members of such a state.

Philpott also seems to ignore the problems associated with majoritarian democracies. These problems are naturally compounded when the members of a particular group form a decisive majority. In a pluralistic society, where there is no simple majority, it will be more difficult for a single group to discriminate against minorities. This may be one of the advantages of federalism, which would seem more likely to create a legal, political or cultural milieu that permits a diverse expression of the good. Philpott postulates a group without minorities, but there are minorities in any human society and the question is whether the subdivision of existing states will bring new minorities into the foreground and create new possibilities of conflict. This is one of the concerns in the work of Donald Horowitz, who argues that successful movements for self-determination tend to create residual minorities which are victimized by the new majority.[155]

The important point is that the principle of self-determination, left to itself, may actually diminish the scope in which individuals can exercise their autonomy. This is true within the larger group, as well as minorities. It seems inevitable that national rights, which must be exercised on a collective basis, reduce the degree of personal freedom which any citizen enjoys. The more narrowly we define a self-governing group, the more likely it is that the demands for conformity from the members of the group will have to be intensified to maintain the necessary cohesion within the group.

These kinds of criticisms are not enough to defeat the general principle of self-determination. If a large majority of people in a particular territory desire secession and there is no reason to believe that it imperils other interests, it is difficult to see why they should not be permitted to secede. This is a fundamental democratic and political right, which relates directly to the political concept of legitimacy. The political validity of a state's title to the sovereign

power rests on the consent of the majority of individuals within the state. Philpott recognizes the need to accommodate the legitimate interests of existing states, however, and is careful to distinguish between the right of self-determination and a right of secession, arguing that there should be a presumption against secession. This seems more realistic than the position that Wellman takes: in Philpott's view, the *prima facie* right to self-determination does not extend to a claim for secession unless there is a manifest injustice. This gives his theory a remedial character, however, which gives the legal principle of legitimacy priority over the political principle.

Ascriptive Theories

There are other theories of secession which ascribe the right of self-determination and secession to certain kinds of groups. This view of secession seems to have received the endorsement of recent history, which provides so many examples of national movements seeking independence from an existing state. There are corresponding theories in the academic literature. Avashai Margalit and Joseph Raz, for example, argue that the members of an "encompassing group" like a nation have a right to decide whether the group should exercise sovereignty over their own affairs. In their view, the distinguishing features of such groups are primarily social and cultural, and provide the basis on which the members of the group can identify with each other.[156]

David Copp argues, in a similar manner, that a group which claims the right to secede must qualify as a "'society' in a relevant sense". A society is different than a family, and requires a discernible sense of cultural or ethnic autonomy.

> Examples are French society, Puerto Rican society, and the Cree living in northern Québec. In the relevant sense, a society is a group comparable in size and in social and economic complexity to the population of a state; it has a multi-generational history; it is characterized by a relatively self-contained network of social relationships and by norms

> of cooperation and coordination that are salient to its members; it is comprehensive of the entire population of permanent residents of a relevant territory, with the exception of recent arrivals who may not yet fit into the group's network of social relationships.[157]

Although Copp argues for an "associative" rather than an "ascriptive" theory of secession, there are ascriptive elements to this concept of a society which distinguishes these groups from mere associations. The question whether a group constitutes a society is a matter of degree, he suggests, and determines whether a particular group might appropriately form a state.

The approach taken by Margalit and Raz traces the right of secession to individual rights.[158] The crucial claim is that the well-being of the individuals within an encompassing group depends upon the group's ability to preserve its culture.

> It may be no more than a brute fact that our world is organized in a large measure around groups with pervasive cultures. But it is a fact with far-reaching consequences. It means, in the first place, that membership [in] such groups is of great importance to individual well-being, for it greatly affects one's opportunities, one's ability to engage in the relationships and pursuits marked by the culture. Secondly, it means that the prosperity of the culture is important to the well-being of its members. (449)

The argument is simply that the individual's membership in a cultural group gives value and meaning to the life which he chooses to pursue. It follows that political arrangements which improve the "prosperity of the culture" will improve the well-being of the group's members.

Margaret Moore suggests that the most visible defence of nationalism lies in the argument that national cultures provide the set of values within which the individuals make their personal decisions:

> This identification of nationality with cultural membership suggests what is "special" about nations. It suggests that membership in a nation is unlike membership in other groups because it serves an integrating function in individuals' lives. The encompassing cultural structures that go with nationality are the context in which people make choices about their lives and pursue their well-being.[159]

Although Moore acknowledges the attraction of the cultural argument, she goes on to argue that the existing literature fails to distinguish between culture and identity. Once we make this

distinction, and recognize that many national groups have retained their identity in spite of profound changes in their cultures, the cultural argument is more difficult to maintain.

There are a variety of related arguments in the literature. In another paper, for example, Moore considers the suggestion that national identity is an instrument of social justice, since it promotes feelings of fellowship and provides the good-will necessary to permit the re-distribution of wealth and other social programs.[160] William Galston, for example, argues that rational justification is not enough, in itself, to motivate individuals to observe the rights and duties imposed upon them by society. Some identification of interests is necessary, in order to provide the psychological motivation to act in the interests of a larger common good.[161] One argument, against this, is that similar kinds of identification are possible above the level of national identity, at least in the instance of natural and humanitarian disasters. There is also a question whether an individual's identification with an ethnic or national group and a larger multi-national state need exclude one another.[162]

Margalit and Raz essentially take it as a given that there are "many circumstances" where self-government is necessary "for the prosperity and dignity of encompassing groups." (460) Since it is the individuals within the group who receive the benefits of membership in the group, Margalit and Raz argue that it is those individuals who are "best placed to judge whether their group's propriety will be jeopardized if it does not enjoy political independence." (457) These are political arguments, which essentially assume that self-government is valuable for the group, in much the same way that autonomy is valuable for individuals. This raises the question of political legitimacy, which holds that a state's title to the sovereign power is conditional upon the consent of the governed..

The same authors recognise the adverse effect of secession on other parties, when their

interests are in conflict with those of the seceding group. They accordingly restrict the right of secession to a group with a substantial majority in the relevant territory, "for the purpose of protecting the culture and self-respect of the group". This is subject to the additional proviso

> . . . that the new state is likely to respect the fundamental interests of its inhabitants, and provided that measures are adopted to prevent its creation from gravely damaging the just interests of other countries. (457)

These restrictions raise the question of legal legitimacy: it is only if the seceding state is likely to meet the necessary standards of justice that it is entitled to secede. Although the moral and political issues may coincide, this implicitly recognizes that the moral question of legitimacy is paramount.

There are other ascriptive theories which might be mentioned. David Miller argues, in a realistic vein, that national communities "have a good claim to political self-determination." (65)[163] Miller is at pains to distinguish between nationality and a simple notion of ethnicity, however, which describes a cultural identity.

> The problem of secession arises only in cases where an established state houses two or more groups with distinct and irreconcilable national identities--irreconcilable because, for instance, each takes a different religion to be constitutive of its identity, or because each includes as part of its historical self-understanding its separation from, and antagonism towards, the other; a case such as that of the Jews and the Palestinians in Israel. (113)

In Miller's view, this kind of claim is not sufficient by itself, and must be buttressed by a second claim that the group in question exercises authority over the territory which it wishes to occupy. This recalls the stipulation, in Wellman, that a seceding group have the ability to perform the ordinary functions of government.

Miller is forced, however, to amend his theory to accommodate rival interests. There may, he acknowledges, be cases where secession deprives a parent state of economic resources or some other advantage which is essential to the well-being of its citizens. We therefore need to

consider the viability of the original state, in determining whether a minority is entitled to secede. It is interesting that this would be in accord with a notion of the common good: if we postulate a common good, it would follow that the seceding minority has some interest in preserving the well-being of the citizens of the parent state. In much the same way, Miller recognizes that secession tends to inflame the tensions between national groups in the resulting states. As a result, it is necessary to canvass questions of human rights and the possibility of discrimination in determining whether a particular claim to secession should be upheld.

This suggests that any right to secession comes with corresponding obligations, as the Supreme Court of Canada held in the *Secession Reference*, and raises institutional questions which require an examination of the specifics of individual cases. Miller is willing to take the principle of nationality much further, however, than many authors. In some cases, he writes, the hostility between two groups may be so ingrained that secession may not be feasible without an actual "exchange of populations" to prevent the creation of minorities in the resulting states. This calls for an impartial adjudication, if we are to resolve such issues without rewarding the two groups for their failure to respect the rights of minorities in the territory in question.

This raises a hornet's nest of issues in political theory. Liberals often argue that nationalism makes no sense in the framework of liberal theory, since it gives a collective good authority over individual rights. The argument for national self-determination is that national or ethnic rights are a necessary adjunct of the individual's right to exercise autonomy over his own life. This raises a question of discrimination: without such rights, the argument goes, an individual who is a member of a national minority will not enjoy the cultural or social advantages which will accrue to the majority.

Although the latter argument is usually made to justify group rights, a nationality which

cannot obtain such rights within an existing state is in a logical position to claim a right of secession. As a result, the liberal tradition has shown considerable sympathy, historically, to claims for national independence. Will Kymlicka writes:

> For most of the nineteenth century and the first half of the twentieth, the rights of national minorities were continually discussed and debated by the great liberal statesmen and theorists of the age.[164]

One of the hall-marks of this liberal tradition was its respect for the principle of self-determination, particularly in the instance of small states trapped in larger empires. The individual rights of the Irish, the Finns and Greeks was felt to include rights like the right to use one's national language.

This raises larger philosophical issues. For one thing, the answer to the question whether theories of secession should be based on a national right of self-determination will depend on whether national identity is such a fundamental feature of human society that political theories must accommodate it. This is a disputed claim. Jeremy Waldron, for example, argues that individuals do not need a sense of belonging to a particular national or ethnic culture in order to maintain their ability to make meaningful choices in their lives. The existence of an increasingly fragmented modern lifestyle, which borrows its cultural traits from remarkably diverse sources, demonstrates that nationality is not a necessary part of human life.[165] On Waldron's view, there are individuals who refuse to be defined by location, ancestry, citizenship or language.[166]

There are any number of empirical issues which could be raised in this context. One difficulty is that Waldron's argument only seems to hold in the affluent world, which does not provide an adequate model for those parts of the world where national conflicts have attained the most prominence. And of course there is an argument that these parts of the world have retained a strong sense of national character, in spite of their cultural fragmentation. The United States of

America and the province of Quebec provide two examples of this: far be it for anyone to suggest that nationalism has not found its way into the "American" character. There is no doubt that the cosmopolitan argument has a certain moral appeal, since the principle of equality weighs against the argument that national attachments should be privileged over other social markers.

The right answer is the pragmatic one. It appears to be an inescapable fact, at this point in history, that individuals find definition in a social context which takes much of its colouring from their national or ethnic identity. Even if it is possible to imagine the individual outside a national context, it is by no means clear that an individual is in a better position to make choices outside such a context. We cannot make meaningful choices without some sense of who we are, and since the existence of a common culture and character, institutionalised in the state, provides a social context which arguably increases the autonomy in people's lives, it follows that anyone who wishes to promote the interests of the individual must be willing to promote a larger social identity.

In the context of political rights like secession, it is important to separate the issue whether nationalism is a positive feature of human society from any issues about its place in a theory of self-determination. Margaret Moore writes that the question

> . . . is not that of what way of life is existentially attractive, as a way of life, but rather what is the appropriate response to the fact that many people do have national identities and attachments. This second question takes it as an empirical given that national identity is important for most people, in conditions of modernity.[167]

This essentially reverses the matter:

> Once we distinguish between these two types of questions, it becomes clear that the real issue is not whether having a particular national identity is rational or defensible or justifiable, but whether it is rational, justifiable, defensible, to expect people to *give up* their national identity. (8)

The suggestion that there is no reason for individuals to assume a national identity simply fails to

capture the reality of the existing world and there is a heavy onus on those who reject national attachments to establish the moral and practical efficacy of their own position.

Since most claims for secession come from national or ethnic movements, it seems naive to believe that it is possible to construct a viable theory of secession without recognising the part played by a national or ethnic good in such a process. If national identity is an elementary part of human life, the major advantage of deriving a theory of secession from the concept of nationality is that it accommodates the ordinary make-up of human society. It is this kind of descriptive position which seems to stand behind Will Kymlicka's argument that the liberal tradition is based on a recognition of the individual's capacity to choose "the communal and cultural circumstances" in which he finds himself.

> And the result of this conception of individual self-direction is not to distance people freely from each other, but to enable various groups of people to freely pursue and advance their shared communal and cultural ends, without penalizing or marginalizing those groups who have different and perhaps conflicting goals.[168]

It follows that group rights which protect minority cultures are justified from a liberal perspective because they ensure the well-being of the individual.

Remedial Theories

Remedial theories take the position that the state's right to govern is subject to moral constraints. The right of secession arises, on such an analysis, when the state acts so unjustly towards an identifiable group like an ethnic minority that it no longer has a legitimate right to govern that group of people. The question of self-determination only arises, in the instance of remedial theories, after the state has lost its legitimate authority. This is essentially a condition-precedent which must be met before the right of self-determination can be exercised. It will be apparent that a remedial theory of secession traces any right of secession to the principle of justice, rather than consent. This raises the legal question of legitimacy and is often seen as a

means of correcting a historical injustice.

Allen Buchanan is probably the most prominent exponent of a remedial theory of secession. He has summarized his position in "Theories of Secession", an article in Philosophy and Public Affairs, where he argues that a group has a right to secede if either of the following conditions has been satisfied.

> 1. The physical survival of its members is threatened by actions of the state (as with the policy of the Iraqi government toward Kurds in Iraq) or it suffers violations of other basic human rights (as with the East Pakistanis who seceded to create Bangladesh in 1970), *or*
>
> 2. Its previously sovereign territory was unjustly taken by the state (as with the Baltic Republics). (37)

This sets out a general right of secession, which gives any aggrieved minority a moral prerogative to secede.

Buchanan envisages a number of other situations, where there might be a special rather than a general right of secession. "Remedial Right Only Theories", he writes,

> . . . allow that there can be *special* rights to secede if (1) the state grants a right to secede (as with the secession of Norway from Sweden in 1905), or if (2) the constitution of the state includes a right to secede (as does the 1993 Ethiopian Constitution), or perhaps if (3) the agreement by which the state was initially created out of previously independent political units included the implicit or explicit assumption that secession at a later point was permissible (as some American Southerners argued was true of the states of the Union). (36)

Although the second and third situations seem to raise contractual issues, they do so in a moral rather than political context. The question, in both cases, is whether a state is entitled to retain its authority in those circumstances where it has breached its commitments.

Per Bauhn adopts a much broader remedial stance, which contemplates a right of secession which is based on cultural grounds. This is based on the larger principle that the state has an obligation not to discriminate against minorities. Bauhn uses the example of a cultural subsidy:

> What if the government strongly subsidizes the cultural practices of the dominant cultural group and gives nothing at all to the members of the cultural minority (who still are obliged to pay taxes just like all other citizens)? Does this constitute a just ground for secession?[169]

In Bauhn's judgement, this will depend on the subsequent course of events. The disadvantaged group has a primary obligation to seek other solutions, such as a democratic change of government.

In spite of these reservations, the members of the minority culture "are no longer obliged to be fully loyal to that state" and "are justified in refusing to pay taxes to a state which is deliberately unfair to them in its distribution of its fiscal resources." (111) This seems to provide the beginning of a predictable series of events, which leads inexorably towards secession. If the state responds

> . . . by increasing repression, so that state officials either refuse to protect the basic rights of the members of the minority culture (to life, freedom, physical and mental integrity), or actively violate these rights, then secession is morally justified, since the state no longer performs those protective functions which justify the loyalty and obedience of its citizens in the first place. (111f)

Although he appears to be speaking of a unilateral act of secession, Bauhn is firmly of the view that the state has an original right to govern and only loses such a right if its actions assume an oppressive character.

Nielsen

The practical distinction between the two kinds of theories of secession is that theories of secession based on self-determination run in favour ofr secession. This is evident in the view adopted by Kai Nielsen, who argues that human beings cannot flourish without "a secure social identity", which is found in an attachment to a local identity "and not just to humanity in general".[170] This leads

> . . . to a recognition that the very fact of its being *ours* is important to *us* and that we

> must, as Emile Durkheim argued, acknowledge the importance of such local attachments to ourselves, whoever we are, if we are not to experience alienation, feelings of homelessness and *anomie*. (31)

This culminates in national attachments: "We are, to put it crudely, lost if we cannot identify ourselves with some part of an objective social reality: a nation, though not necessarily, a state, with its distinctive traditions." (32)

Nielsen holds that multinational states have failed to provide adequate protection for minority cultures. As a result, national identities are "only secure" in

> . . . modern conditions . . . when people with these national identities gain control of the conditions of their existence by having the power that goes with having their own state: a state which protects and actively furthers these national aspirations. (32)

The essential difference between the positions taken by Per Bauhn and Nielsen lies in the latter's assumption that a multinational state is generally incapable of protecting the culture of a minority. Nielsen's theory nonetheless has the same fundamental form as a remedial theory, since it essentially holds that Quebec has something like a peremptory right to secede, in order to remedy the failure of Canada to protect the rights of its minorities.[171]

The difference between a legal and a political theory of secession in this context is primarily strategic. It is revealing that Nielsen shows no concern for the rights of national minorities in Quebec and argues that the province has a "sturdily democratic" history. There is no obvious difference between Quebec and Canada in this regard, however, and Nielsen's argument is tailored to fit the needs of a *sovereigntist* position.[172] From an evidentiary perspective, Nielsen's theory favours Quebec, since it places the burden of proof on Canada, the overholding state, to rebut his presumption in favour of secession. The problem is that this appears to rest on the simplistic assumption that the multinational state is inherently illegitimate. This is simply untenable, in the existing international order.

The deeper philosophical problem is that Nielsen's position fails to acknowledge that the source of the legal order lies in the inherent authority of the state. This is a fundamental premise of any legal system, since the law derives its own authority from the fact that society has a legitimate authority over individuals and minorities. There is no getting past this simple issue, which finds expression in the principle that the state enjoys a *prima facie* authority to pass laws which bind the individuals and minorities within its jurisdiction. This is the fundamental philosophical problem with those theories which derive the right of secession from the right of self-determination. If the state has no original authority, there is no practical means of determining when it has acted outside the bounds of its authority and the issue of secession is simply a matter of preference.

This is a dubious position, legally and morally, and Nielsen implicitly retracts his position, in the course of his argument. The irony is that this manifests itself in the introduction of a legal conception of legitimacy, to protect the rights of minorities in the new state. Although the right to secede ultimately derives from the democratic rights of the majority in Quebec, he argues that it must be accomplished without violating "anyone's rights". This brings in the need to guarantee the rights of the minorities in Quebec: "Any other kind of political order in such circumstances", Nielsen writes, "would not have legitimacy." (30) The real force of these assertions, however, lies on the other side of this argument, in the assumption that minorities cannot secede without just cause. This is necessary, from a practical perspective, if his theory is to prevent any new minorities from exercising their right of self-determination, and seceding from a sovereign Quebec.

Conclusions

The significant point is that Nielsen, like other authors, recognizes that the moral aspects

of the question of legitimacy take precedence over the political aspects. This raises the legal question of legitimacy: if a state acts within the moral boundaries of government, it is entitled to maintain its authority, in the face of internal opposition. These boundaries are determined by the principle of justice, which provides the legal standard of legitimacy. The real question which needs to be asked is whether this kind of standard should apply to all states, as a condition of sovereignty? Although the literature has yet to face this question as directly as it might, the moral consensus is that any state which manifestly disregards the principle of justice is legally illegitimate.

The immediate problem is that this requires some institutional framework, above the level of the state, which can decide such issues. Nielsen recognizes that there must be a legal body, which can deal with issues like the national debt and the distribution of property between the resulting states.

> There are requirements of fair treatment and fair division on both sides. Thus the seceding nation cannot just walk away from its previous association . . . without there being a fair division of the assets and liabilities of the state they are seceding from. Here, to insure fairness, either the parties must come to an uncoerced agreement or failing that they must abide by a decision from an international court. (36)

As it stands, however, the international law has its origins in a political rather than a legal order, which derives its efficacy from the consent of individual states. This reflects the origins of such a law, which developed on the understanding that the state is an individual, living in the state of nature, and is free of the constraints of positive law.

But there is no difficulty in a situation where a state agrees to abide by the decisions of a court; the situations which require immediate attention are those where an overholding state refuses to cede its authority over a disputed territory, whatever the views of other states. This is the familiar problem of sovereignty: if a state is sovereign, in the traditional sense, there is no

legal means of compelling it to respect those decisions which go against its will. There is still a sense, however attenuated, in which states exist above the law and can only be subjected to the extra-legal constraints imposed upon them by other states. There is an internal alternative, in rebellion, but in either case, any challenge to the state's title to the sovereign power lies outside the legal arena.

From a legal perspective, this is the exact problem of secession. The problem persists, in of the consensus that states are obliged to exercise the powers of government in accordance with the principle of justice. This consensus holds, whether we are speaking of remedial theories, or theories of secession based on self-determination. Allen Buchanan, who takes a remedial approach, writes:

> I have also argued that other conditions ought to be satisfied if a group that suffers any of these injustices is to be recognized through international law or international political practice as having the right to secede. Chief among these is that there be credible guarantees that the new state will respect the human rights of all its citizens . . . (37)[173]

This kind of restriction is attractive to many authors because it comports rather well with a liberal conception of justice, which emphasizes personal rights.

From a logical perspective, this can be seen as a matter of consistency, since a minority cannot claim the moral right to secede when it is oppressed, without granting the same right to other minorities. It is legally significant, however, because it suggests that individual states are subject to an overarching, enforceable moral order. This nonetheless calls for a qualification, since the question whether a minority has a right to secede is different from the question whether it wishes to do so.

The literature at least implicitly accepts this position. Remedial theories of secession usually operate on the basis that the right of secession can only be exercised on a democratic basis, usually by holding a referendum. The separation between the legal and political questions

of secession is blurred by the fact that the issues which arise in a political context of consent have a moral character of their own. The substantive issues may be similar, in either case, and a good deal of the difference between theories of secession based on self-determination and remedial theories of secession in this context is a matter of process.

This is not the place to examine the exact nature of the political question of legitimacy. It is difficult to imagine a plebiscite succeeding, however, unless there is a perception of injustice. Wayne Norman expresses this rather well, in the draft of a paper, where he criticizes the abstraction of choice theories:

> Choice theories hold, with some limitations, that if a majority in a region want to secede then they have a right to. . . . But people who actually want to secede almost always want to do so for certain reasons, and it is these reasons they cite as the moral justification for their movement. It is these reasons they advance to their fellow citizens in order to get them to join the movement or at least to vote for secession in a referendum. People do not merely proclaim that they should secede because they want to.[174]

This is an important criticism of choice theories, which is generally overlooked, and raises a significant argument in favour of a nationality thesis. There is a fundamental problem with theories of secession which ignore the dynamics of existing conflicts.

The moral issues aside, the legal process is not designed to determine what lies in the popular will and it is impossible to decide many of the issues which arise in a political context in a legal forum. Much of the difference between the two processes can be found in the difference between what is, logically or inferentially, in keeping with principle, and what is in keeping with the legitimate opinion of a majority. Although there is a sense in which it is the moral and legal question takes precedence over the political question, there is no reason why a legal theory of secession would exclude an independent political right. The question whether it is in the interests of a minority to secede is a matter of opinion, and can only be decided by the consent of the relevant minority. That consent, as the Supreme Court of Canada held in the *Secession*

Reference, is still subject to legal constraints.

In the final analysis, the political question reflects the practical reality of government. It lies in the fact that a government which loses the confidence of a significant ethnic group or national minority, with an appropriate claim to territory, will find it difficult or impossible to carry out its ordinary functions. There are sociological realities here, which seem implacable. Once the interests of the state and an identifiable minority diverge, it will only be a matter of time before a government finds itself accused of oppressing a minority. This takes us back into the original question and raises the question of legal legitimacy.

Chapter 6. Institutional Issues

Introduction

A number of authors have commented that the existing literature does not deal adequately with the institutional issues which arise in the context of secession. The philosophical literature is particularly difficult and adopts an unduly theoretical approach to questions like secession. There are at least three different areas of concern. Donald Horowitz criticizes the literature for its failure to take account of the sociological dynamics which give rise to a minority's claim to the right of secession. Allen Buchanan, Wayne Norman and a number of other authors have argued that it fails to address the realities of the international law. The third area of concern is that existing theories have yet to deal with the limitations of the legal process.

The fundamental difference between remedial theories of secession and theories based on self-determination lies in the question whether the state has an original right to govern. The remedial approach implicitly subscribes to such a view and holds that the state is entitled to a presumption of legitimacy. The argument against theories of secession based on self-determination, on the other hand, is that they implicitly deprive a state of the benefits of this presumption. This is significant legally because the authority of the law rests, to some extent, on the certainty of the sovereign power.

The chapter then reviews the relevant international law, in an effort to determine its significance in the context of secession. There is an immediate problem, since the international law, which is made by states, does not recognize any right of secession. There are historical rather than practical issues, here, since events like revolution and secession occur outside the ambit of the law, inside and outside the state. As Leslie Armour puts it, there is an open question whether the legal order could be extended to encompass the possibility of "lawful" and

"unlawful" revolutions. This raises an important question, which deserves more attention than it has received in the literature.

Putting aside the practical considerations which make secession such an intractable problem, one of the primary legal difficulties in revolution and secession is the question of hiatus. This manifests itself in issues concerning the criminal or civil liability which attach to individuals as a consequence of their actions in the *interregnum* between the end of one legal order and the beginning of the next. This is because the events which occur in the hiatus between legal orders occur outside the ordinary legal order. There is accordingly no positive law, in the ordinary sense, for the courts to apply.

It will probably be self-evident that a court cannot deal with issues which arise in such an interval without falling back on an extra-constitutional body of overarching rules and principles. This would also give the courts a more neutral authority to determine the status of legal obligations and responsibilities which arose in a previous legal order, and terminated in another. There may be an argument as to the origins of such principles, but it does not appear to be possible to rely on such principles without falling back on the kind of moral order envisaged by the natural law. Whatever its derivation, it is impossible to rule on the legitimacy of the state without a source of legal authority which takes precedence over the ordinary legal and political orders.

Discussion

In "Theories of Secession", Allen Buchanan suggests that there are two different philosophical questions which arise in the context of a right of secession. The first question asks us to identify the circumstances under which a group of people have "a moral right to secede". (31) There is a second, more neglected question, however, which asks us to identify the

circumstances under which there is a legal right of secession. It is the first question which has dominated the discussion in the area, and few authors, on Buchanan's analysis, have even begun to describe the way in which their proposals might be "incorporated into international legal regimes." (33)

There seems little doubt that Buchanan is right in arguing that it is the second kind of question which calls for urgent consideration. Wayne Norman and a number of other authors have recognized that there is a need for a theory of secession which provides a legal or institutional authority with the criteria to adjudicate such issues. This calls for a theory of secession, which sets out the institutional means that could be used to determine whether a minority has the right to secede. These kinds of theories can be distinguished from "ideal" theories, which deal primarily with the theoretical aspects of the question.

This is not to deny that we occasionally need to look at ideal cases, which can provide helpful exemplars in any moral inquiry, but theories which fail to address the prevailing legal and political realities are of little assistance in developing legal norms. The issue is not so much what an ideal world would look like--considered ontologically, that is a relatively meaningless endeavour--but how we should incorporate general principles into the existing order of things.[175]

As a whole, the literature of secession displays a theoretical character which shows a surprising indifference to the realities in which such claims arise.[176] Donald Horowitz complains that philosophers have ignored the sociological aspects of secession.

> . . . if interest [by philosophers] in the problem is driven by events, the methodology is not, for much of the literature thus far often displays a thoroughgoing ignorance of the complexities of ethnic interactions. To say this is not to exhibit hostility to the efforts of philosophers on such issues in general--for moral reasoning is needed--but *a priori* methods that seem appropriate to other issues are utterly unsuitable to this problem.[177]

Horowitz is referring to the problems which arise from the relatively naive accounts of the

general political right of self-determination in the philosophical literature.

Most of the complaints lie on the institutional side, however. In "Self-Determination in Practice", Daniel Philpott argues that it is time for theories of self-determination to address the "institutional question" which arises when we consider how a right of secession might be introduced into international or domestic law. The problem is that the existing international order does not have the capacity or the resources to regulate a question like secession.[178] At this time, it is by no means clear how the right to secession might be exercised in international law, particularly if we wish to give it meaningful force in a domestic context. It does not seem sufficient to speak of international conventions, which operate by agreement between states.

Buchanan argues that remedial theories are preferable to primary rights theories precisely because they satisfy realistic criteria and contemplate a right of secession which is in keeping with the norms of international law.[179] It will come as no surprise that these norms, which have been created by states, run strongly in favour of maintaining the integrity of existing states. The usual argument is that such a right would undermine the stability of the international order, but the real issue seems to lie in the fact that any developments which give minorities independent political rights constitute a potential threat to the integrity of existing states.

Before considering the specific issues which might arise in litigating a question like secession, it is necessary to step back and consider whether the existing literature has the resources to meet the needs of legal practice. There is some appreciation of the fact that current theories have tended to ignore the needs of legal or political institutions, and cannot be implemented in the existing international order. However, no one has seriously examined how a theory of secession might be applied in a legal setting, or looked at the needs of an adjudicative model in the area. This requires some knowledge of the natural parameters of the legal inquiry

and the process of taking evidence.

Wayne Norman writes that the moral guidelines in the literature have yet to provide a cogent philosophical response to the existing political process, which "is crying out for a legal framework".[180] This, in his view, requires a different approach to moral theory, which reflects the institutional needs of a legal system. Any satisfactory treatment of an issue like secession calls for "institutional moral reasoning", which would

> . . . evaluate political principles in part by evaluating the institutions they would justify, taking into consideration the dynamic effects of the institutions in society. In Rousseau's memorable phrase, this way of reasoning takes men as they are and laws as they might be.[181]

There is a methodological issue here, which is as much a matter of legal theory as a matter of moral judgement. It arises out of the traditional legal stance rather than the philosophical literature: from the perspective of practice, at least, the law already exists, and simply must be found.[182]

If we are going to incorporate a right of secession into the general law, we accordingly need to find those aspects of the law in which it might reside. Rather than pose the question whether there is a legal right of secession, we need to find the right and determine its substantive contents. This is the kind of pragmatic approach that might be taken by a judge in deciding the issue, who is faced with the problem of determining how the existing law might be developed to deal with a new legal problem.

It is not so much a matter of looking at the international law as a matter of looking at the principles of ordinary adjudication. This generally takes place in domestic courts and tribunals, which only deal incidentally with the international law. Nonetheless, it is these courts and tribunals which have dealt, historically, with the demands of a fair process, the difficulties of proof, and the determination of appropriate remedies.

The major questions in the development of an institutional right of secession have as much to do with determining what is possible as with anything else. The issues that arise in the context of questions like jurisdiction, forum, grounds and enforceability, ultimately raise a larger question of justiciability, which is an integral part of the present inquiry. And since it is the domestic system of law and principle, more than any other, which establishes those parameters, it is the common law tradition, as it arose in the English law, that provides the basis of the theory of legitimacy advanced in the present dissertation.

One of the fictions which sustains the common law is the assumption that the entire body of the existing law can be seen as a coherent whole. As a result, it is generally assumed that a hitherto unrecognized legal principle has its source in the theoretical underpinnings of the existing law. Although this kind of feature may be more prominent in the common law, it is probably an inevitable component of any form of legal reasoning. Ronald Dworkin has described this aspect of the judicial process in Taking Rights Seriously and Law's Empire, where he uses the metaphor of a "chain novel" to describe the entire body of case law. There are many concerns which come into conflict with each other and the legal process consists of an ongoing attempt to reconcile the apparent conflict between competing values, rights and principles.

The law develops by inference, and the courts continually return to the origins of the law in order to determine the legal force of specific principles. This generally proceeds, in the common law, by a process of discovery, in which the significance of unexplored or neglected aspects of the law are reassessed and brought into the foreground. It is often, at least, a question of unearthing the moral foundations of the law, however tentative they may be. Nor is this restricted to the common law: the notion of coherence forms a fundamental part of any

jurisprudence. The courts are required to continually reinterpret individual aspects of the law to preserve the integrity of the entire *corpus* of the law, as successive changes in its moral foundations register their effect. This process provides the natural means of introducing a legal right of secession.

Legal and Political theories of secession

There is a philosophical issue which seems to lie under these criticisms of the existing literature. The initial question, at least legally, is not whether a state has a moral right to secede, but whether the state is inherently legitimate or illegitimate. This is important because much of the contemporary work in political theory, which is based on the right of self-determination, at least implicitly rejects such a view. Remedial theories, on the other hand, retain the presumption that the state is legitimate, but place moral and political conditions on the ownership of the sovereign power. Although the state has original authority, it is the principle of justice which provides the continuing source of its legal powers, and a state which acts unjustly may lose its warrant to pass and enforce the law.

On the remedial view, the decisive issue in determining whether a minority has a right of secession is whether the existing state has conducted itself in a manner which requires a moral remedy. The legal right of secession arises in those circumstances where the state loses the benefit of the moral presumption that its authority is legitimate. The essential problem with theories of secession based on self-determination is that they implicitly do away with the presumption. Such theories suggest, at least, that the state does not possess any original authority and receives its authority by delegation from individuals.

One of the major difficulties is that the term "legitimacy" has been used indiscriminately in the literature. Although the term finds its way into the discussion of theories of secession

based on self-determination, this conflates the legal and political aspects of the term. Harry Brighouse, for example, sets out three conditions of legitimacy in an article entitled "Against Nationalism".[183] But the difficulty lies at a deeper level, in the use of consent as the criterion of political authority, when states actually function without the consent of a significant portion of the population.

Theories of secession based on self-determination ultimately trace the right of secession to the withdrawal of consent by the populace rather than the moral character of the state. On such a view, the authority of the state is always delegated, rather than original, and the state has no inherent right to govern. The problem with applying the notion of consent to the political process is that it does not seem possible to restrict the concept of consent to consensus. As a result, theories based on self-determination inevitably justify some form of a majoritarian democracy, in which the so-called legitimacy of the state is dependent on its success in meeting the wishes of a majority.

There is nothing in such an arrangement to guarantee the survival of the just state, which only retains the power to govern because it acts in accordance with the wishes of the majority. Nor is this a theoretical concern. One of the major problems in the area is that the democratic impulse which manifests itself in a campaign for secession often fuels the oppression of ethnic or cultural minorities trapped within the new state. Thomas Pogge expresses this point, with the necessary poignancy, in a footnote to an essay criticizing nationalism, even in its "bland and conservative" manifestations. "It is of the essence of justice", he writes, "that a majority's consent cannot lend *moral* legitimacy to the mistreatment of a minority."[184] This raises all of the moral problems which attend upon majority government, since the issue of consent can only be decided on majoritarian grounds.

The problem of secession is a problem of minorities, which generally arises when a majority is in a position to control the apparatus of the state. It is important to appreciate that this problem has a fundamentally democratic character: instead of being regulated by moral principles, the state is a creature of the public will, in whatever way it chooses to manifest itself. This introduces an element of uncertainty into the political realm, which is at the mercy of popular prejudice.

Once we accept that the attitude of the majority in a state may be antagonistic to minorities, the mere fact that a resulting state is democratic will not be sufficient to preserve its legitimacy. This explains why a remedial approach to secession, based on the principle of justice, is necessary to supplement the deficiencies of a political theory. This cannot be accomplished without subjecting the political realm to some form of legal regulation, under which the state enjoys the right of government as long as it acts within the constraints of the principle of justice.

The state loses this authority when it acts oppressively, without sufficient regard for the interests of the individuals in the minorities which form part of the community. It follows that the possibility of secession will arise in any circumstance where a majority has failed to respect the rights and interests of a disadvantaged minority. This gives an oppressed minority the right to secede, on the basis that the overholding state has stepped outside the sphere of its legitimate authority.

There is a second question of legitimacy, however. If the new state oppresses the remnants of the majority that has oppressed it, the new minority has similar moral and political rights. This may give rise to a further right of secession. The moral point is that there is an overarching standard, which applies throughout the course of these events. As a result, the legal

question of legitimacy arises equally in the instance of an overholding or a seceding state.

There is no means of deciding the legal question on an ordinary democratic basis, since that would give the majority the prerogative to decide for itself whether it has oppressed a minority. This difficulty may be overcome by specifying the population which is entitled to decide the question of oppression, but that calls for a legal resolution of the issue, which determines when the political question can be asked, of whom it can be asked, and the circumstances under which it will take effect.

There might be an argument that the problem of majorities can be avoided by deciding the moral question of legitimacy in a larger political forum, outside the domestic political order.[185] This merely resurrects the problems of a political solution at another level, however, since the difficulties associated with a political conception of legitimacy apply as much in the international as the domestic arena. The political problem in such a forum is not one of majority rule, but derives from the fact the actions of individual states in the international state system are determined by their perception of their own interests. The fundamental observation is that there is nothing which requires the state to act in accordance with the moral order.

There is nothing to prevent a moral right of secession arising in the political realm. A theory of secession based on the common good will naturally include a remedial principle, since a state which acts with manifest injustice towards any of its citizens cannot be said to be acting in accordance with the interests of the community as a whole. The argument that the majority has no interest in the rights of minorities takes us into impossible contradictions, since it suggests that a government acts against the interests of the majority in fulfilling its obligations to subsidiary populations.

In any event, there is no reason why there needs to be any moral difference between a

political and a legal right of secession in this context. The difficulty lies in the process of determining the issue, which cannot be decided by the larger majority, without compromising the fairness of the process. It follows that a viable political theory of secession will have to provide a mechanism for determining who should be consulted in deciding the issue of secession. In many cases, this will essentially decide the issue of secession. This seems beside the point: although such issues can theoretically be decided on a legal or a political basis, it is difficult to see how it can be effectively decided by political means.

The international law

Although Allen Buchanan and Wayne Norman are right to question the failure of the philosophical work on secession to take the international law into account, there seems little prospect of reconciling the work in political theory and the international law. This is primarily because the international law does not recognize the right to self-determination, as that right is understood within the philosophical literature. This is in spite of the wording of the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic Social and Cultural Rights*, which seem to guarantee such a right.[186] As Lee Buchheit writes, quoting a commentator, the debates in the Human Rights Commission "made it clear that the principle of self-determination would be invoked only for the liberation of colonial peoples and territories."[187] Although the covenants protect minority groups, they have not been interpreted in a manner which envisages a larger right of secession.

There are other international instruments, like the *Charter* of the United Nations, which might seem to extend the principle of self-determination beyond these narrow constraints. Most of these instruments have been drafted and interpreted, however, in a manner which excludes any right of secession.[188] The view of the Supreme Court of Canada in the *Secession Reference*

seems accurate:

> The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states. The various international documents that support the existence of a people's right to self-determination also contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states.[189] (282)

This is trite law. The rights under international law which permit secession, in an extreme case, arise out of the protections given to fundamental human rights, rather than the right of self-determination *per se*.

The leading work in the area is Antonio Cassese's Self-determination of peoples: A legal reappraisal. Although Cassese seems to favour an extension of the principle of self-determination, he is unable to marshal any law stronger than the 1970 *Declaration on Friendly Relations*, which might give rise to a limited right of secession. On the contrary, he acknowledges that the overwhelming consensus among states is that there is no right of secession in international law.

> . . . it cannot be denied that State practice and the overwhelming view of States remain opposed to secession. Indeed, it seems that this is one of the few areas on which full agreement exists among all States.[190]

As a result, one of the primary difficulties of any attempt to devise a legal theory of secession is that it calls for fundamental changes in the international law.

Cassese finds that he is forced to write that an act of revolution or secession is not subject to international legal standards.[191]

> As we saw above . . . international law does not ban secessionism: the breaking away of a nation or ethnic group is neither authorized nor prohibited by legal rules; it is simply regarded as a fact of life, outside the realm of law, and to which law can attach legal consequences depending on the circumstances of the case . . . (340)

Other states can refuse to recognize a new state or impose conditions on its recognition, as the

Supreme Court of Canada held in the *Secession Reference*. These are subsequent decisions, however, which are subject to political considerations and do not affect the inherent character of secession.

Cassese nevertheless wants to argue that there is a remedial right of secession at international law, albeit one which is extremely limited. The strongest grounds for such an assertion lie in the Aaland Islands case, which arose after the first World War. In that case, the League of Nations appointed three jurists to determine whether the inhabitants of the Aaland Islands had the right to secede from Finland and join Sweden. After the Committee of Jurists ruled that the dispute fell within the jurisdiction of the League of Nations, a Commission of Rapporteurs was appointed "to recommend a programme of action." (29) Both bodies recognized that there were cases where

> . . . the State at issue manifestly abused its authority to the detriment of the minority, by oppressing or persecuting its members, or else proved to be utterly powerless to implement the safeguards protecting the minority. In such cases, according to the Commission of Jurists, one must regard the dispute as no longer coming within the purview of domestic jurisdiction . . . On the same issue, the Commission of Rapporteurs took a bolder view and stated that, when confronted with the cases at issue, one ought exceptionally to admit the right of 'separation' of the minority from the State. (31)[192]

There are a number of problems with any use of these decisions as the basis of a right of secession at international law. The two reports were advisory opinions and the comments on which Cassese relies were inessential, since both reports stressed that the solution to the conflict concerning the Islands lay in the protection of minority rights, rather than the relinquishment of Finnish sovereignty.

Cassese also argues that the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the U.N.* implicitly allows secession "when very stringent requirements have been met." (118)[193] He is

careful to use hypothetical language in making these arguments, however, and his position seems quite weak.

> It can therefore be suggested that the following conditions *might* warrant secession: when the central authorities of a sovereign State persistently refuse to grant participatory rights to a religious or racial group, grossly and systematically trample upon their fundamental rights, and deny the possibility of reaching a peaceful settlement within the framework of the state structure. (119, italics added)

It is true that this contains the elements of a remedial theory:

> Thus, denial of the basic right of representation does not give rise *per se* to the right of secession. In addition, there must be gross breaches of fundamental human rights, and what is more, the exclusion of any likelihood for a peaceful solution within the existing State structure. (119f)

There is something artificial about these arguments, however, for there is no legal mechanism to enforce such rights, which can only be asserted in rebellion.

Cassese derives a similar right of resistance from the *Algiers Declaration on the Rights of Peoples*, but the *Algiers* document is merely the expression of "a private group of politicians, trade-union leaders, representatives of liberation movements, and intellectuals from various countries." (277) His argument is somewhat convoluted here, moreover, since it rests on Article 21 of the *Declaration*, which holds that the rights of minorities are subordinated to the principle of territorial integrity *if* those rights are respected by the state in question.[194] It is by no means clear that the *Declaration* has any legal significance, but the negative inference on which Cassese relies deprives a state of the protection afforded by the principle of territorial integrity if it fails to respect minority rights.

This is not the same as a positive assertion of a legal right to secede, which takes place within a legal order, and if anything, it merely moves the parties into an arena outside legal regulation.[195] Cassese may still be correct in arguing that documents like the *Algiers Declaration* and the *Helsinki Declaration* are significant because they rest the principle of self-determination

on individual human rights. This suggests that a failure to respect the basic human rights of a minority might give rise to a right of self-determination, which culminates in a right to take up arms. This would be consistent with a remedial approach to secession, since it sees the right to self-determination as a matter of justice.

Although the international law of human rights has developed, incrementally, at least, the machinery of the international law raises many questions about enforcement.[196] There is no effective means, at this point in time, of enforcing international guarantees of human rights within an unwilling state. There is always the possibility of "humanitarian intervention", but that is an action by one state against another, without the interposition of a decision by an independent and impartial legal body, which confirms the legality of such an action. This is the crucial component of the legal question.

There is therefore no means, at this point in time, of trying the legal question of legitimacy which arises in the context of secession. This is not possible without giving a court the authority to rule on the legality of the state's conduct in its internal affairs. This is in keeping with a remedial theory of secession, under which the state derives its legal and coercive powers from the principle of legitimacy. This gives the state the authority to act in the interests of everyone within the community.

This is probably common to any theory which purports to reconcile the different interests within the state. Allen Buchanan espouses a remedial theory, for example, which recognizes a right to secede in circumstances where the state has failed to respect the human rights of a group of people with a claim to part of its territory.[197] The significance of Buchanan's theory, like other remedial theories, is that it gives the moral order precedence over the political order.

The dynamics of such a theory seem to derive from a notion like the natural law, which

has lost much of its force in ethical and political theory, but remains prominent in philosophy of law. This is because the natural law provides a convenient means of expressing the idea that there is a moral law above the positive law, which determines whether positive laws are valid.[198] This notion is useful, in an Anglo-American context, because it fits in well with the dynamic of the constitutional process, in determining the validity of domestic laws. It is of little significance whether such a law derives from religious sources, some form of social consensus, the common features of the human psychology, or some other source.

As Norman Kretzmann writes, the concept of the natural law has a long history in philosophy of law.

> There are references to a universal or a natural law in Aristotle's *Rhetoric* and the doctrine was familiar to the ancients. Cicero speaks of it as the law of God, "everlasting and unchangeable, extending to all nations and all times, with one common teacher and ruler of all". Those "who formulated wicked and unjust statutes for nations," he writes, thereby breaking their promises and agreements, put into effect *anything but laws*.[199]

The matter is a relatively simple one: any government is subject to ethical restraints, which ultimately determine the validity of its laws. These norms must be broad enough, in a political context, to leave enough scope for a government to exercise the ordinary prerogatives of making and implementing public policy. This brings in the question of legitimacy.

The natural law would seem to provide the obvious basis for a remedial theory of secession, since it suggests that a state will retain its legitimacy as long as it acts within widely accepted moral norms. The same idea is found in Augustine, and Aquinas, who writes that human law:

> ...has the nature of law in so far as it partakes of right reason; and it is clear that, in this respect, it is derived from the eternal law. But in so far as it deviates from reason, it is called an unjust law, and has the nature, not of law, but of violence.[200]

Aquinas held that the first precept of the natural law arises from our inclination to preserve

ourselves.[201] It thus provides the ethical basis for the concept of self-defence, which furnishes one of the cornerstones of our conception of personal rights.

This is a place, interestingly, where the medieval view seems to capture more of what we actually experience than the contemporary view, which is forced to fall back on relatively weak assertions that people have the right to defend themselves. The idea of choice is a triviality in such circumstances and it seems more correct to say that a population is *obliged* to defend itself. This is an important consideration, legally. If self-preservation is a moral duty in such cases, it comes with all the hallmarks of the doctrine of necessity, which gives the demands of self-preservation precedence over ordinary legal restrictions. There is no obvious reason why the reasoning employed in such an instance cannot be extended to the case of a minority, which has suffered severe abuses under an overholding state.

Thomas Hobbes develops the medieval position in *Leviathan*, where he essentially holds that the individual right of self-preservation gives rise to a right of association, which provides the basis of political authority. This is a contractual relationship, which is contingent on the provision of the peace and protection which the individual is seeking. Thus, if the enemies in a war

> . . . get a finall Victory; so as . . . there is no farther protection of Subjects in their loyalty; then is the Common-wealth DISSOLVED, and every man at liberty to protect himselfe by such courses as his own discretion shall suggest unto him.[202]

On this view, the authority of the political order ultimately derives from the consent of individuals, rather than from the powers of the state.

The legal significance of this position derives from the fact that it separates the interests of the individual and the community at large. Once we have separated these interests, the problem is that these interests will inevitably conflict. We are accordingly left with two

alternatives: we can give the interests of the individual ascendancy over the interests of the community, or vice-versa, without recognizing that they share the same interests. If there is a legal argument against contemporary liberals, it is that they take the former position, which traces the authority of the state to the consent of the populace and at least implicitly deprives the state of its original jurisdiction.

Although John Locke takes a similar view as to the origins of political authority, he adopts a remedial view of revolution. In a well known passage near the end of the *Second Treatise*, he argues that the people have a right to defend themselves against a government which has become an adversary.

> . . . whenever the Legislators endeavour to take away, and destroy the Property of the People, or to reduce them to Slavery under Arbitrary Power, they put themselves into a state of War with the People, who are thereupon absolved from any farther Obedience, and are left to the common Refuge, which God hath provided for all Men, against Force and Violence.[203]

This is a remedial view, albeit a political one, which holds that a government which oppresses the people is illegitimate and loses its title to the sovereign power.

The same reasoning would provide the basis for a remedial right of secession in the instance where a state oppresses a minority. Locke does not believe that a ruler was free to act as he wished, since he is still subject to the natural law, which ultimately gives rise to the right of revolution. There is no conflict between the individual and collective interests in society, in this regard, since the natural law gives the individual a right to preserve the community as well as himself.

> . . . having in the State of Nature no Arbitrary Power over the Life, Liberty, or Possession of another, but only so much as the Law of Nature gave him for the preservation of himself, and the rest of Mankind; this is all [a man]. . . can give up to the Common-wealth, and by it to the Legislative Power, so that the Legislative can have no more than this. Their Power in the utmost Bounds of it, is limited to the publick good of the Society. (§135)[204]

On Locke's reading, the state has an ethical mandate, which incorporates each individual good in a larger common good. This presumably includes the rights of minorities.

Locke's position in this regard derives, however, from the more basic premise that governments "are dissolved from within", by various abuses of their powers. (425) The right of revolution seems to arise after the government has lost its legitimacy and is no longer governing in the common good. This tacitly assumes that they have an original jurisdiction, which does not derive from the people. The assumption, in the instance of existing states, is that they are entitled to maintain their authority until such time as they oppress the people and contravene the natural law. The recognition of an international authority to prosecute crimes against humanity can certainly be seen as a step towards some recognition of a doctrine like the natural law in the international jurisprudence.

Lockes' argument is still a part of the discussion in political theory. R.E. Ewin, for example, endorses a remedial theory of secession which gives a people the right to reject the authority of a central government. The right to secede, he writes,

> . . . might be thought of as something derived from the right of individual persons not to be unfairly persecuted. If they are treated sufficiently badly, then, the argument might go, they will be in their natural condition with respect to the government, no longer bound to obey it, and therefore justified in setting about establishing a new state with whomsoever they choose, using whatever means are reasonable in the circumstances.[205]

From this perspective, it is most convenient to see the right of secession as one facet of a larger question of legal legitimacy. This places moral parameters on the actions of a state, which loses its authority when it oppresses a minority. This gives rise to a right of revolution, or secession, which exists outside the realm of law.

The problem with the argument that the right to secede arises in the state of nature, after the state loses its legitimacy, is that it is the state of nature which requires regulation. From a

legal perspective, it does not seem possible to bring events like revolution or secession within a legal regime without moral or legal principles which transcend the normal constitutional order. If they are to have any force, these principles need to apply in the unregulated political realm where revolution and secession occur.

This is in keeping with our moral instincts on the subject of secession. The fact that there may not be any constitutional protection for the rights of a minority within an oppressive state does not seem to affect its right to secede. This is because the illegitimacy of an overholding state derives from a moral order which transcends the constitution. It is this body of substantive principle which would provide the natural source of authority to decide such a question.

The general right of revolution is of no assistance in the instance of secession, since a minority's claim to the right of secession arises out of the fact that the majority of the populace support the illegitimate actions of the government. This is complicated by the fact that there are many situations where the accidents of geography or the random distribution of population make it impossible for a minority to lay claim to a particular region or locality.

There is a broader ethical issue here, since it is offensive to suggest that the validity of the state's conduct depends on whether the members of a minority are distributed randomly throughout the larger population. It is also significant that a minority's claim to the right of secession usually arises when there is no realistic prospect of overthrowing the apparatus of the state. As a result, the right of secession arises in exactly those circumstances where there is no meaningful right of revolution.[206]

In spite of these differences, it is evident that the essential legal problem posed by revolution and secession is the same. In both instances, it arises from the simple fact that it is impossible to form a new state without terminating the existing constitutional order. This

disrupts the continuity on which the law relies in determining legal claims and creates a hiatus between the new legal order and the previous legal order. In the common law, as we have seen, this occurs entirely within the political realm, outside the ordinary legal and political orders.

This raises any number of practical questions. Which statutes and regulations, for example, remain in force under the new constitutional order? To what extent do litigants retain or lose their status under the old order? How far back do we trace the origins of a valid title to land? These kinds of issues are difficult to deal with if there is a legal discontinuity because the courts determine the status, rights and obligations of the parties before them by deriving them from norms which are assumed to exist at the time when the relevant events occurred. Simple as it is, this proposition proceeds on the basis that the present constitutional order reaches back in time and extends into the future.

Secession and revolution are extremely difficult concepts, from this perspective. That is because it does not seem open to a court to apply a previous constitutional standard without abandoning the constitutional order from which its own jurisdiction derives. And if there is no nexus between the earlier order, and the subsequent order, there is nothing which guarantees any of the rights which accrue under the older order. This raises the essential problem of secession, since it is impossible to decide these legal issues, or rule on the question of secession, unless there is a higher, overarching legal order, which abridges both regimes.

There are at least two possible answers to the question how this higher, extra-constitutional order might survive the transition from one political regime to another. One is that the sovereign power is an inherent feature of any government and is somehow transferred from one state to another. Although this is the kind of view which Carl Schmitt appears to espouse, it runs into difficulties when there is an intervening state of anarchy or civil strife between the

termination of one state and the inauguration of another. The other possibility is that the sovereign power has its source in a higher order, which continues without interruptions. If the sovereign power is suspended or ceases to exist, it can therefore be renewed or resurrected. Nor is there anything to prevent the creation of a new sovereign power, outside the ordinary legal and political orders, which is entitled to the allegiance of the courts.

The first possibility, then, is that the sovereign power never ceases to exist. The second is that the source of the sovereign power continues to exist, throughout any hiatus between the two legal orders. Both of these possibilities go against the view that a successful revolution takes effect as a *fait accompli* that occurs in some inchoate region, outside the ordinary legal order. This would provide the basis for an extra-constitutional legal order, which survives any dissolution of the ordinary legal order.

Leslie Armour takes up this kind of question in an essay entitled "Law and Revolution", where he argues that the concept of law adopted by Ronald Dworkin raises the possibility of a legal revolution.[207] This is because the law, in Dworkin's view, is made up of legal principles, as well as rules, which are often indistinguishable from moral principles. Unlike rules, "principles are guides, may be balanced off against one another, and have their origin in widespread common agreement."

> There is nothing in Dworkin's thesis which prevents the principles from surviving the dissolution of the legal system--guiding, indeed the departure of the old and the ushering-in of the new. So far as I can tell, one might appeal to general principles to determine, on Dworkin's account, whether a revolution was "principled" or not--and so it would, in one sense at least, be fair to ask about the legality of revolution.[208] (80)

This is the essential legal question posed by revolution or secession: if we want to bring such events within the rule of law, we need a supervening legal order, which survives any dissolution of the constitutional order.

We cannot speak about a legal transition of power from an overholding state to a seceding state without a set of norms which govern the possession and transfer of the legal powers of the state. This is an important and neglected question. E.P. Papanoutsos argues in an older article that we need to distinguish between revolutions which create valid laws and revolutions which do not.

> The only revolution that creates law is one which is morally authentic, with roots deep in the community and historically justified by its own deeds . . .[209]

It follows that the only way to introduce the concept of legality in these situations is by falling back on substantive moral views.

This does not exclude ordinary legal principle and there is nothing to prevent a court from using the principles developed in the context of the transfer of land or chattels to determine whether the state has a valid title to the sovereign power. This calls for an extra-constitutional law, however, which governs the political events which occur between the dissolution of the overholding state and the formation of the seceding state. As we have seen, this is not possible without placing the source of the constitutional and legal order under some form of enforceable moral constraints. At this time, however, there appears to be little in international law which would provide the continuity needed to regulate events that occur within the hiatus between the former legal order and the legal order that replaces it.[210]

We have already seen that the legal consensus in the common law is that the courts have the final right to determine whether to obey the actions of a revolutionary government. There are at least some moral considerations which enter into such a decision. This gives the courts a residual power, at least, to reject the new political order. The significant suggestion is that there is a moral order above the constitutional order, which determines the validity of the new political order. The importance of such an order is that it transcends any particular set of circumstances

and is not subject to any interruptions. The question is whether this might provide the basis for a set of extra-constitutional legal principles, which could be used to regulate events in the instance of a disruption in the political order.

The most difficult issue, in this context, is how we resolve legal claims which arise in a legal order that has now expired. Since political events occur with remarkable alacrity, in comparison with legal developments, this is difficult without making some use of the prior order. Thus the *Britannica* tells us that judges in the period after the Russian revolution

> . . . were directed at the beginning to apply Russian imperial laws, but only to the extent that they had not been revoked by the Revolution and were not contrary to the revolutionary conscience of the judges.[211]

This is only a temporary, *ad hoc* solution, which does not address the theoretical problem. In addition, the problem of a discontinuity is far more pronounced in Western legal systems, where individuals and groups have more extensive legal rights.

The constitutional hiatus created by an illegal act of secession was considered by the United States Supreme Court in *Texas v. White* (1869) 74 U.S. 227, where the state of Texas moved to recover federal bonds which had been sold by the military authorities of the state during the civil war. The court had no hesitation in holding that the state's secession from the union had no legal effect, and the legislative and executive actions of the rebel state:

> . . . were absolutely null. They were utterly without operation in law. The obligation of the State as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. (238)

The court accordingly ruled that the "Rebel Government" of Texas, which had joined the Confederacy, had never existed as a lawful or *de jure* government of the state.

The question was whether the *de jure* State, now resurrected, was bound by the actions of the illegal, intervening state. The Supreme Court held that some the Acts of the unlawful and

revolutionary government, exercising powers akin to a *de facto* government, must be regarded as valid. In the words of the Chief Justice, at 240:

> It may be said perhaps with sufficient accuracy, that Acts necessary to peace and good order among citizens, such, for example, as Acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar Acts, which would be valid if emanating from a lawful government, must be regarded, in general, as valid when proceeding from an actual, though unlawful government . . .

This was of no assistance to the defendants, since the court was of the view that the bonds were sold by the military authorities in furtherance of the war, and any actions in support of the rebellion were invalid on their face.

It is significant that the Supreme Court ultimately turned to equitable considerations, in deciding whether to annul the actions of the insurgent government.[212] It is the equitable considerations, moreover, which explain the spirited dissent by Justice Grier, who saw the matter as one of fairness.

> A court of chancery is said to be a court of conscience; and however astute may be the argument introduced to defend this decree, I can only say that neither my reason nor my conscience can give assent to it. (242)

Counsel for one of the defendants had argued that, even if there was a legal vacuum, the doctrine of estoppel was sufficient to restrain the power of the state and prevent it from repudiating the contract entered into by the rebel authorities. (232)

It follows that the existence of a legal discontinuity is significant, theoretically, because it leaves the courts with no alternative but to turn to larger ethical considerations. This raises a question as to the contents of any extra-constitutional legal order, which would govern the transition from one constitutional order to another. Although Leslie Armour sees a problem with the natural law, which cannot be ascertained with any certainty, he falls back on a related

concept. Above the constitutional order, there is simply "the people":

> . . . there comes a point at which, it seems, there is no appeal except to the common understanding of principles commonly held. (85)

It is important to make a distinction, however, between a legal and a political standard. The question, legally, is not what the people wish, but what follows from the principles on which they agree. It is these broad moral principles, shared in common, which provide the natural basis for an extraconstitutional legal order.

Ronald Dworkin seems to adopt a similar standard in arguing that the notion of a "legitimate" community is based on shared principles: the members of such a community recognize that their "fates are linked . . . by common principles, not just by rules hammered out in political compromise".[213] This is impossible unless the members of the community share the same moral understanding, which provides the essential basis of any adjudicative process. This is where the difference between the legal and political process manifests itself. Although it may not be possible to obtain a consensus on the question of secession, it is still possible to obtain a consensus on the general principles which form part of the extra-constitutional order. There is therefore nothing to prevent a legal authority from appealing to the views generally held in society.

The fundamental point is that the legal issues which arise on secession need to be decided on moral principles, which are shared equally by the majority and the minority. It is not the outcome which matters, in a legal context, so much as the process of inferring what is appropriate from overarching moral principles. This is, to all appearances, the kind of exercise which the Supreme Court of Canada envisaged in the *Secession Reference*.

There are subsidiary issues here and the most important consideration in many circumstances is probably to determine the composition of the population which should be

consulted on a referendum. Since this cannot be decided on a democratic basis, legal methods will have to be brought into play in deciding such an issue.[214] This will have much the same effect. At some point, a court will have to fall back on general moral or political principles, in order to ensure the fairness and efficacy of the political process.

Chapter 7. A Legal Standard of Justice

Introduction

The rest of the dissertation sets out a legal theory of secession, which is based on the legal concept of legitimacy. The most fundamental assumption in the law would seem to be the assumption that society has the right to exercise a reasonable degree of authority over its members. The legal corollary is that a state has authority over the individuals on its territory and only relinquishes that right when it contravenes the natural limits of such a prerogative.

The present chapter argues that the standard which is needed to decide this issue can be found in the legal principle of justice. This principle rests on two fundamental assumptions: one is that people are equal: the other is that the different actors in society share some common interest. The second assumption is a methodological assumption, as much as anything else, which is a necessary part of any adjudicative process. This means that any adjudication of the contest between competing parties will take place on the basis that the rights of the competing parties merge in some larger interest, which meets the ends of justice.

The fundamental axiom of a legal theory of secession is that individuals, groups and the community as a whole share the same fundamental interests. When the exercise of the sovereign power is not directed to such ends, and the interests of groups or individuals diverge from the interests of the community at large, a right of dissolution might naturally arise. In an appropriate case, this would manifest itself as a right of secession. This kind of theory seems more in keeping with constitutional practice than a bare theory of individual rights, which does not provide a satisfactory account of the public good.

The role of a court on this concept of justice is to maintain the proper equilibrium in the relations between the different parties in society. This can be seen in the attempt to reconcile the

rights of competing parties in difficult constitutional cases. The decision of the Supreme Court of Canada in the *Secession Reference* is instructive in this regard, since it focuses on the need to reconcile the "various rights and obligations" of the parties.

This is only the first step in developing a theory of legal legitimacy, however, which needs to set out the conceptual machinery needed to decide the question of secession. The principle of justice contains subsidiary principles, such as the principle of equality, which requires that the state treat all individuals and groups with a certain moral deference. The authority of the state cannot be legitimately used to deny the basic rights of people who live under its jurisdiction. The state has an obligation to act in the good of all its members: although there is considerable room for disagreement on the means of achieving such a goal, it does not permit serious violations of minority rights.

It is the subsidiary principle of legal equality which provides the source of individual and group rights. This brings in the question of discrimination, which is essential in the context of secession, and calls for some means of determining when the state has contravened the standard set by the principle of justice. That requires the development of specific criteria, which can be used to determine whether a state has acted justly in a particular situation. The concept of human rights, which has already received wide international recognition, provides a major source of these criteria.

Discussion

The legal question of legitimacy arises on the basis that the state loses the prerogative to govern when it fails to govern in accordance with the principle of justice.[215] This is a legal rather than a political principle, though it is in keeping with the procedural thrust of contemporary liberalism. That is because it concerns itself with the legitimacy of the state's actions rather than

with questions of policy. The principle of justice governs the question whether the actions in the political realm come within the moral parameters of government and does not infringe upon the right of the political actors to determine whether a particular initiative is the right policy for the state to pursue.

There is a philosophical dispute between some liberals and communitarians as to whether the state serves anything other than an instrumental purpose. If nothing else, however, it seems evident that the state is a necessary instrument of social good, which ensures a minimum of justice in the relations between the members of society. So long as it serves such a purpose, in a reasonable manner, it has a legitimate claim on our allegiance. It follows that the argument for a legal right of revolution or secession has a positive side. Since a just state has a right to maintain and exercise its legal jurisdiction, it has the right to enforce its laws against majorities and minorities alike.

The best view appears to be that a constitution is a set of principles which exists under the auspices of a legal principle of justice. This principle can be seen as the primary article of the state. It is the principle which provides the touchstone of the constitutional process: legally, the purpose of the state is to secure justice, which lies in maintaining the fairness of the relationships between the individuals and groups within society. The principle of justice accordingly provides the ultimate source of legal validity, supplemented and articulated by the guarantees found in a *Charter*, a *Bill of Rights*, or other constitutional documents. One of the integral aspects of the principle of justice is the protection of rights, which serve as a rough measure of the degree of freedom to which individuals and groups are entitled.

In many respects, the principle of justice can be seen as a principle of interpretation, which will guide a court in applying the provisions of the constitution. This is necessary, if we

are to resolve the discrepancy which arises when different parts of the constitution come into conflict with each other. It also provides a basis, however, on which a court could determine whether constitutional provisions are in keeping with the basic moral rights of groups and individuals. It therefore provides such a body with the necessary means to determine when a state becomes morally and legally illegitimate. It is this finding which essentially gives rise to the legal right of secession.

There are at least three sets of prerogatives which must be considered in this context. The first set is composed of individual rights, the second of group rights, and the third of the prerogatives of the state, which ideally correspond with the interests of the community as a whole. The multinational state probably provides the clearest example of a political arrangement in which all three sets of prerogatives come into potential conflict with one another. Any court which rules on secession will have to address the legitimate rights of: 1) the overholding state, which guarantees the existing legal order; 2) the minority which is claiming secession, along with other groups whose rights and interests may be affected by secession; and most prominently, perhaps, 3) the rights and interests of individuals within the state.

There is an important methodological issue here, which relates to the role of the courts in overseeing the relationships between the different parties in society. The role of a legal principle of justice, on this view, is to resolve the conflicts between the claims made in all three domains. It is when the state serves one set of interests to the detriment of others, and the moral equilibrium of the state is lost, that it becomes illegitimate. The fundamental premise of the law, methodologically, is that it is possible to serve all of these interests at the same time. It follows, from a legal perspective, that the individual and collective interests of the members of society cannot be separated from each other. The view of rights which best serves the individual will

best serve the community.

Without such a postulate, there is no basis on which an adjudicative body can reach a neutral decision, which must be based on principles accepted by both the individual and the state. A third party who adjudicates a contest between two groups maintains his neutrality by adopting a stance which somehow incorporates the interests of the two groups. This holds with even more force in a legal or judicial forum: it is a necessary premise of any means for resolving disputes, if it is to provide a solution which meets the interests of both sides. The immediate significance of this process lies in the fact that the prerogatives of individuals, groups and the state come into such dramatic conflict in the context of secession.

It follows that the interests of an individual who challenges the actions of the government ultimately merge with the interests of other individuals. When a court decides that a restriction on freedom of speech benefits the public interest, this means that the restriction benefits the person challenging the restriction. It is true that this may seem to be a rather tenuous notion in those cases where a court punishes an accused. This is a matter of degree, however, and as long as individuals have a social as well as an individual identity, they have an interest in the larger good of that society.

The task which faces a court is to determine what lies in the interests of all the parties, rather than to decide between competing claims. This essentially assumes that the interests of individuals, groups and the state converge in some larger, more encompassing consensus. The theoretical role of the constitutional courts is an integrating one, which is intended to unearth the moral and political consensus on which these different sets of rights are premised. This is a larger and more important philosophical enterprise than is generally acknowledged. It is also more in keeping with the political and legal orders than one might think. Even states at war

share certain interests, which manifest themselves in the common good served by the exchange of each others' prisoners.

The philosophical roots of such a position can be found in American pragmatism. John Dewey, for example, saw the tendency to separate individual elements from the rest of reality, as "the most pervasive fallacy of philosophic thinking".[216] As Matthew Festenstein writes, in Pragmatism and Political Theory:

> Dewey argues that the individualistic school of England and France in the eighteenth century errs in conceiving of the individual as 'something *given*, something already there', outside of society, and in seeing social institutions as instruments for advancing the interests of pre-social individuals. The school fails to grasp the constitutive role of the institutional and social environment in shaping individual identity. (24f)[217]

There is accordingly a sense in which the identity of the individual is made up of elements in the community from which he takes his understanding of himself and other people.

Festenstein writes that Dewey's commitment to a "renascent liberalism"

> . . . is supported by a particular view of human flourishing, and by the conviction that the interests of individuals essentially contain 'a regard for the welfare and integrity of the social groups of which we form a part'.[218]

Although Dewey was a liberal democrat, it is his concept of the larger good which unites his ethical and political theories. This does not affect his ethical stature as a liberal, in Festenstein's view, who holds that the "central good" is "that of individuality or the capacity for autonomous choice." This may express the matter too explicitly, since Dewey avoided abstract definitions of the "good". There is no reason to dispute the essential point, however, which holds that it is a mistake to see individual and group rights as opposing interests.[219]

Dewey argues that we cannot conceive of individual human beings, as they actually exist, outside a social context. The fulfilment of individuals is dependent upon others, and attributes of social life, like language, are an intrinsic feature of the individual. As he writes, in "The

Individual in the New Society", a narrow liberal view

> . . . ignores the fact that the mental and moral structure of individuals, the pattern of their desires and purposes, change with every great change in social constitution. Individuals who are not bound together in associations, whether domestic, economic, religious, political, artistic or educational, are monstrosities. It is absurd to suppose that the ties which hold them together are merely external and do not react into mentality and character, producing the framework of personal disposition.[220]

This is in keeping with more contemporary arguments, *per* Kymlicka, that any meaningful guarantee of individual rights includes social and cultural rights.

Dewey was suspicious of abstractions and wanted a moral theory which would facilitate moral and political decision-making, rather than a theory which provided general answers to theoretical questions. As Festenstein writes:

> Social interests 'flourish to some extent in all persons who have not already been warped'. Self-interest and benevolence are 'both of them secondary phases of a more normal and complete interest: regard for the welfare and integrity of the social groups of which we form a part'; and overcoming these secondary phases is 'a condition of mental and moral health'. (60)

It follows that the interests of the individual and the entire community coincide. Dewey's view is significant from a methodological perspective because it means that the right solution to a social or political problem can meet the interests of the individual and society. This is very much in keeping with the mode of reasoning used in a legal and constitutional forum, which proceeds on the assumption that the legitimate interests of different parties can be reconciled in some larger, over-arching good.

The same theme is an integral part of the work of some contemporary philosophers, and Charles Taylor adopts a similar position in criticizing the "atomism" of the liberal tradition. In "Cross-Purposes: the Liberal-Communitarian Debate", one of the essays in Philosophical Arguments, Taylor suggests that atomists accept two basic tenets in political theory. They believe (1) that the social aspects of existence should be explained "in terms of properties of the

constituent individuals" and (2), that "social goods" can be explained as "concatenations of individual goods."[221] The major advantage to such a position is that it provides a relatively simple, schematic means of investigating social phenomena, which is more in keeping with the demands of economic and statistical analysis than a traditional philosophical approach.

There is no reason to doubt the benefits of the approach which Taylor is rejecting from the point of view of the social sciences. It runs into difficulties, however, when we turn to philosophy. Like many authors, Taylor argues that society is something more than a collection of discrete individuals, whose interests can be separated from the interests of the larger community. It is in the legal and political arenas, however, that the practical importance of such a view comes to the fore. That is because legal and political institutions cannot function without some means of reconciling individual and group rights with the interests of the larger community.

The point of the critique by Taylor and others is that it is impossible to separate the interests of individuals and the interests of the community. The same position can be extended to groups. This kind of view weighs in on the side of authors, like Allen Buchanan and Will Kymlicka, who see group rights as a necessary part of any comprehensive theory of individual rights. Kymlicka has essentially argued that every individual lives within a national or cultural context and has a personal interest in preserving community values. The same kind of insight surfaces in the more recent work on nationalism, which recognizes that it is the community which determines individual identities. Authors like Margaret Moore, have argued that individuals find their identity in the cultural groups of which they form a part.

There is an ontological question, which arises in this context. Dewey's position rests on the principle that individuals do not exist in isolation from the community and form a necessary

part of some larger whole. We are born into a community, much as we are born into a family, and subjected to its norms without exercising any choice in the matter. This is a question of context, as much as anything else, and it is naive to think that we can abstract the individual from the community, since it is the community which provides the sources from which the individual takes his identity. As a result, the statement that the community is made up of individuals seems incomplete and there is a psychological sense, at least, in which we can say that it is the individual who is constructed from the community.

It would follow that there are problems with the view that the community and the state owes its existence to the exercise of individual choice. This goes into other issues, however, and there is a huge literature on autonomy, which is beyond the range of the present discussion. On the legal side, however, there is a consensus that we are obliged to obey just laws, and whatever we make of autonomy, it is a relative concept which does not deprive the state of its right to enforce such laws. The question of consent has already been discussed, and it may be sufficient to say that there is a presumption which runs in favour of the state's authority. Although there are situations where an individual is entitled to reject the authority of the state, this is capricious in the absence of conditions which deprive a state of its legitimacy.

Although it is impossible to work out the details of a general theory of adjudication in such a limited context, it is possible to discern its basic outline. It has already been suggested that the principle of justice regulates the relationships between individuals, groups, and the state. The first requirement for any legal theory in the area of secession is therefore to provide a theory which can accommodate all three sets of original rights and identify the place where they converge. This raises the question of justice: it is when a state oppresses a minority, for example, and the three sets of interests diverge that a state fails to abide by the general principle

of justice and loses its moral legitimacy. It is in these kinds of circumstances that a minority might acquire a a right to secede.

The question of legitimacy gives rise to a separate species of legal rights. If the right of secession is a remedial right, it is a second order right. That is to say that it is premised on the contravention of other rights, and is not one of the rights which come under the ordinary purview of the principle of justice. In this sense, it is a legal rather than a simple moral right, which repairs the injustice of the state. It will be evident that a court can only adjudicate this kind of issue if it is independent of all three actors, including the state. It will also be evident that the state cannot be judged, in this context, unless it is in some sense equal to individuals and groups, and has its own rights and responsibilities. These rights and responsibilities are of no effect unless they apply to the state, irrespective of its constitutional structure or the popular will.

The legal principle of justice is a substantive principle and rests on the moral consensus in society. This runs against the academic literature, which tends to exaggerate the diversity of moral views in society. In After Virtue, for example, Alasdair MacIntyre argues that our society has become so pluralistic that it "cannot hope to achieve moral consensus." (252) As a result, he suggests, the role of a constitutional court has become that of a mediator, which has no recourse to the moral consensus needed to reconcile the conflicts which come before it. Thus, in *Regents of University of California v. Bakke* 438 U.S. 265 (1978), the United States Supreme Court followed "incompatible principles" in striking down a special admissions program for minorities, even as it upheld the right of the University to consider race in its admissions process.

MacIntyre essentially argues that this kind of development has robbed the United States Supreme Court of its moral jurisdiction:

> The Supreme Court in *Bakke*, as on occasion in other cases, played the role of a peacemaking or truce-keeping body by negotiating its way through an impasse of

> conflict, not by invoking our shared moral first principles. For our society as a whole has none. . . . (253)

This is a dubious argument, in a legal context. In any constitutional jurisprudence, the courts constantly invoke moral values and principles to justify their decisions, on the basis that those values express the general consensus within society.

There is an official aspect to the judicial function that is absent in academic work and legal reasoning follows its own conventions. While a judge's personal views will affect his decisions, the work of the judiciary assumes that there is a wide consensus as to the underlying moral principles which form part of the constitutional order. It is apparent that the process of interpreting the law is open to diverse conclusions: the legal inquiry proceeds in a cautious, empirical vein, which restricts itself to the facts of specific cases and does not set out the meaning of terms and concepts before applying them to the facts. This leaves us with a relatively empty conception of justice, which acquires most of its substantive content when it is applied to specific circumstances. In addition, a constitution contains vague verbal formulae, and may be interpreted in a variety of ways. Nonetheless, there is more agreement on fundamental principles than the philosophical literature acknowledges.

The primary requirement of any legal process is the ability to make decisions, and it is no use saying that we cannot decide between competing views, since that makes it impossible to resolve the conflicts which arise between different individuals or groups. This requires different strengths than theoretical work and judicial bodies need a far more refined, and extremely graduated, capacity to distinguish between different cases. On the larger issue, however, the simple fact is that decisions must be made, and in many cases, it is impossible to make them without drawing on positive and substantive moral views.[222] Although there is plenty of room for the scepticism of a jurist like Oliver Wendell Holmes, a judicial system cannot operate

successfully in a manner which throws doubt on the moral efficacy of its own rulings.

This does not affect the general and procedural character of the principle of justice, which takes precedence over our specific moral views. In *Planned Parenthood v. Casey*, for example, the majority of the United States Supreme Court held that a decision like *Roe v. Wade* calls on both sides of a divisive issue like abortion "to end their national division by accepting a common mandate rooted in the Constitution." (11) The view adopted by the court is substantive, but essentially neutral: it suggests that those on both sides of the issue have a common interest in accepting a resolution based on constitutional principles, whatever moral views they hold. This reflects the larger principle of justice, which holds that the common interest of the parties transcends the moral views on either side of the contest. This is in keeping with the practice in the courts. As a rhetorical matter, the arguments of counsel in a constitutional case are directed at convincing the court that it is in the larger interest to hold in favour of their clients.

This goes to the heart of the legal process. The courts are charged with the task of articulating a legal consensus which ensures that the same principles will be applied to different cases. In doing so, the judiciary infers what principles should govern their decisions in specific cases from a common set of moral principles, which have been accorded constitutional status. It is this consensus which maintains the coherence and consistency of the law, and sets out the legal obligations of the political actors in the state. This is evident in the decision by the Supreme Court of Canada in the *Secession Reference*, which holds that there is a constitutional obligation to negotiate any claim for secession in a manner which accommodates the rights and interests of all of the affected parties.

The judgement suggests that it is the common interest which provides the criteria needed to determine the right disposition of any contest between the exercise of different rights. The

court in the *Secession Reference* spoke of the need to reconcile the "various rights and obligations" of the parties and it is this process of reconciliation which stands at the heart of any resolution of such claims. (249) Nor did the court restrict itself to rights:

> In the event [that] secession negotiations are initiated, our Constitution, no less than our history, would call on the participants to work to reconcile the rights, obligations and legitimate aspirations of all Canadians within a framework that emphasizes constitutional responsibilities as much as it does constitutional rights. (273)

The exact meaning of the word "responsibility" is unclear, but it clearly includes the obligation on the various parties to respect the constitutional rights of other participants in the process. This reflects the central question of justice, which lies in maintaining the fairness of the relationships between different parties.

From the point of view of adjudication, it seems impossible to construct a viable theory of legitimacy without an overarching view, which unifies all of the competing interests in a single, comprehensive theory of rights. Without such a view, an adjudicator can only choose between the positions put forward by the competing parties and cannot render a decision which serves the interests of all the parties. This is a requirement of any satisfactory decision-making process, which brings competing principles into keeping with a third and larger principle. The process of reasoning in constitutional cases is one of inference and the courts generally begin with moral principles which they regard as incontestable. This allows them to evaluate competing claims on the basis of a common standard.

The most basic principles of justice are found in the moral and political principles on which the constitution is premised. The Supreme Court of Canada recognized the importance of these kinds of precepts in the *Secession Reference*, such as a basic respect for the democratic tradition and the need to protect minorities and their rights. There is also an obligation on the political actors to act in good faith, within the rule of law, and introduce any changes to the legal

order through negotiation and consensus. In the Canadian context, this includes a principle of federalism, which "facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province." (252)

These underlying constitutional principles have their derivation in a more fundamental requirement that a government exercise the sovereign power in the common interest, without discriminating against individuals on the basis of their membership in a minority. As a result, any distinctions which a government draws between national groups must be based on rational grounds, which further some genuine public interest. The good in question must extend beyond the interests of a single group and serve a larger good. It is not enough if a language law is in the interests of the majority of people in Quebec; it must also serve the interests of minorities, if only because they share an interest in the well-being of the majority.

The resulting arrangement must be "reasonable": it must have the capacity to explain, to all of the actors, why the legal distinctions between different groups are legitimate. These moral precepts take precedence over the specific requirements of the law. The decision of the Supreme Court gives the principles on which it relies an extra-constitutional significance, since any act of secession takes place, legally, outside the constitution and can only be subjected to legal restrictions if there is a higher legal order. Although the Supreme Court went to some trouble to demonstrate that these principles were in keeping with the Canadian constitution, it is possible to imagine circumstances in which a written constitution might conflict with such requirements. This is particularly true in the instance of a state where there is long standing hostility between different ethnic groups.

These kinds of general moral principles provide the ultimate source of a state's legal legitimacy. As a result, they naturally provide the framework in which any legal right to

secession should be considered. There are two separate sides to this: one relates to the provenance of the right of secession, which finds its origins in the failure of an overholding state to respect the moral limits of its authority. The other, equally important side of the question, is the actual process of secession, as it applies to both an overholding state and a minority which wishes to secede. It is the latter aspect of the question which the Supreme Court of Canada deals with in the *Secession Reference*, which places legal restrictions on all of the parties affected by such a process.

The Supreme Court held that the Canadian constitution cannot be amended without an agreement and the political actors must simply negotiate until they reach a solution which meets the interests of all parties. As the court recognized, it is the question of legitimacy which lies at the root of such a stipulation:

> Refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole. (268)[223]

While the Supreme Court recognizes the possibility of an impasse, that does not affect the obligation of the political actors to reach an agreement.[224]

There is a fundamental issue here, which was not fully considered by the court. On the one hand, the Supreme Court took pains to leave the question of secession in the political arena, outside the reach of any court. At the same time, the court holds that political decisions must be made within the constraints of the fundamental principles which it sets out.[225] This recognizes that the legal question of legitimacy takes precedence over the political question. That does not mean that secession can be decided exclusively in a legal forum: on the court's view, the question of secession is a political question, but one which must be decided within the moral constraints expressed in the legal concept of legitimacy.

The question of secession forces us to consider the nature of these precepts. That is because it is impossible to apply these kinds of precepts, in a legal forum, unless they have a universal application. The problems which confront us in the case of secession normally arise when there is a conflict between different ethnic or religious groups. As a result, it does not seem possible to settle such disputes without falling back on the substantive beliefs which the two groups hold in common. At some point, there has to be an appeal to an overarching moral view that sets out the standards which apply to individuals in both groups.

It might be noted that this position diverges from the view that Antonio Cassese takes in Self-determination of peoples. The major issues in Quebec, he writes:

> . . . must be settled at a political level and the law can only intervene at a further stage, when political solutions have already been found and there is a need for their consecration in norms and institutions.[226]

This is the traditional view, which gives the political order precedence over the legal order. If it fails to capture the spirit of the decision in the *Secession Reference*, however, it is probably because the ethical considerations which actually arise in the instance of secession are pressing enough to force any court to place restrictions on the actors in the political realm. It is true that the *Secession Reference* was decided after the publication of Cassese's book and constitutes an important development in the existing law. Nonetheless, this illustrates the manner in which the law is developing.

It is the legal principle of justice which governs the courts in refereeing the relations between the different parties in society. This is a substantive principle, which rests on the moral principle that individuals and the groups of which they form a part are equal. It nonetheless has a procedural character, since it only places the most general restraints on government. This is not a particularly modern concept: in the Summa Theologica, for example, Aquinas tells us that an

individual is only bound by laws which are "proportionate" and impose an equal burden on individuals who are equally situated.[227] It seems pointless to debate the matter, since the principle of equality would seem to be a necessary feature of any coherent concept of a just state. If the state is comprised of a variety of different actors, the only alternative to the principle of equality is to favour the interests of one party to the detriment of others.

The same considerations surface in the contemporary philosophical canon. The issue of equality is the concern of the entire "procedural" tradition in philosophy and occupies the central place in discussions for or against a variety of possible rights. It is on this basis that Kymlicka wishes to argue for group rights, which would rectify the inequality that the members of minorities might suffer in a society where the majority belongs to another culture. Allen Buchanan and Jeremy Waldron argue, against this, that ethnic or national rights essentially discriminate against individuals who do not belong to such cultural communities. It is the concept of equality which provides the basis of both arguments.

There is fundamental irony in the fact that the substantive concept of equality, in itself, might seem to contravene the procedural notion of equality in the philosophical literature. Since people have different conceptions of the good life, Ronald Dworkin argues,

> . . . the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is intrinsically superior, or because one is held by the more numerous or the more powerful group.[228]

The *reductio ad absurdam* is whether this kind of argument applies to a morality premised on the concept of equality. What of views, someone might say, which hold that people, or the views they hold, are morally unequal? Shouldn't they be treated equally?

But theory is one thing; reality another. It is impossible to treat two contradictory views equally, without rejecting them both. The choice between equality and inequality is a

substantive rather than a formal issue, and the questions that this raises are relatively straightforward. From a constitutional perspective which includes a commitment to equality, can we describe activities which are antithetical to the principle of equality as part of the good life? Is an overtly racial view, or a hatred of foreigners, a part of the good life? These questions all invite the same substantive answer.

The contemporary philosophical literature tends to neglect the substantive nature of the legal process. As Brian Barry explains it, the conflicts between parties with competing rights must be resolved by an appeal to rational standards, which can be accepted by either of the interested parties. This is fair enough, but if the conflicts are substantive, there is no escaping the fact that these standards need substantive content. And if a substantive principle of equality forms part of a common good, the legal apparatus of the state will have to favour some conceptions of the good over others. There is nothing obviously procedural in the finding that the activities of the Klu Klux Klan, for example, may be subjected to legal constraints.

This is probably the major legal difficulty in the philosophical literature. In Justice as Impartiality, for example, Barry makes a distinction between first order conceptions of the good, like those found in the Aristotelian tradition, and procedural or second order conceptions. Jason West gives a synopsis of the distinction in an unpublished paper:

> Substantive conceptions are comprehensive in so far as they are general moral theories which try to give principles for deciding how to act or live one's life. . . . Further, according to Barry they are capable of yielding specific resolutions to questions about individual policies. By contrast, second-order conceptions of the good do not specify what the content of the good is.[229]

Barry wants to rest political theory on the second order good of impartiality, which specifies how we should make political decisions but does not stipulate what policy should be followed in a particular case.[230]

Although this is a political rather than a legal argument, Barry takes it with him, when he turns his attention to constitutional theory. The immediate problem is the descriptive fact that the constitutional law does not restrict itself to matters of process. Barry finesses the issue by arguing that certain substantive goods are common to any conception of the good, which can therefore form a legitimate part of the constitutional order. This is notable, if only because it is very similar to a legal approach, which generally functions on the basis of the moral consensus in society.[231] On the more fundamental point, however, it merely demonstrates that we need a substantive standard to decide ordinary constitutional issues.

Barry's primary example is a constitutional provision guaranteeing freedom of religious worship: since the proponents of any conception of the good will claim the freedom to worship, he argues, the principle can serve as a "substantive rule" of justice. The problem is that this does not provide us with enough substantive content to answer the questions which naturally arise in a legal setting.[232] These are questions like: What do we mean by "worship"? Does the right to worship extend as far as public prayer? Are there ancillary rights? The answers to these kinds of questions cannot be decided solely on procedural grounds and the major problem with adopting a procedural view is probably that it conceals the adjudicative standard in difficult constitutional cases.[233]

The force of the procedural argument in contemporary thought may derive some of its force from the development of the doctrine of "due process" in American law. The distinction between procedural and substantive legal issues has been complicated in the United States, however, by the development of a substantive doctrine of due process. The limitations of a procedural principle of equality are illustrated by the notorious decision in *Attorney-General of Canada v. Lavell* (1973), [1974] S.C.R. 1349.[234] The case demonstrates that the substantive

powers of government take precedence over procedural doctrines, which do not give the courts the authority needed to overturn morally offensive legislation. There will be procedural safeguards in any effective legal system, but these safeguards primarily ensure that substantive questions are decided fairly and impartially.

In any event, the substantive principle of equality occupies an essential part of the liberal tradition, since it is not possible to derive a procedural principle of equality without it. Why should we give individuals the benefit of equal process before the law? The answer seems forthcoming: if individuals are entitled to equal process, it is because they have the same substantive value as other people. There are religious formulas which express these sentiments, such as the statement that we are all equal in the eyes of God. The point is that there is something in the moral content of what we are which is fundamentally the same.

The law usually concerns itself with the application of general principles to specific circumstances. We might say that Irish and Welsh groups, for example, have equal rights. This is not a helpful statement without the addition of a substantive proposition, such as the proposition that national languages should be preserved. These kinds of subsidiary propositions require further substantive content, however, like the proposition that a language cannot be preserved unless it is a language of instruction in schools. Whether a particular assertion is substantive is a relative matter and admits of many degrees.

It follows that the principle of justice and its subsidiary principles have substantive elements. As we have seen, this should not obscure the fact that the constitutional process requires something more than a simple ethical evaluation. The courts are required to determine whether the actions of the state come within the legitimate bounds of government, rather than whether they are correct. As a result, judicial decisions have a distinctly procedural character

and are usually neutral on specific questions of morality. For that reason, the contemporary ethical and political literature is more in keeping with the parameters of the legal process than with ordinary ethical or political beliefs. This does not change the nature of the constitutional process, however, and the task of the courts remains substantive. It requires some reference to an independent source of authority, which can only be found in a set of moral beliefs.

Rights

If the principle of justice is based on the concept of equality, it is the principle of legal equality which provides the source of individual and group rights. This kind of principle is enunciated, constitutionally, in a provision like section 15 of the *Canadian Charter of Rights and Freedoms*, which states that every individual "is equal before and under the law and has the right to the equal protection and equal benefit of the law". This brings in the question of discrimination, which is essential in the context of secession, and calls for more specific criteria, which can be used to determine when the state has contravened the standard provided by the principle of justice.

It is beyond the scope of the present dissertation to review the history of the concept of rights, which appears to have developed from the recognition that the natural law gave the individual claims against society. As the *Encyclopaedia Britannica* puts it, the concept of rights has become the *lingua franca* of contemporary debates in moral, legal and political theory.

> Today, the vast majority of legal scholars, philosophers, and moralists agree, irrespective of culture or civilization, that every human being is entitled, at least in theory, to some basic rights. . . . the last half of the 20th century has seen, in the words of human rights scholar Louis Henkin, "essentially universal acceptance of human rights in principle" such that "no government dares to dissent from the ideology of human rights today."[235]

What is notable is that this has occurred in the popular realm, outside the relatively narrow confines of academic work. This is probably explained by the modern belief that those with

moral, social and political expectations are entitled to some kind of recourse in the courts.[236] In any event, this means that the idea of human rights shares same uncontested character of earlier principles of legitimacy, which were uncontroversial in their time.

The breadth of the development of legal rights often seems to be overlooked in the academic literature. The Britannica puts the matter as well as anyone in stating that, "in the real world", it probably makes more sense to say that we have witnessed "a rising and overriding insistence" on equality.[237] It is not the concept of a right which is so central, from such a perspective, as the more basic axiom that there is some deep sense in which individuals, and comparable groups of individuals, are morally equal.[238] We can accordingly infer the general principle that the rights and obligations in society should be equally shared. It is the infringement of such a principle which would seem to provide the fundamental basis on which a legal right to secession might be grounded.

There is nothing novel in the argument that the question of secession raises itself in the context of minorities. The assertion of a legal right usually presents itself as an argument that a group has been discriminated against. This is particularly true in the constitutional arena, where a claim of discrimination generally follows the same format. 1) Since other individuals or groups enjoy a particular prerogative, and 2) since the party before the court shares the relevant characteristics of those individuals or groups, 3) the law must grant it the same prerogative. The essence of the claim is the contention that individuals or groups with the same essential features have not been treated equally.

There is nothing legalistic in the distinction between a moral and a legal right to secession, or the decision to place a higher burden on a minority in a legal forum. There are many questions of degree and it is evident that a legal right to secession would only arise in cases

of pressing and substantial inequality, where a minority has been oppressed. It would be a mistake to try to specify the precise inequality which would give rise to a claim of discrimination that was sufficient to justify a legal order in favour of secession. This is in keeping with the general practice of the common law courts, which only discuss such issues after they have made a finding of facts which require them to do so.[239]

This is a much broader issue, in the context of secession, than it is in a normal legal context. The argument on secession is simply that a state must treat majorities and minorities equally and that the right to secession arises when the state fails to do so. This raises a question of discrimination: the focus of the legal inquiry is not the nature of the inequality, but the burden which it imposes on a member of the minority. At some point, the discrimination which gives rise to a claim of secession is oppressive, and at some point, the oppression is of such a substantial nature that the person or group is entitled to reject the authority of the state. Perhaps the most obvious example in recent years was the Indonesian government in East Timor, which facilitated the violence of the pro-Indonesian militias.

One of the problems in the area is that the term "human rights" seems problematic. There may be issues as to what constitutes a "human being", or whether the rights which we normally attribute to human beings derive from other sources. It is the concept of the person which is momentous, legally, since legal rights and obligations have historically been attached to the concept of persons. As a result, the French term which is commonly used in the area, *les droits de la personne*, seems preferable to the Anglo-American phrase. The legal issue is a question of status, more than anything else, which calls for a different kind of analysis than the ontological, religious, or biological issues.[240] There is a primary sense in which it is individual rights which concern us, albeit individual rights which are exercised by the members of a minority.

The same kind of issue arises in the liberal literature, which generally adopts the view that any legal or political right of secession must be premised on a moral right of secession.[241] Although it is usually accepted that the right to secession is a group right, many authors would insist that this kind of group right should be seen as an adjunct of individual rights. The matter might seem simpler in the legal realm, since a legal right to secession can only be exercised by groups. This is Buchanan's argument:

> If an individual right is one that . . . can be exercised independently by an individual, then the right to secede . . . is not an individual right. Its exercise requires collective action, even though we can speak of the individual rights that members of the group have to participate in that collective action.[242]

Nonetheless, there is a sense in which it is individual rights which concern us on secession. That is because it is individuals who provide the unit of experience in society and suffer the brunt of the oppression against a minority. If it is minorities and groups which are the targets of genocidal state practices, the brutal ontological fact is that discrete persons die.

It is now accepted that personal rights, usually described as "human rights", are foundational. They do not require any further justification, at least in the West, and appear to be morally self-evident. It is exactly this characteristic which gives them the extra-constitutional status which is needed to decide the legal question of legitimacy. We need to distinguish between the legal and political aspects of legitimacy in this context, and it is notable that the concept of personal rights will often conflict with a principle like majority rule. That is because it is an overtly ethical concept, rather than a political one. It therefore provides the moral content needed to instantiate a legal principle of legitimacy, and seems well-designed to provide the necessary corrective to the democratic principle in the context of secession.

There is another factor which is important in a legal context: the modern concept of rights is inclusive and open-ended and it is impossible to exhaustively determine what constitutes

a personal right, or whether new categories of rights might be used to justify the actions of a minority in seceding from a larger state. This is an advantage, however, in a legal context, since the courts need some room in which to tailor legal concepts to the circumstances that arise in specific cases. The concept of personal rights merely provides a yardstick, by which we can measure whether the state has acted justly in a particular set of circumstances. It would be a mistake to confine the meaning of a term like "oppression" or "illegitimacy", legally, without considering the implications of such a move on specific cases.

Although it is not possible to enter into the debate as to which rights qualify as essential personal or "human" rights, Allen Buchanan seems right in arguing "that there are some candidates for inclusion in the list that are relatively uncontroversial because they are supported by a wide range of moral theories and traditions of ethics."[243] For the most part, Buchanan adopts the set of rights espoused by John Rawls:

> These include the right to life (understood as a right not to be unjustly killed), a right to liberty that at least encompasses freedom from slavery, from involuntary servitude and forced occupations, a right against religious persecution, and a right to the material conditions of subsistence. I have argued elsewhere that this list should be expanded at least to include rights against discrimination on grounds of gender, race, ethnicity, nationality, and religion, and this expansion accords with the mainstream of modern human rights doctrine as embodied in international law. (6)

Even in those instances where it is contraventions of the right to life, liberty and security of the person which provide the immediate cause for concern, it is the question of discrimination which seems pivotal. It is not the fact of oppression which gives rise to the right of secession, but the fact that the oppression discriminates against a particular group, with the natural right to form its own state.

It is necessary to develop a more integrated view of personal rights, in the philosophical arena, which deals more satisfactorily with the wide range of claims which have been advanced

under such a designation. One of the problems that requires more attention, philosophically, is the conflicts which arise between competing rights. As the Canadian jurisprudence illustrates, constitutional guarantees protecting freedom of expression will naturally impinge upon a minority's right to preserve its language and culture. It is inevitable that an individual's right to property will conflict with another individual's "right" to equality of opportunity.

It is neither feasible nor realistic to place restrictions on the infringements of personal rights which might provide the basis for a claim that a state has oppressed a minority and lost its legitimacy. Still, the distinction between individual and group rights seems to dissolve in this context. There is a sense in which the personal rights of individuals are often more compelling than other rights. Such rights include legal protections against torture, indiscriminate crimes of violence, and the basic right to life, some degree of liberty, and security of the person. As a result, they provide the most likely examples of a cause of action in secession. These rights cannot be given legal recognition without an additional right of due process, or "fundamental justice", as the term is used in instruments like the *Canadian Charter of Rights and Freedoms*.

Having said this, there may well be social, cultural and political rights which might activate a legal right to secede. A minority which was denied the right to vote and participate in elections, for example, would seem to have a *prima facie* case of oppression. There is no need to restrict such rights to individual rather than collective rights and this might include some form of a right to self-determination. There are more concrete group rights, certainly, like the right to certain schools, the right to public services, or even the right to a fair share of a federal budget, which could conceivably give rise to a right of secession. The academic distinction between negative and positive rights is of little help in this context and the relevant question seems to be one of exigency.[244]

Although Buchanan is concerned about procedural fairness, the rights which concern him are substantive and rest on the assumption that human beings are substantively equal. This is evident in the fact that he argues for an institutional morality which is "significantly teleological" and sees basic human rights as a necessary good in any human society. (19) In that sense, at least, the rights which accrue to persons are not a matter of agreement and the position which he takes provides an alternative to the contractual view of international relations. This view attempts to show that reasonable nations would naturally agree to some form of equality, which permits them to pursue their own affairs without interference from other nations.[245]

The problem is that the Westphalian view cannot ensure the equality of individuals within the state and many states have flagrantly abused the rights of minorities. The other problem is that The events which give rise to immediate concern are the events in East Timor, Kosovo, Kurdistan, or, less recently, Biafra, where there are grave human rights abuses. As the Economist reported, at the end of 1998:

> Since 1945 there have been around 100 serious armed conflicts in the world. It would be difficult to name many that did not involve some war crimes or crimes against humanity. In the past decade alone, conflicts in Somalia, Rwanda, Bosnia, Chechnya and Sri Lanka have all involved the large-scale murder or mistreatment of POWS, attacks on civilians and atrocities. (11)

By any conceivable definition, the actions of a state which permits the rape and murder of a minority are oppressive and discriminatory. These are the situations which need to be addressed before considering more difficult circumstances.

Here we immediately run into uncharted problems. That is because there is no skirting the fact that the problem in dire cases is one of process. There is no legal means, in the present international order, of resolving such issues. The first step in the development of a legal theory of secession is accordingly to set out a legal machinery to resolve such conflicts. From the

perspective of this discussion, it seems sufficient, as Buchan suggests, to start with the most common case, which "seems to be something like that of a national minority with group-claims against the majority nation-state in which it finds itself."[246] The more complex claims can be dealt with by way of analogy or an extension of the same principles.

Chapter 8. A Legal Right of Secession

Introduction

A legal theory of secession needs to satisfy two requirements. It needs to set out a principle of legitimacy that gives us some means of determining when there is a legal right of secession and when the right can be exercised. This will establish the standard which would be applied in specific cases. The second thing a legal theory needs to do is identify the source of the jurisprudence that would be needed to interpret and apply such a principle.

The first issue which needs to be addressed is the principle of sovereignty. This principle has a factual and a normative component. The factual component of the issue derives from the fact that the world is composed of recognised states, which theoretically exercise the sole authority within their internal affairs. This provides a relatively stable system in which political power can be exercised. As a result, there are practical factors that militate in favour of maintaining the present system and a legal theory of secession should contain a presumption of legitimacy which favours existing states.

There is a neglected issue here, however, which relates to the integrity of domestic legal systems. There is a sense in which territory is the decisive issue, since a legal decision in favour or against secession will have to address the legitimacy of the state's title to territory. It is the state's claim to jurisdiction which matters, however, and the significance of the issue of territory derives from the fact that the legal jurisdiction of a state was based, historically, on its control of the land within its borders. The word "control", in this context, does not refer to the simple ownership of land, so much as the right to the government of a particular territory.

The fundamental normative observation is that the efficacy of the law derives, to a large extent, from the certainty of the political and legal orders. On the philosophical side, the issue

accordingly lies in maintaining the authority of legitimate states, which is necessary to maintain the stability of the legal order. This is the problem with those theories of secession which are based on the right of self-determination. These theories rest the concept of legitimacy on the consent of individuals and do not deal with the legal question of legitimacy. The difficulty with this position, legally, is that it fails to recognize the title of a just state, which retains the right to government unless it acts in a manner that compromises its legitimacy.

It is the remedial theories in the literature which provide the natural basis for any legal theory of secession. This is because the basic premise of the remedial approach is that we have an interest in maintaining the integrity of sovereign states, which can only be challenged in circumstances that draw their legitimacy into question. There are two aspects to such a principle. One is that the legal authority of the state over individuals and groups is legitimate and gives it legitimate powers. The other is that the state receives the warrant to exercise these powers from a legal source, on the express condition that it exercise them in accordance with the principle of justice. This isolates the principle of legitimacy, as the deciding issue in determining whether a minority has a right to secede.

There is enough in this analysis to give us a legal theory of secession, which would recognize a right of secession when the state fails to govern in accordance with the principle of justice and the principle of legal equality. The analogy with the law of contracts is helpful: if the state breaches its fundamental obligations to a minority, the minority may elect to terminate the existing contract. It is apparent that secession is only one of the possible remedies, in dealing with situations where the state has acted outside the scope of its legal mandate, and the substantive cause of action in secession is oppression. Indeed, the moral force of the argument for secession suggests that minorities are entitled to other remedies in situations where secession

is not a practical alternative.

It also stands to reason that it is only a substantial breach of the principle of justice which will justify a remedy like secession. This explains the importance of the concept of oppression, which provides the natural standard for any legal action in secession. There is a difference, however, between the legal and philosophical understanding of such a concept. The courts rely on the ordinary meaning of fundamental terms and do not deal with theoretical concerns outside the context of specific cases. This is a reflection of the pragmatism of the law, which makes use of moral principles, not for their own sake, but as a means of ascertaining what is just in a particular set of circumstances. The courts rely on the plain meaning of important terms and avoid philosophical speculation, on the assumption that such terms are foundational. Rather than restrict the scope of the law, this leaves the substantive framework of the law open to exploration, and capable of continual extension, in the light of new facts.

The essential argument is that a minority which has been oppressed by an overholding state has a legal right to secede. The actual decision to secede remains a political decision, however, and can only be decided in the political arena. This does not mean that it is free from judicial scrutiny, and any process which is used to decide such a divisive issue requires legal supervision. This raises a separate head of jurisdiction, under any legal theory of secession, that extends to the decisions made solely in the political realm. An independent electoral decision, made by referendum, cannot be decided without some recourse to a body with the authority to decide the substantive and procedural questions which arise in the context of any process of secession. This is a product of the limitations of the democratic process, which is not well suited to decide the legal question of legitimacy. There will always be a need for an impartial umpire, outside the political process, to settle the disputes which arise between the competing parties.

The second goal of any legal theory of secession is to establish the source of the jurisprudence that would need to be developed in the area. The overriding legal question, in determining the origins of any jurisprudence, is where a right to secession might be grounded. There are two fundamental alternatives: one is to recognize such a right within a constitutional framework. This is not a feasible solution, since there is nothing in a constitution which can legally bind successor states or govern the *interregnum* in which the process of secession will take place. The other alternative is to recognize the legal force of an extra-constitutional moral order, made up of general moral principles, which are binding on legitimate states.

Discussion

The first consideration that needs to be taken into account, in developing a legal theory of secession is the principle of sovereignty. There are two aspects to such a concern: one is the simple fact of sovereignty; the other is the need for such a principle, in maintaining the legal order.

The fact of sovereignty

Any realistic theory of secession must recognize that the international political order is premised on the existence of independent states, whose primary interest is to maintain their own authority. This is not a fact which will go away and there is little reason to pursue theories which fail to acknowledge it. The international order may have its deficiencies. But there is some sense to it, at least historically, and it seems naive to treat it as an arbitrary arrangement that can be dismantled without major social upheavals. Christopher Wellman's contention that "many" groups have a right to secede "even in the absence of past injustices" simply fails to acknowledge the social and political dynamics of sovereign states.[247]

Allen Buchanan writes that there are sound moral reasons to support the territorial

integrity of states:

> . . . the recognition of that principle in international law and political practice promotes two morally important goals: (1) the protection of individuals' physical security, the preservation of their rights, and the stability of their expectations; and (2) an incentive structure in which it is reasonable for individuals and groups to invest themselves in participating in the fundamental processes of government in a conscientious and cooperative fashion over time.[248]

There is accordingly much to be said for retaining the ordinary powers of the state. This is not a simple matter of serving the self-interest of existing states. In cases where a fundamental question of injustice does not arise, the balance of convenience seems to tilt in favour of the existing state.

There are troubling questions about adopting any theory of secession based entirely on freedom of association, since that would undermine the existing notion of sovereignty. As Wayne Norman writes, any attempt to institutionalize a pure choice theory "would almost certainly spell the end to the system of states as we know it."

> . . . most states, including the majority of currently undemocratic states, would likely be torn asunder by opportunistic secessionist movements -- *including many for which there would have been no natural impetus in the absence of the currency and enforcement of the choice theory itself.* I think this would be so catastrophic in terms of human lives and well-being that the states making international law would never permit it; and not just out of cynical fears for their own dismemberment.[249]

We should be wary of any attempt to let unrestrained choice determine the political order. There is no question that the notion of sovereignty, which allows the state to preserve itself, increases the stability of most societies. Unless we introduce other kinds of criteria, there is nothing to prevent such a principle from leading to the complete disintegration of the state system.

Lee Buchheit catalogues the "fear" of secession under six headings, at least four of which reflect the uncertainties which would accompany any erosion of the principle of territorial integrity.[250] Allen Buchanan appears to see this as the most serious objection to theories of

secession based on self-determination.

> Primary Right theories are not likely to be adopted by the makers of international law because they authorize the dismemberment of states even when those states are perfectly performing what are generally recognized as the legitimating functions of states. Thus Primary Right Theories represent a direct and profound threat to the territorial integrity of states--even just states. (45)

The problem with institutionalising such a theory is that it is likely to precipitate a wholesale fragmentation of states with an acceptable record of justice, tolerance and human rights.

This kind of criticism would seem to undermine any argument for a legal right of secession based on the moral right of self-determination. Copp side-steps the issue, however, in "International Law and Morality in the Theory of Secession", by arguing that such a right would not affect the principle of sovereignty. "[I]t is no part of my proposal", he writes,

> that a country that ignored the International Court [of Justice] in such cases would lose its sovereignty. My proposal does not increase the enforcement powers of the Court or of the United Nations. It simply adds secessionist crises to their areas of jurisdiction. (238)

Copp has no difficulty with the fact that states are not required to submit to the jurisdiction of the court.

> One might think that the Court ought to be given the power to compel states to accept its jurisdiction, but unless this change were made, there would be no requirement that a state submit to the Court on matters of secession. And the issue whether this change in [the] powers of the Court ought to be made is separate from the issue whether the Court ought to be given a role in disputes about secession. (236)

The problem is that this is would create little more than a notional right, which is of little assistance in the pressing cases which call for a moral remedy.

There is no doubt, as Norman observes, that the history of violence which often accompanies movements for secession would seem to justify a general presumption against it. The most obvious illustration of this in recent memory was the break-up of the former Yugoslavia. As Antonio Cassese writes,

> It is well known that in Croatia and Bosnia-Herzegovina, as well as in a few former Soviet republics, secession has rekindled old hatreds and led to *loathsome* bloodshed. The realization of self-determination, instead of gradually unravelling old inter-ethnic enmities and solving deep-rooted conflicts, has triggered a settling of accounts that has been ferociously carried out by force of arms, thus resulting in the negation of the very essence of self-determination.[251] (273)

The most momentous criticism of a loosening of the reins may be that the availability of a remedy like secession reduces the incentives for participating in the ordinary political process of the existing state.[252] From a practical perspective, it may simply be that people who are forced to live with one another are forced to curb the excesses of their emotions.

It is notable, in this context, that the status quo does not always benefit the existing state, since there are legal obligations on a state to maintain its territorial integrity. Buchheit, for example, writes that states do not have an unfettered right to relinquish territory or cede it to another state without the consent of the people leaving in the territory.[253] Antonio Cassese takes a similar position.

> Neither State practice nor resolutions adopted by the United Nations or other intergovernmental organizations has recently laid special emphasis on the principle that in the case of a transfer of territorial sovereignty by one State to another, the wishes of the people concerned should always be taken into account. This however does not mean that this has been discarded or neglected by States or international organizations. The truth of the matter is that the concept was simply regarded as obvious . . .[254]

This appears to be a place where consent determines the legitimacy of the state's actions. A state cannot legitimately divest itself of the burden of government without the permission of the individuals and groups living under its jurisdiction.

The integrity of the legal system

This raises a neglected consideration in the literature. That is the importance of maintaining the integrity of the legal system. Copp recognizes this issue when he writes:

> States are important because of the benefits that a legal order can bring to society, and the success of a legal system does depend on the state's having effective jurisdiction over its

territory and on its continuity over time.[255]

The sovereignty of the state is significant, in this context, because it secures the authority of the legal order which it underwrites. The problem with a right of secession, from this perspective, is that it undermines the authority of the system.

Placing secession within easy reach would accordingly undermine the domestic legal order and introduce a dangerous element of uncertainty into many decisions concerning the rights and status of individuals. Buchanan goes some way towards recognizing this in "Theories of Secession":

> Individuals' rights, the stability of individual expectations, and ultimately their physical security, depend upon the effective enforcement of a legal order. Effective enforcement requires effective *jurisdiction*, and this in turn requires a clearly bounded territory that is recognized to be the domain of an identified political authority. Even if political authority strictly speaking is exercised only over persons, not land, the effective exercise of political authority over persons depends, ultimately upon the establishment and maintenance of jurisdiction in the territorial sense. (47)

This is in keeping with the history of the common law. In spite of the recent attempts by states to extend the jurisdiction of their courts to offences committed in other countries, domestic courts generally exercise their powers over individuals by virtue of the fact that a person is within the territory over which the court has jurisdiction.[256]

If we wish to maintain some semblance of a legal order, the continuity of legal claims needs to be protected. The ownership of property, for example, is usually decided by the passage of title from one owner to the next, in a chain of transactions ultimately devolving from the sovereign. This can be traced to the hereditary conception of legitimacy: when there are two competing claims, it is the claim nearest the sovereign which takes precedence. The essential question is one of certainty: this gives us a way of definitively deciding who has the superior claim. As soon as the sovereign power is disrupted, this is lost, and there is nothing in which to

vest a legal title. The significance of such a factor should not be understated, from a practical perspective, if we are to secure any degree of justice in the ordinary affairs of life.

In theory, at least, we are returned to the state of nature, in which claims under the previous legal order have no authority. There is some sense, at least, in which sovereignty merely refers to the inherent power of the state, which keeps the moral framework of the existing collection of rights, privileges, obligations and responsibilities intact. The philosophical question is whether we need to maintain the traditional concept of sovereignty, in order to preserve a reasonable degree of order in society.

Legitimate states

The second aspect of the question of sovereignty is more philosophical and resides in the very nature of political authority. Sergio Cotta tells us that medieval thinkers distinguished between justifications of the origins of power (*quod titulum*) and justifications of its exercise, over time (*quod exercitium*). This is a helpful distinction: although the two issues may overlap, it is the second issue which concerns us on the legal question of legitimacy. That is because there is a legal and moral presumption, all things being equal, in favour of the status quo.

As Lee Buchheit writes, this is reasonably well expressed in the legal maxim, "*pacta sunt servanda*" which expresses "the rather rudimentary proposition that, all things being equal, contracts should be kept."

> The import of this principle to the social contract is clear. When a number of groups band together . . . they commit themselves to stand by their agreement and remain loyal to the social entity in return for the benefits of life in the larger association. (21)

The implication is that any unilateral decision to secede is unfair, since other groups are entitled to assume that the state will continue to exist. The seceding group has no right to disrupt the continuity of the legal order without taking the interests of other groups and individuals into

account.

As we have seen, the two positions in the current literature of secession appear to operate on different premises. The basic premise behind the remedial position is that we have a general interest in maintaining the territorial integrity of the state, which can only be challenged in those circumstances where a state seriously defaults on its moral obligations. One of the philosophical tenets underlying such a position appears to be the observation that an individual has no choice but to accept the reasonable constraints of the larger community in which he finds himself. This encapsulates the traditional view of the law. Unlike much of the contemporary philosophical literature, the law operates on the premise that the state possesses some legitimate authority over the individual, with or without the consent of the individual. The primary legal fact lies in the existence of the sovereign power. This is the source of the legal order, and the rule of law, which cannot be disrupted without a legal state of revolution.

The law accordingly rests on the presumption that the authority of an existing state is legitimate. This authority comes with important reservations, nonetheless, which reflect the constraints imposed on the state by a community's conception of justice. From the latter perspective, the question of legitimacy would seem to arise in those situations where the state overreaches its authority. There is a point, certainly, where laws are so unjust or unreasonable that the individual is morally obliged to disobey the law. We can go much further than this, however, since most states are subject to the limitations of a written constitution. The failure of the government to respect those limitations may invalidate a particular law and give individual citizens a legal or constitutional right to disobey an unjust law.

It is notable that this right of disobedience, if that is the appropriate term, is premised on the general principles which we find in constitutional enactments and cannot be distinguished

from general moral prescriptions. This constitutional process provides a useful dynamic for determining whether a state has a legitimate claim to the authority which it exercises over citizens. Against this, there is the position taken by those authors who base the right of secession on the right of self-determination. These authors generally accept the liberal view that the state derives its authority from the consent of the individuals under its jurisdiction, rather than the existence of a sovereign power. It is the moral autonomy of each individual that gives rise to a democratic right of self-determination, through which individuals, acting collectively, grant the state the authority to exercise the state prerogative.

A number of authors have accordingly argued that any rights held by groups, or the larger community, can be traced to the personal right of individuals to freedom and autonomy. And if we take such a position, it seems evident that the state derives its authority from the fact that individual citizens have, freely and independently, given it the licence to govern. This reflects the fact that most of the contemporary work in political theory is at least implicitly atomistic: as Donald Horowitz has remarked, "sharply individualistic justifications of a collective right to secede appear to be ascendant." (198) From this perspective, secession is merely a convenient means of repairing the infringement of a collection of individual rights. It is the fact that the individual rights of the people within a group have been infringed, rather than the existence of the group, which gives the group a collective right to remove itself from the jurisdiction of the overholding state.

The second position is significant, as Christopher Wellman writes, because it does not restrict the right of secession to those situations where the restraints imposed on the individual become unreasonable. The right of political self-determination is meaningless without some freedom of association, which permits individuals to choose who they wish to associate with

politically. This view is reflected in the theoretical work on legal and political obligation, which generally focuses on the question whether the individual has agreed to be bound by the political or legal restrictions which the state has placed upon him. The ontological issues which arise in such a context have already been mentioned.

Legally, the important question is one of temporal priority. One of the major problems with such a position is that it does not seem possible to give the individual any moral or political prerogatives without assuming that the community already exists, since it is the community which grants the individual those prerogatives. The evolution of our rights seems significant here. We are born into families and our parents generally retain their authority over us in childhood, unless they exceed the standards set by society. This authority is lost over time, as an individual approaches and enters adulthood, but our ability to choose the people with whom we associate always remains subject to political and legal restrictions. There is never any situation in which the freedom to associate is not subject to reasonable constraints.

This does not do away with the volitional issue, since individuals retain the right to reject the authority of the state when it places manifestly unjust restrictions on their personal liberties. Although this can be seen as a withdrawal of consent, there is no reason why this kind of right needs to be predicated on the existence of consent. This is a pivotal issue, legally if not morally, and these kinds of arguments suggest that any legal right of secession will depend on whether individuals are entitled to reject the authority of the state. It is important to separate two cardinal issues, here: one is whether individuals consent to the authority of the state; the other is whether they have the right to revoke that consent. It is the second question that raises the legal issue of legitimacy.

The distinction between the two issues is reflected in the common law. A contracting

party's right to rescind a contract only arises if the other party has already acted in such a way as to repudiate the contract. This may be a question of neglect, as shown by the second party's refusal to perform its fundamental obligations under the contract. This gives rise to a right of election: the first party can then elect whether to terminate the contract, or maintain the existing agreement and sue for damages. Once a minority has established oppression, which constitutes a fundamental contractual breach, the issue is whether it wishes to seek redress within the existing state. This seems to take us into contractual principles, which hold that it has no obligation to accept the assurances of a state which has already failed to meet its equitable obligations.

The analogy with the case of secession is plain and does not require elaboration. The essential analysis holds, moreover, with or without the formalities of a constitutional document. However these questions arise, however, it is worth stating that there are many technical issues which might arise in this kind of context. In some circumstances, for example, there may be a legal question whether the state before the court is the same state that oppressed a minority. It may be argued, as a result of constitutional changes, that there is no continuing identity, through time, which makes the respondent state responsible for the actions of its predecessor.

Separating the cause of action and the question of remedies

This isolates the question of legitimacy, as the deciding issue on the question of secession. It will be apparent, however, that secession is only one of the means of dealing with those situations where a state can no longer legitimately claim the sovereign power. Consider the case where a state receives the support of a majority of its citizens because it has persecuted a particular minority. If these individuals are dispersed throughout the territory, there is little, short of external compulsion, which can compel it to respect their rights. The importance of the example is that it demonstrates how the question of legitimacy raises itself in situations where

there is no feasible right of secession.

The availability of a remedy like secession does not affect the moral rights of the individuals or minorities who are oppressed by the state. In point of fact, their moral claims are probably more pressing than the claims of a minority which happens to be collected in a particular territory and is in a position to secede. The same cause of action, in oppression, would appear to lie in both cases, and it seems difficult to give a court the authority to decide secession without giving it at least implicit authority over other wrongs committed by the state. A right of secession is a remedy, more than anything else, and should probably be seen as one of a number of subsidiary rights which might be available when a state acts outside the scope of its legitimate authority. The narrow question of secession will only arise in those circumstances where there is a viable territorial claim.[257]

This tells us a good deal about the nature of any legal right of secession, which functions more as a remedy than a cause of action. The legal right of secession is a right to withdraw from an association, rather than a right to form a new association. This is a secondary right, in essence, which is incidental to the rights that arise from the state's obligation to exercise the prerogatives of government in accordance with the principle of justice. The moral obligation to redress an injustice arises whether a minority is dispersed throughout the state or concentrated in a particular territory. The substantive right is the same in both cases: it is merely that the division of territory will not rectify the injustice in the former example. This demonstrates that an order of secession would only lie in a situation where there was a set of practical circumstances, which made it possible to identify a minority and a territory that could feasibly be separated from the existing state. This is where the legal rather than the philosophical considerations enter into the subject of secession.

There are differences between the legal and the philosophical account of legitimacy, in this context, since the legal concept is forced to deal with evidentiary and procedural considerations that do not arise in the philosophical inquiry. Although it is the failure of the state to fulfill its obligations which gives rise to the right of secession, the proof of a negative assertion is inherently difficult in an evidentiary forum. It is far more convenient, from a probative standard, to prove the positive assertion that a minority has been oppressed, than it is to prove that state has failed to respect the subsidiary principle of equality.

It is probably impossible to determine, in the absence of a specific set of facts, the precise point when a state has lost its right to exercise the legal powers of government. Nonetheless, if a legal theory is going to preserve the powers of legitimate states, a legal right of secession will only arise in circumstances where there is a pressing and substantial breach of such a duty. This brings in the concept of oppression, which holds that some degree of exigency is necessary to trigger such a significant right. This kind of standard is also in keeping with the spirit of the right to self-determination in international law, which arises in the instance of colonial domination by a foreign power. The primary reason to adopt such a high standard, however, is that secession is an extraordinary legal remedy, which calls for demonstrable proof of injustice.

This raises a central legal issue, which is what constitutes oppression? The use of such a term in an ethical and philosophical context is merely instructive in this context. Iris Young, for example, writes of "five faces of oppression" -- "exploitation, marginalization, powerlessness, cultural imperialism and violence"-- in discussing the feminist concepts of racial and sexual oppression.[258] She suggests that these may be used as criteria to determine whether individuals or a group has been oppressed. This kind of discussion might implicitly inform any legal or political discussion of the issue, but the issue in a legal forum is far less theoretical. As a general

rule, the courts avoid commenting on the meaning of terms unless they are required to do so, and *obiter dicta*, unnecessary statements of opinion, do not bind other courts.

When Henry Sidgwick used the term "oppression" as a possible justification of secession, he did so on the assumption that the ordinary meaning of the word was self-evident. This is apparent in many constitutional concepts, such as "freedom of expression" or "fundamental justice", and it is exactly this characteristic which gives them the capacity to establish the moral circumstances that might give rise to such a right. The natural comparison is probably with primitive terms in the area of ethics, which are probably incapable of definition. This does not deprive them of meaning: on the contrary, it demonstrates that we cannot discuss moral issues without making use of the basic concepts to which they refer. Much the same argument applies in both instances: it is the certainty of general constitutional principles which is important in a legal forum and there is no reason why we need a precise position, morally or legally, to develop a functional jurisprudence.

The legal inquiry into the meaning of a term like "oppression" is a factual rather than a philosophical endeavour. This introduces a methodological issue into the inquiry: however unsatisfying it may seem, philosophically, it is important to leave the theoretical underpinnings of terms like "oppression" open-ended in a legal context. This leaves the scope of such concepts relatively unfettered, and reflects the instrumental nature of legal theory, which is open to continual elaboration. The substantive content of any right of secession can only be worked out over time, by an examination of the facts of individual cases. Nor is this restricted to the common law tradition, since any jurisprudence will be continually forced to tailor the concepts which it uses to the facts which arise in novel cases.[259] The courts are primarily interested in moral principles as a means of assessing the importance of different issues in the cases which

come before them and the ultimate issue is whether a particular resolution of a case meets the ends of justice.

This is a pragmatic approach: theory is never an end in itself and should not be developed in the absence of facts which require such an elaboration. The law generally applies legal theory to more egregious examples, where there is a wide consensus, and then extends the principles developed in such circumstances to increasingly difficult examples. This is a more cautious approach than is found in philosophy and comes from the fact that the decisions of the courts have practical consequences, often unforeseen, which force any conscientious judiciary to express itself with considerable reservation. In the context of a theory of secession, this means employing a concept like oppression in situations, such as genocide, where a state has manifestly contravened the principles of justice. It is only from there, that a court needs to work out the implications of such a doctrine in the more difficult examples which might arise in the instance of implicitly racial policies or discrimination in the provision of public services.

As the discussion in the present chapter illustrates, the idea of oppression is bound up with the idea of a burden. There seem to be two aspects to the question: a minority is "oppressed" when it is 1) treated adversely, in a manner which is fundamentally and substantially different than the way in which the majority is treated; and 2) when it suffers a burden as a consequence. This is a question of proportionate equality: it does not mean that every group must be treated in exactly the same way. If the burdens in society are distributed improportionately, the laws which enforce such a discriminatory regime are contrary to the general principle that the burdens and opportunities in society should be equally shared.[260] At some point, it is evident that the distribution of rights, prerogatives, interests, benefits, duties or burdens is so disproportionate that it can be characterized as oppressive.

It is only in these circumstances that a minority would be in a position to claim a legal right of secession. It is apparent, moreover, that the answer to the question of what constitutes "oppression" lies primarily in the concept of legitimacy. If it is a substantive notion of equality which provides the relevant standard of legitimacy, the conduct of the state will be oppressive when it disregards the minimal requirements of such a standard. This would presumably take us into some analysis of the nature of an "undue" burden on a minority, an analysis which has many sources in the constitutional jurisprudence in North America and Europe.

The Political Question

This is only one aspect of the question of legitimacy, however, and leaves open the political side of the issue. It is the political question which comes logically within the scope of our freedom of association and should be decided in a political forum, outside the legal process. Although it is subject to many complexities, the political question is bound up with questions of choice and preference, and cannot be decided by the simple application of moral principles to established facts. The matter is complicated by the fact that the claim will often arise in a situation such as Quebec, where the group in question already enjoys some form of self-government. The question in such an instance is not so much whether the group has the right to govern itself, as the extent of such a right.

A legal ruling would normally go no further than a ruling that a referendum be held, in order to ascertain the wishes of the parties. The legal question is whether there is a right of secession: whether the group wishes to exercise that right is another issue entirely, which arises in a political forum. The political issue generally raises speculative questions, which impinge on personal interests, and should be decided by the individuals affected by them. The strongest force of the argument for a referendum may lie in ascertaining whether the wishes of the

individual members of a minority correspond with the wishes of their leaders.

Although there will be moral considerations which arise in a political context, the moral argument is not precisely the same in the legal and political context. From a political perspective, it is probably enough to say that a state becomes illegitimate when it loses the confidence of the electorate. This presumably occurs when it fails--conspicuously fails--to meet the needs or expectations of individuals, whether those needs derive from their status as individuals or their membership in groups. This is an issue which can only be settled by a democratic process, though there are many situations where the necessary lack of consent can probably be inferred from the circumstances of the case.

In those cases where there is a claim of secession arises in the political realm, independently of the legal process, there will still be a role for a court with a supervisory jurisdiction over the political process. This is essential to correct the moral deficiencies in the political account of legitimacy, which takes us into all the problems of a majoritarian democracy. A referendum seems unlikely, for example, to determine whether the new states will respect the rights of minorities. There may well be instances, as Horowitz suggests, where the possibility of intolerance constitutes one of the major attractions of secession.

In any event, a legal regime is necessary, if only to referee the relevant political contests. There is the distinct, procedural problem of deciding which population, in which territory, should be consulted. There is also the problem of tallying the votes in any referendum, which requires the supervision of a third party. Even if all of the relevant parties agree that secession is appropriate, there will be issues on which they disagree, and an adjudicative process will be needed to resolve disputes. The kinds of issues that would naturally come before a court are whether the people within a group, as identified by the court, are in a position to exercise such a

choice, whether they have exercised it fairly and properly, and whether they are entitled to particular remedies.

For these and other reasons, a political solution, on its own, will never be sufficient. It will still be necessary to determine when a political right arises and how it can be exercised. These kinds of issues take us beyond the question whether a particular minority wishes to secede and are difficult to decide in a partisan political forum. Even if one advocates such a solution, it will be necessary to provide some form of recourse for a party which feels that it has been treated in a manner which is manifestly unfair. It is irrelevant, in this context, whether one subscribes to a democratic resolution of the issue or not.

It will be apparent that this raises a second head of jurisdiction in the context of secession. By any account, a court with the authority to decide whether a minority has a legal right of secession needs a procedural authority, to decide the issues which will arise if it refers the matter is to the political realm. There is no conceptual reason, however, why this authority would not extend over independent referenda and other events occurring entirely within the political arena. The decision of the Supreme Court of Canada in the *Secession Reference* demonstrates that a minority cannot circumvent the restraints of justice, merely by choosing to deal with the issue in the political realm. This suggests that a court with jurisdiction over secession needs inherent jurisdiction, to deal with the full of range of possibilities which might arise in such an instance. The natural standard in such matters is fairness, which is widely used as a legal standard in procedural matters.

Possible Sources of a Legal Right of Secession

This raises the second consideration, in developing a legal theory of secession, which needs to identify the origins of any right of secession in the area. The major difficulty in

providing a viable theory of secession, from a legal perspective, is that such theories cannot stand on their own. As a matter of practice, the legal order does not derive its authority from itself. It has its pedigree in some other source, whether it is the natural law, a constitution, the political authority of a sovereign, or an elected assembly. The primary question facing any legal theory of secession is accordingly where we might find the legal authority for regulating claims for secession.

There are a number of ways of approaching the issue. The courts cannot operate without a constitutional principle--what H.L.A. Hart described as a "rule of recognition"--which can be used to determine when a law is valid.[261] This will ultimately be decided by determining whether a particular law derives from a valid source of political authority. The question can easily be enlarged to incorporate the constitutional constraints on government. The issue on secession, however, is whether that source of authority is legitimate, and in keeping with the larger moral order, as it is expressed in the principle of justice.

This raises a foundational issue for any system of law. If it is to be binding on a state, however, any decision on secession would need to draw on an extra-constitutional jurisdiction, which only exists, at present, in the larger moral realm. There may be a difference, in this context, between the political and legal conceptions of legitimacy. From a legal and methodological perspective, it does not seem possible to develop a feasible theory of secession without an assumption that it is in the interests of the majority to protect the rights of minorities. Otherwise, constitutional provisions which protect a minority's language, for example, would contravene the democratic interests of other persons in the state.

This is evident in the general philosophical literature, since contemporary authors who trace group rights to individual rights have little choice but to take the position that the decision to

award rights to minorities serves the interests of individuals outside the minority group. This is not possible unless those individuals have a personal interest in the well-being of the minority. The arguments which have been made in advancing the cultural rights of minorities are accordingly significant because they suggest, at least implicitly, that it is in the interests of the whole society to respect the rights of minorities.

There is a practical dimension to these arguments. As the Supreme Court of Canada recognized in the *Secession Reference*, the essential problem which needs to be considered is the rights of minorities. This kind of concern arises on both sides of the question. Lee Buchheit identifies two concerns with regard to the problems experienced in resulting states, either by minorities "trapped" in an unfriendly state or by a majority "stranded" without the resources of the larger state.[262] Both of these areas of concern are notable because they demonstrate the need for a standard of justice which will protect the rights of minorities in the original and the resulting states. This also shows the limitations of a view based on the right of self-determination: it is not enough, in such an instance, that it is in the interests of the seceding group to separate.

There may be cases where a state receives the support of a large majority of its citizens precisely because it has oppressed a minority. There is nothing which guarantees that the will of the majority will always be exercised in a morally defensible manner, and a majoritarian solution is a poor measure of moral legitimacy. As a result, anyone who adopts such a theory will need to introduce legal constraints, in order to ensure that the right of secession is only exercised when it is morally justified. It is these constraints which will determine the essential dynamic of such a theory, rather than its democratic nature. The fact that a satisfactory resolution of a contentious matter is satisfactory from a political perspective, does not demonstrate, in itself, that it is morally legitimate.

The argument against basing a right of secession solely on a democratic basis is accordingly that the legal legitimacy of the political order rests on a supervening moral order. This is ultimately the larger argument behind the introduction of a legal process to determine such claims. A government which seriously contravenes the rights of a minority will lose its legitimacy, even if it has received the consent of a large majority of individuals. The exact demands of the principle of justice cannot be calibrated precisely, but the situations which concern us initially are situations in which a state has oppressed a particular minority. These cases are relatively straightforward, from a legal perspective, since the state has demonstrably acted outside the bounds of its legitimate authority.

A constitutional source

It does not seem possible to find the necessary source of a legal right of secession within the domestic law. Logically, the ordinary law presupposes its own validity and cannot be used to extinguish or overturn itself. There is also a problem of coherence, since one of the axioms of interpretation is that each facet of the law, is consistent with the other facets of the law. Much of the work done by judges in the common law tradition is to reconcile apparently conflicting aspects of the law in a manner which demonstrates the cogency of the whole *corpus* of the law.

The working assumption is that individual laws complement each other and the courts are naturally reluctant to use one part of the domestic law to overturn another.[263] This was enough to defeat the intentions of the *Canadian Bill of Rights*, the predecessor of Canada's *Charter of Rights*, since it required the courts to give a piece of ordinary legislation pre-eminence over other statutes. Since that time, the Supreme Court of Canada has developed the concept of quasi-constitutional law, to overcome such a difficulty, but this is of no assistance in the instance of secession.

If we cannot ground the right to secession in the domestic law, there seem to be two other possibilities. The first is to seek a legal source within a domestic constitution, explicitly or implicitly. This possibility has been canvassed by Allen Buchanan in Secession: The Morality of Political Divorce. This would at least bring the question of secession within a legal framework and provide a relatively peaceful means of settling such disputes.

Wayne Norman discusses the components of a reasonable "secession clause" in "The Ethics of Secession and the Regulation of Secessionist Politics".[264] To begin with, such a clause would have to specify what regions or groups would be entitled to sue for secession. It would then have to formulate the question to be used in any referendum, stipulate the majority needed to win any ballot, and provide for adjudication by a third party as to the terms of secession. This seems perilous, from a political perspective, since the process of amending a constitution to allow for the possibility of secession is a delicate exercise, which may foster exactly that sense of indignation or injustice that gives rise to movements for secession in the first place.

The fundamental problem related to the use of a domestic constitution to regulate claims of secession has to do with the overriding issue of legal competence. From a legal perspective, it seems inherently problematic to ask the parties to a constitutional arrangement to resolve an issue like secession entirely on their own, and much of Norman's argument would seem to support an extra-constitutional solution to the problem. The need for a venue outside the courts, the need for an adjudication by a third-party, the need to set the terms of separation, all seem to take us outside the existing constitution.

The analogy with divorce may has been used too frequently in the literature, but it has its uses, and serves to illustrate the difficulty in this context. A court's authority to dissolve a marriage contract does not derive from the contract, but from the law under which it is made, and

it is not the fact that the parties agree to a particular resolution which invests it with legal authority. A court may approve of such a disposition and incorporate it in the *decree nisi*, but the wishes of the parties are not decisive. This is evident in the fact that the jurisdiction of the court to award a divorce asserts itself in exactly those circumstances where the parties cannot reach an agreement.

This provides a helpful analogy with secession. How can a court with the authority to regulate secession derive its authority from the very constitution which it is rescinding? It is true that the resulting states can ratify any act of secession after the fact, as independent states, but this is of no assistance in determining whether a group is entitled to secede. Nor does it provide us with any mechanism to regulate the hiatus in which the act of secession occurs. There is no clear way out of the problem, unless we accept that the agreement emanates from a higher legal source, which stands above the constitution and the sovereign power.

This point is not as contentious as it may appear. Those authors who make an analogy between secession and divorce have implicitly accepted that we need a legal regime in which to decide such issues. We do not expect the divorcing spouses to police the resulting settlement or mediate the disputes which arise in its interpretation. It is the court which decides who will have custody or access to the child, who will bear the financial obligations, and how or when the decision will be enforced. A court derives its jurisdiction from the legal system, rather than the parties, and is not bound by the fact that the parties agree to a particular resolution, if it finds such a resolution is unjust.

The significant point is that it is impossible to speak meaningfully of divorce without presupposing the existence of an authority beyond the parties to such an action. The same is true of any legal right of secession, which presupposes the existence of a body with authority over the

state and its national minorities. It is true that such a jurisdiction should be exercised with caution, to preserve the viability of government. Nonetheless, it is difficult to see how secession can be dealt with in a legal manner without giving a court a higher authority than the states which have political and legal jurisdiction over the affected peoples.

There is a deeper problem, however, with the analogy of divorce. There is a conceptual problem with the argument that the authority of a court derives, in some way, from the agreement which it has dissolved. That lies in the fact that the sovereign power, as the repository of the political authority of the state, exists independently of a constitution and does not derive from it. This is a complicated matter, historically, since constitutional provisions were first introduced, in England, to restrict the powers of the sovereign. In the American context, it is the people who are sovereign, and the constitution is the product rather than the source of the sovereign power. This places any question as to the mere existence of the sovereign power outside the reach of the constitution.

It is true that there are conventions, outside the legal mechanisms of the state, which place restrictions on the exercise of political authority. This is prominent in the English tradition: since the English law emanates from the sovereign, it has been difficult, historically, to regulate the exercise the sovereign power. As a result, constitutional conventions have developed, in lieu of legal rules, to govern the actions of the crown. Some of the conventions are of enormous significance: it is entirely a matter of convention, for example, that a government must resign on its defeat at the polls.

The problem is that the courts have no authority to enforce constitutional conventions. In *Reference Re Resolution To Amend the Constitution of Canada*, [1981] 1 S.C.R. 753, for example, Justice Martland observed that it was the prerogative of the Crown, in the person of the Governor

General, to dismiss a government, and that the courts could not correct the failure to do so without "creating a state of legal discontinuity, that is a form of revolution." (882) This is because the law, historically, derives its authority from the command of the sovereign. It follows that the courts cannot question the existence of the sovereign power without questioning the source of their own authority. As a result, it seems impossible to regulate claims for secession, even in the most compelling circumstances, without recognizing the existence of a set of extra-constitutional moral principles, which place legal constraints on the legitimate exercise of the sovereign power. These would be general, foundational principles, which can probably be found in any of the major legal and religious traditions.

An Extra-Constitutional Solution

The other possibility is to ground the right to secession in an extra-constitutional body of law, which would bring the political sources of the domestic law under some form of legal regulation. If the principle of legitimacy is to be binding on the original and succeeding governments, it must take its legal force from a body of principle outside the original constitution. Even if secession is permitted under an existing constitution, a resulting state will not be subject to the provisions of the constitution and the restrictions which it places on government. This is also necessary, to cover the lacuna between the expiry of the original constitution and the coming into force of the new constitutional order. It will be apparent that an extra-constitutional court would still be bound to respect the provisions of a domestic constitution, but only in a manner which respects the principle of justice and the extra-constitutional law, and not on issues which go to the question of legitimacy.

This requires major developments in the international law. We have already seen, however, that any right to secession in international law is extremely restricted. As Daniel

Philpott writes, the idea of self-determination

> . . . has advanced little beyond that of an inspired principle, enumerated with others in international covenants. In international legal consensus and state practice, there is no "right" to self-determination (outside the colonial context) strong enough to elicit outside recognition to a people seeking federal autonomy or independence from a state. Self-determination has remained in the long shadow of the stronger principle of state sovereignty.[265]

Although the concept of sovereignty has been weakened, as a result of developments like the creation of the European Economic Community, the North American Free Trade Agreement, or the increased co-operation of the states withing the North Atlantic Treaty Organization, there are fundamental difficulties here.

Philpott takes the position that there should be a presumption in favour of federalism and against secession, in order to avoid the conflict generated by a process which calls sovereignty into question. This is easier to accomplish, at least in many cases, because the internal regulation of the boundaries, division of powers, and terms of a federation does not threaten the sovereignty of the state. It would naive not to recognize that there are potential problems with such a solution, however, precisely because it takes place within the sphere of the overholding state, without the supervision of neutral parties.

The presumption which Philpott adopts is reasonable enough. But there will inevitably be situations where the concept of sovereignty is desperately insufficient, morally, and needs to be ameliorated by the principle of legitimacy. The strongest argument against this is the realistic one:

> The final criterion for international law as an instrument of self-determination is whether it might develop in the conceivable future. The prospect appears unlikely. Conceptually, there is no lack of international legal grounds or bases for it, for several UN documents endorse self-determination along with human rights and minority rights. But the same documents emphasize the value of non-interference as well. What would be needed is not the development of new legal doctrines or rights, but a recalibration of the priority of self-determination with respect to sovereignty. The desire to abridge sovereignty, though, is

precisely what is lacking. (21)

The truth is that the existing body of international law seems unlikely to provide an adequate source for a legal right of secession.

Although the international law is changing, it remains a matter of convention, which derives its force from the fact that states have agreed to be bound the law. Sovereign states are independent actors, much like the individuals envisaged in contemporary theories of the social contract, and are not subject to the rule of a higher moral authority. It is enough to say that international law has developed on the basis that the internal affairs of a sovereign state are not subject to international regulation and this principle, left to itself, is sufficient to prevent the development of any right of secession.

This calls for changes in international law, which recognize the special jurisdiction of legal bodies dealing with violations of basic rights. This has arguably been achieved, to some extent, in the instance of individuals. The statute creating the Tribunal for the Former Yugoslavia, for example, gives the tribunal a personal jurisdiction over individuals who are responsible for the commission of extraordinary offences like torture or genocide. This does not extend to the personality of states, however, and the tribunal does not possess any inherent jurisdiction over the offences in question.[266] It is naive, however, to think that contraventions of human rights can always be dealt with by legal actions or prosecutions directed at specific individuals. There are many situations where it is the state, in its corporate guise, which oppresses a minority.

There is always the possibility of using a body like the United Nations Security Council to deal with such matters, but the Council is a political rather than a legal body. It is not possible to consider the differences between a political and a legal forum at any length. But part, at least, of

the character of the Security Council's actions, derives from the unfettered nature of the Council's mandate. There is no doubt that the *ad hoc* actions of the Council are often motivated by the political interests of the member states, rather than established legal principles. The Council has no real obligation to justify its actions, respect precedent or even maintain the consistency of its rulings. This would arguably interfere with its function, which is primarily to provide a forum for the expression of the political will of the most powerful states. None of this rules out the possibility that there might be a role for a body like the Security Council in setting out a legal framework for secession, appointing a judiciary, or policing international rulings.

The fundamental point is that the political order is not a moral order: it is an order based, in some narrow sense, on a consensus of self-interest. The actions of a body like the Security Council, laudable or not, are not the product of a legal process. The courts are consultative bodies, on the other hand, which are not designed to make political decisions or undertake initiatives, *ab initio*, like a deliberative body. The distinguishing feature of the legal process, whatever its deficiencies, is that it is a reflective process, which forces the courts to provide a rational justification for their decisions, in accordance with incontestable moral principles. The "rule of law" essentially consists of adjudicating the matters before the court on the basis of principle rather than the wishes of the parties. The point, in this context, is that the actions of a court, with all its imperfections, proceeds on the basis of principle. Their proceedings are primarily justificatory: they provide us with a set of reasons why a court feels compelled, as a matter of logic, to reach a certain conclusion.

This is ultimately a professional and a psychological matter: the argument must simply be that the training and status of judicial actors, along with its accoutrements and peculiarities, puts them in a more neutral position than political actors. This is a relative issue, and there are many

policies with respect to the appointment and establishment of the judiciary, which may effect the matter one way or the other. An adjudication--if the term is even appropriate--in a political forum does not subordinate the facts of specific cases to general rules. The political process is partial, by its nature, and does not lend itself to an impartial scrutiny of such questions. There is an important sense, at least, in which political decisions are made on the basis of what is in the interests of the different parties.

This highlights the difference between a legal process, properly construed, and a process of mediation or arbitration. Many of the advantages of an extra-constitutional court derive from the fact that the authority of the court arises from moral principles, independently of the parties. Although any agreements between the relevant parties deserve considerable respect, there are important limits to such a principle, and a court considering a claim for secession should have the authority to overturn any agreement between the parties which contravenes the principle of justice.

The development of a legal right of secession in the international sphere would not replace the political standard. It would introduce a remedial jurisdiction, over the existing political standard, which applies a legal standard in a situation where a state oppresses a minority. It would also give a court the jurisdiction to supervise the political events within the domestic order which might culminate in secession. Although this is fraught with difficulties, it is notable that many of those difficulties are political in nature. They concern matters like the make-up of a court, the choice of panels, and attempts to treat the adjudicative process as a forum for political arguments. The legal system is also subject to many forms of political interference: this is often relatively subtle, whether it consists in the exercise of prosecutorial discretion, the appointment of judges with a known bias, or the withholding of evidence.

These kinds of deficiencies are an inevitable part of any legal apparatus, but the issue is a relative one, and the legal process remains open to rational scrutiny. The deeper issues lie in the distribution of power between the legal and political process, and there is no escaping the fact that a legal doctrine of secession would place the most fundamental political fact within the state under the scrutiny of an adjudicative body. This may be an anathema to those in positions of power within the existing state system. But what are the alternatives? And what use is a right of secession, if there is no legal mechanism to enforce it? In Humanitarian Intervention, Fernando Tesón argues that states are entitled to use "forcible action" against other states which are committing serious human rights deprivations, and it might be argued that there is some protection for human rights under the existing system.[267] But this merely justifies war and invasion as a means of resolving internal disputes within states, and offers a rather reckless alternative to the rule of law.

Chapter 9. Trial Matters

Introduction

There appear to be three separate stages in any legal process to determine whether a group has a right to secede. The first is merely to determine whether the case should be heard. This should include a preliminary determination as to whether secession is feasible in the circumstances which give rise to the claim.

The second stage is to determine whether there are grounds to secede. This divides itself into two subsidiary stages, which concern themselves with the interests of the minority seeking secession, and the interests of groups who might be adversely affected by secession. There is a political component to the former aspect of the question, which would probably have to be determined by a mechanism like a referendum. It is this stage of the process which provides the subject of the final chapter.

A remedy like secession will only be available in those circumstances where the state can be divided into appropriate territories and the third stage is to determine the relief which should be granted to a successful applicant. This raises three separate issues. The first issue lies in determining whether a minority has a legal right to secession. The second issue, which proceeds from the first, lies in determining who should be consulted on a referendum, what question should be asked, and how a referendum would be held. If there is a referendum, and a substantial majority vote in favour of secession, the third issue lies in deciding where the boundaries of the new state should be drawn and dealing with ancillary issues like damages and costs.

The question of legitimacy is always present and the party seeking secession is subject to the same constraints as the original state. This allows us to distinguish between a legal and an illegal act of secession: the primary characteristic of a valid act of secession is that it respects the

principle of justice and the subsidiary principle of equality. This is a requirement which follows the entire process. Once a decision has been made in favour of secession, both sides have an obligation to negotiate any relief in a manner which respects these principles. This must be taken to include a relatively peaceful resolution of the issues which have arisen between the parties.

Many of the procedural issues which arise in these three stages of litigation will be evident to anyone familiar with the process of litigation. These issues relate to matters like the forum in which a case should be tried, the requirements of standing, the burden of proof in an application, and the enforcement of any orders. Although the technical aspects of a legal process are always open to refinement, the concerns which arise under most of these headings are relatively straightforward. The party applying for a remedy, for example, is obliged to establish that it has the status to come before a court and advance a claim on behalf of the relevant minority.

The burden of proving oppression falls naturally on the minority asserting it. This preserves the authority of the state over its domestic affairs and maintains the stability of the international order. The most important consideration in determining where the burden of proof should fall in an action for oppression may be that the efficacy of the legal order depends upon the certainty of the state's powers. This serves the general interests of individuals, groups and states and is necessary to preserve the benefits of an established society. There should be a legal presumption in favour of maintaining the integrity of existing states.

It is the question of enforcement which raises the major obstacle to the development of any legal process to resolve such claims. That is because it is impossible to devise a meaningful cause of action without giving a court some authority over individual states. The problem is that this would seriously undermine the principle of state sovereignty, which provides the basis of the existing international order. It might seem more plausible to give a court the authority to issue a

declaratory order, but that would have little effect in cases where an oppressive state refuses to accept the court's authority.

There are also administrative issues, which deserve more attention than they can be given in the present context. As a practical matter, it is difficult to see how a court with authority over secession could operate effectively without the use of an independent investigative agency.

Discussion

No one has examined the details of the legal process that would be needed to decide an application for an order recognizing the right of secession. The present discussion accordingly examines some of the issues that would have to be considered in creating a cause of action in oppression, with an order of secession in support. There are two fundamental aspects to any cause of action: one is substantive, the other is procedural. Although it is impossible to separate these aspects of the process completely, the present chapter deals primarily with the procedural aspects of the process. The final chapter deals with the major substantive issues which arise in the trial of an action, where the more philosophical issues lie.

Forum

The first issue is where an action in oppression and an application for an order in secession should be tried? Putting aside any questions with respect to jurisdiction, the possibility of bias seems to rule out any attempt to use domestic courts as a forum in which to try a claim of secession. Although it may not interfere with the result in an individual case, it is evident that a state will exercise a considerable degree of control over its legal apparatus, either through the appointments process or more informal means. Other issues aside, a minority cannot be expected to seek relief from the courts of the state which has allegedly oppressed it.

The problem with the domestic courts goes beyond political intrigues or personal bias. In

most cases, at least, the instincts of a constitutional court will run in favour of the constitution under which it functions. This is problematic, since any act of secession takes place outside the constitutional order, and it will be necessary for a constitutional court to go beyond its ordinary jurisdiction in determining which principles apply to such an act. There may be ways of restricting such eventualities, such as requiring that constitutional lapses be dealt with in a manner consonant with the body of the constitution. That will not deal with difficult situations, however, where there is a complete lapse, or where a minority challenges the legal validity of the provisions in the constitution.

Daniel Philpott raises this kind of issue in "Self-Determination in Practice", where he argues that the difficult legal issue is to determine whether a minority seeking secession will meet its obligations to other citizens of the seceding state.

> More difficult to judge is whether a group meets standards of liberalism, democracy, and respect for minorities, what its distributive obligations are, and whether it merits the last resort of political independence. These are judgements about the substantive realization of goods, not merely the following of procedures, and given their subjective, contingent, and almost certainly contested nature, a court seems required to make them.

The problem is whether a domestic court is in a position to decide such an issue.

> . . . here, partiality is more questionable, dependent on the degree to which a court could serve as an independent "third party", rather than represent the interests of the central government. (23)

Philpott goes on to suggest that an international body might be more appropriate, though it remains "an even more distant possibility" at this point in time.

Allen Buchanan originally suggested that secession could be regulated by constitutional provisions which permit secession. As long as the authority of a court rests in a domestic constitution, however, it is difficult to see how it can make such a decision without overturning the legislative basis of its own authority. The question whether secession should be permitted is a

fundamentally different task than the task of interpreting or applying the constitution. This is directly related to the problem of future enforcement. How is a domestic court to settle any outstanding issues after the constitution has been rescinded and the parties become two sovereign states?

It accordingly seems evident that a court which oversees a question like secession will have to derive its authority from a source above the state. This could arguably be vested in the political authority of an international body like the Security Council, which might police the decisions of the court or appoint its members. If states are sovereign in the traditional, Westphalian sense, however, there seems to be no way for a court to obtain its authority from other states, whether they are considered individually or collectively. That is because the cardinal principle in international law is that states are not entitled to interfere in each other's internal affairs.

There nonetheless seems to be a need for an international court, which can act as a proper referee between the contesting parties. David Copp has argued that the *Statute of the International Court of Justice* be amended, so as to give the International Court of Justice a jurisdiction over secession. This would at least entrench the right to secede in international law, though the real problem with Copp's position is that it does not address the frailties of the international law, as it is presently interpreted. Still, this is a step forward, and at least provides the framework of a legal mechanism for resolving such disputes.

The legal right which Copp envisages would give minorities the right to appear before the International Court of Justice. This would be a momentous development that goes far beyond secession, since it would implicitly give groups the same kind of legal status as the state. There is a more fundamental problem here, however, since that would require that the International Court

of Justice rule on the legalities of the internal affairs within a state. This is a difficult and delicate task, with many repercussions, and it is doubtful whether a court without a compulsory jurisdiction would have the legal and moral authority to decide such issues in a convincing manner. A weak institutional apparatus may be worse than no institution, from this perspective, and merely legitimize the actions of states who disregard its rulings.

Allen Buchanan has suggested that the problem of bias within domestic courts may be solved by the appointment of an independent judiciary or the use of an international court. It may be impossible to avoid some allegations of bias, however, since it will often be in the interest of a losing side to attack the impartiality of a court. This kind of problem will be intensified if a court has limited powers, or derives its authority from its rhetorical or persuasive role.

There would probably be attempts to manipulate the process of appointing members to any international court and the statutory instrument creating such a court should address such concerns. The Convention which governs the European Court of Human Rights, for example, stipulates that judges must be nationals of different states, and similar arrangements would place some limits on the more direct forms of political bias.[268] At first glance, it might seem better to give both sides some say in the appointment of specific panels, but that invites strong dissenting opinions. This is an unsettling possibility, which only stands to increase the political tensions between the parties. Although the American jurisprudence seems to have neglected the value of consensus, it is clear that divisive precedents complicate the law and undermine principles like *stare decisis*.

Standing

The next issue which needs to be considered is the identity of the parties who come before a court. This raises the question: which groups or minorities should be permitted to claim the

right of secession? Lee Buchheit wrote in the late seventies that this was the most prominent issue in the international law with respect to the right of self-determination.

> The doctrine of self-determination has never been interpreted to mean that *any* group wishing to adopt the title of a "self" has a right to political independence. Throughout its checkered career, the doctrine has always been understood, variously but consistently, to require a nation, or a people, or a colonial people, or some other category with a similar ethnological basis. It has never been intended to encompass a group of people, for instance, united only by a common economic advantage but otherwise entirely fungible with the other members of society. (228)

Buchheit argues that these "parochial" factors are necessary because an ethnological group is "likely to produce government based on consent." (229)

The legal significance of the position adopted by Copp in "International Law and Morality in the Theory of Secession" is that it restricts any legal right to cases where a group has a historical claim to some form of autonomy. These societies already possess a political and a territorial dimension and are something more than a collection of individuals. The point is that the mere fact of injustice or oppression does not, in itself, give rise to a right of secession. Copp recognizes that this is a difficult issue, morally, since it seems to leave some groups without a remedy. This raises other issues, however, and there are many cases of oppression which must be dealt with by other means.

There is no doubt that it is impossible to recognize a legal right to secede without granting minorities their own status in international law. That still leaves the legal question, however, which is what constitutes a minority in law. Perhaps the simplest way to deal with the issue is to let the jurisprudence decide the matter, on a case by case basis. If it is oppression which gives rise to the right of secession, it is the scope of that oppression which will logically determine the nature and definition of an oppressed minority will be determined by the conduct of the state. This kind of criterion needs to be tempered by practical considerations, which recognize the

natural lines of cleavage in a population and a territory.

There is also the more technical question of who has standing to represent a particular minority. At the outset of any formal process, a court needs to determine whether the association applying for a remedy has the status to make the application. It may be advisable to require that the party representing a minority demonstrate, in some reasonable fashion, that it represents a majority of the members of the minority. This would discourage weak claims, which may serve to aggravate the tensions between the groups within a state. These kinds of issues should be decided expeditiously, however, without excessive formalities, since a legal process will not have much success in resolving such conflicts unless it proceeds with despatch.

There is a related issue here, which concerns the jurisdiction of any court which is given the jurisdiction to try a cause of action. What if a state rejects the jurisdiction of the court and refuses to answer an application from a minority within the state? Although there is no satisfactory answer to such a question, as the international law stands, it illustrates the problem of creating a court with nothing more than declaratory powers. The international law is already full of unenforceable moral commitments, many of which are primarily honoured in the breach, and there is little reason to add to them. The issue of secession arises in exactly those circumstances where states are the most unwilling to accept the views of outside parties, and a court cannot be expected to have any success in resolving conflicts unless its jurisdiction is compulsory.

For all of the institutional difficulties, a legal regime will not be able to deal adequately with the question of oppression unless it has the authority to rule against a state that refuses to participate in the process. If this seems unlikely, it is because the existing state system favours individual states, who do not feel that it is in their interests to accept such substantive changes in the system. The political will to introduce the necessary changes in the existing international

order may have to be found in interstate parliaments and assemblies, like the European Parliament, or the proposed world Parliament, which are not so easily dominated by individual states.

This is not enough, however, and some of the impetus will probably have to come from international legal bodies, which accept their moral jurisdiction in the area. At this point in time, it is difficult to imagine a court with the confidence to develop the terms of a right of action on its own accord. There is a judicial aspect to such developments, however, which is indispensable in redefining the role of international courts. The crucial issue is that an international court would ultimately obtain the prerogative to rule on a question like secession from a moral rather than a political source of authority. This is true, whatever parameters are placed on such a body by the relevant political actors.

The first stage: a preliminary inquiry

In the first stage of any formal process, a court would need to determine whether it should entertain the application. This is a crucial aspect of the process, since any application is likely to exacerbate the tensions between the state and a minority, and exacerbate the conflict between the parties. This may be a product, in part, of whether the parties accept the process as a neutral one, and there is every reason to hold that a party which applies for relief has attorned to the jurisdiction of the court. It would follow that it is no longer in a legal position to reject a valid decision which goes against its interests.

A court primarily needs to determine whether there is a *prima facie* case of oppression. This requires proof of two essential elements: the first is simply that the state has oppressed the minority which is seeking secession.[269] Webster's defines the word "oppress" as "to crush or burden by abuse of power or authority".[270] This seems sufficient, as a rough guide, and a state

oppresses a minority when it violates the legitimate rights and interests of the members of a minority. The second element of proof arises in the context of relief and is more problematic. It requires evidence that the minority has a claim to territory which would provide an adequate basis for a viable state.

It is the first requirement which raises the more substantive legal issues. Roughly speaking, the question in a legal forum comes in two parts: 1) Is there proof that individuals have been oppressed by the state, 2) on the basis of their membership in a minority? The most compelling case of oppression consists of physical oppression, which includes the failure of the state to respect the physical integrity of the members of a minority. This reference to "physical integrity" is not a euphemism: it includes positive as well as negative duties, and goes well beyond the use of torture and disappearances.

It may be obvious, in many cases, that the oppression has a discriminatory character and targets the members of a minority. This will not always be the case, however, and the two issues are conceptually separate. The same evidence may provide proof of both elements. These kinds of technicalities may seem emotionally arid, in a moral inquiry, but they are a necessary part of any attempt to categorize and resolve different legal claims.

From a practical perspective, it is the second requirement that is the more difficult one. In Buchheit's view, for example, a seceding group must demonstrate that it is "capable of independent existence" or "willing to annex itself to an existing, viable entity". (228) The latter comment seems to raise the possibility of intervention from other states, who may be looking for excuses to extend their own borders. In spite of this, the essential issue is an important one, and a minority is not in a position to apply for a legal right of secession unless it has a claim to a specific piece of territory. Buchheit is rather sanguine, in assuming that the viability of a potential

state can be subjected to empirical proof.[271]

A court may be in a position to decide the obvious questions which arise in the instance of enclaves, or isolated geographic regions which do not provide a feasible basis for a separate state. It is not in a position to decide complex issues, however, relating to the question whether a minority has the geographic or economic resources to secede. These are speculative issues, which are better left in the political arena, even when the public is in a relatively poor position to decide such issues. This is true, as long as they give rise to questions of political autonomy and freedom of association rather than questions of justice. The members of a minority have a right, if they wish, to put their cultural or collective interests ahead of the economic benefits that they may be relinquishing.

The issue, at the preliminary stage, is whether the minority has a *prima facie* claim to territory, which will plausibly provide the necessary geographic basis for a viable state. The question of what constitutes a *prima facie* case is a complicated issue, legally, and there is a considerable case law on the issue, at least in the common law tradition. The technical requirements in the instance of secession should be worked out in the case law, though there should be credible evidence, at least, on all of the essential averments.

There will inevitably be disputes as to the natural borders of a seceding state, and the plausibility of such claims may have to be considered at a preliminary stage. This is necessary to avoid gerry-mandering, since the claim to a specific piece of territory will be an important factor in determining the population which should be consulted in a referendum. These are only preliminary issues, however, and the precise demarcation of borders needs to be decided at a later stage.

The second stage: trial of the action

The most important issue in the trial of an action in oppression is undoubtedly the issue of grounds. It has already been suggested that a legal right of secession would arise when a state oppresses a minority, generally by violating the personal rights of the members of a minority. The prospect of a trial raises legal issues, however, which have been overlooked in the academic literature. There are additional questions regarding the jurisdiction of a court, which would have ancillary powers to decide the issues which arise between competing parties in the political arena. These matters are discussed in the following chapter.

The third stage: relief

The major issue which arises in the context of relief is the issue of territory. This is a practical rather than a philosophical question, and requires a more attentive examination of the facts in specific cases than is possible in the present context. As a result, it is only possible to canvass the broader theoretical issues, and the legalities of the matter are more appropriately left to any jurisprudence.

Although Allen Buchanan is careful to describe the state's claim to territory in broad terms, his approach draws on the concept of ownership.[272] This problem surfaces in Secession: The Morality of Political Divorce, where he sets out a series of considerations which determine the scope of any right to secession. The last consideration introduces two different standards with respect to territory:

> If the state (or, rather, the people whose agent it is) has a valid title to the territory, then only the most weighty reasons, namely, a grievance of state-perpetrated injustice or the necessity of self-defence against threats to the literal survival of the members of the group, can justify secession. On the other hand, if the state's title to at least some of the seceding territory is dubious (as I believe it is in the case of Quebec), then the need to preserve a culture can be reason enough to justify secession . . . (153)

From a practical perspective, the territorial sovereignty of a state is an attribute of power and it seems misleading to think of it as a legal title. It is not the origins of the state's authority over

territory which matters as much as the fact of its authority.

Daniel Philpott's view is interesting, if only because he holds a reasonably sophisticated view of the larger state's claim to territory. The state does not "own" the land which it oversees: insofar as the title to land vests in the state, it does so primarily as an elected trustee, which owes fiduciary duties to the citizenry. (370) In the instance of self-determination, Philpott appears to argue that it is these fiduciary duties which are transferred to the seceding government. This is a better account, though it fails to make the essential point that it is the title to land, rather than the land itself, which is vested in the state.[273] As a result, the state has no right to claim the prerogatives which generally accompany the ownership of the land within its territory, and can only regulate matters like the accoutrements of ownership, or the registration and transfer of titles.[274]

The state is the authority in whom the right to property is vested, rather than the owner of the territory, in a fiduciary sense or otherwise. The primary issue on a territorial claim is a jurisdictional one--whether the state has a right to establish and enforce the law within the territory--and the salient question is whether the state has ethically compromised its authority to do so. Buchanan's account of the territorial claim converts the claim that a group has been unjustly treated into a claim for compensation and treats the territorial prerogative as an award to be bestowed upon an injured plaintiff. It is the question of jurisdiction which would be decided during the course of the first two stages of an application for secession.[275] There may be a need for adjustments on the issue of territory, at the stage of relief, but they should clearly be kept to a minimum.

There are a number of ancillary issues which also arise in the context of relief. It is evident that the question of compensation raises different legal issues, which need to be

considered on the question of relief. Among other things, it will be necessary to resolve the claims of individual owners who may be dispossessed in the course of secession, or the property claims which arise when one government cedes its territory to another. Kai Nielsen makes this point in "Secession: The Case of Quebec", where he concedes that a court must be given the authority to decide these issues:

> The court does not decide on whether the society has a right to secede--that is not in any court's jurisdiction--but on what in such a situation is a fair division of assets and liabilities. (36)

Thus, there might be an order that there will be a delay in implementing any final separation, or the costs of secession will be paid by the seceding state.

It does not appear to matter whether the right of secession arises in the political or the legal realm. In either case, these kinds of issues will require some form of legal adjudication, outside the political realm. The body of principles required to regulate any resolution of such issues should logically be derived from the principle of justice, which decides the question of legitimacy.

Burden of proof

I have taken the position that the burden in the instance of a remedy like secession must be high, to avoid the wholesale disintegration of states, and the question of legitimacy or oppression will only arise in starker moral cases. There are three principles which seem paramount in assigning a burden of proof. The first is simply that we should exercise a large degree of caution in instituting fundamental political changes, which inevitably threaten the equilibrium in society.

There is a contractual principle which comes into play here: existing political arrangements should not be changed without good reason. This acquires additional force when the arrangements have been sanctioned by a long and peaceful usage.

The second principle is a basic principle of certainty, which provides the foundation of any legal system. The authority of the law derives from the power of the state and the law cannot operate effectively in circumstances in which its authority is easily questioned. It follows that everyone with an interest in preserving the legal order benefits from the fact that the state's title to the sovereign power can only be challenged in extraordinary circumstances. This may be the most significant factor in the context of secession and weighs heavily in favour of maintaining the authority of the state.

The third principle is geopolitical. It is commonly accepted that every state derives advantages from the fact that the identity of the other states in the international state system is reasonably secure. It is true that the effects of the principle of sovereignty have been diminished by the development of international political associations which curtail the traditional powers of the state. This is apparent in the case of the European Economic Community, which now possesses a Parliament, a bureaucracy and legal institutions with considerable extraconstitutional authority. In spite of these developments, however, the geopolitical principle still enjoys considerable currency and suggests that the present order of states should be maintained until such time as there are pressing reasons to change it.

These three factors seem to support the contention that any legal mechanism to resolve the question of secession should contain a presumption against secession. There are other reasons why there should be a presumption in favour of the existing state, however. It is "crucial to understand", Buchanan writes, that all of the citizens in a state

> . . . have an interest in making sure that secession will not be too easy. As the political sociologist Albert O. Hirschmann has noted, where *exit* from an association is virtually costless, there is little incentive to exercise the option of *voice*--the use of critical dialogue within the association to improve the quality of its performance.[276]

This will be less of a concern when the right of secession derives from a remedial concept, since

that will limit the remedy to those situations where the state has seriously defaulted on its obligation to respect the principle of justice.

This deals with the major burden in a case of secession, which lies in proving the alleged oppression. There are separate burdens, however, which arise in the three stages of an application to secede. In the first stage of the process, the burden should logically fall on the party claiming that it has the right to bring an application. The party claiming oppression has an obligation to provide convincing evidence that there is a strong *prima facie* case. The question is whether the application deserves serious consideration. Since there is a presumption against secession, and serious concerns about the political impact of trying unlikely cases, the standard of proof should be greater than a balance of probabilities. There must be testimony or other evidence which establishes that there are compelling reasons to inquire into the matter.

This may create difficulties if a minority does not have the resources to present a proper case, and there should be provisions to ensure that each of the parties before the court are given a fair opportunity to present its case. There is also a need for independent evidence, and it may be necessary to create an independent investigative apparatus, like a commission, to ensure that a relatively neutral recital of the facts is before the body deciding the claim. If an investigative body is to appear before a court, however, it should be an independent agency, which is not entitled to deference from the court. In spite of its larger political significance, the question of secession is a matter which essentially arises between contracting parties, and should be settled between them. It follows that it is the parties which should have carriage of the case, rather than an independent agency, whose role should generally be restricted to that of an observer.

The matter is more complicated in the second stage of the process, which seems to raise two different questions of proof. One is whether the state has oppressed the minority claiming the

right to secede. The burden on this issue is the major burden in the case and logically falls on the minority seeking secession, which has an obligation to prove that secession is warranted. This is in keeping with the principles of English and European law, and the Latin maxim *onus probandi actori incumbit*, which holds that the party relying on a particular fact has the obligation to prove it.[277] This is necessary, if the integrity of the state is to be given paramount importance. The second issue is essentially to try objections to the application, from groups or individuals who might be adversely affected by secession. Although the facts may be stark enough to deal with this issue at the outset of some trials, there will be other cases where it makes more sense to hear the evidence on the merits of the case before dealing with it.

The burden on the second issue, which raises a question of justice, falls on the group that is objecting to the application. It is the interests rather than the wishes of the group which matters: the question is whether secession represents such a threat to the rights and interests of internal minorities that it operates, essentially in equity, as a bar to any application. This seems to set a high threshold for any party which wants to stop the process, which would have to establish that its rights cannot be accommodated in other ways. There may be a special role for an investigative agency, in ascertaining the facts in this stage of the process, as they relate to groups whose interests might be imperilled by secession. There is another reason to impose a higher burden of proof on an intervenor who objects to the application before the court. The presumption against secession would only permit a court to grant a remedy like secession in serious cases of oppression and an oppressed minority should not be prevented from exercising its limited right of departure without substantial cause. There are also other ways of dealing with such objections. At least some of these issues can probably be dealt with by a rearrangement of borders, or some partition of a seceding state. There are competing interests here. These kinds of

alterations should be kept to a minimum, however, and if we accept the contractual analogy, a court should hesitate to impose its own will on the parties. It is always possible for the applicant to amend its application, however, if these kinds of difficulties prove insurmountable, and return to the court on its own accord.

There is a related issue, which concerns the majority needed to decide the question of legitimacy in the political realm, if an order for a referendum was granted. It is important to bear in mind, however, that the purpose of the referendum is to try the moral rather than the political question of secession. As a result, the legal presumption against secession applies to such a vote, and the size of any majority in a referendum must be substantial, something well above a bare majority. Wayne Norman has argued that this would enshrine the principle of "just cause" in such a process, since it will not be possible to obtain such a majority unless there are good reasons to claim such an extraordinary remedy.

This kind of majority would also take account of the fact that the emotional appeal of many claims for secession far outstrips their viability. As Lee Buchheit puts it:

> The desire for independent self-government may seemingly thrive in the face of irrefutable evidence that the political, economic and military well-being of the group would be better served by a continuing association with a larger political entity. It appears that many groups would gladly embrace an impoverished, defenceless existence in return for the emotional satisfaction of self-government. (8)[278]

There are many reasons to be cautious in granting the wishes of an electorate. This is subject to the observation that, at some point, there is no denying the wishes of a large majority of people within a particular territory.

The third stage of the process deals with relief and the ancillary issues which might arise between the two resulting states. In most instances, one would expect the burden of proof to lie on the party seeking relief. This may be unfair on some issues, however, and the burden of proof

on the question of territory should probably fall on the party which asks the court to depart from the borders used in any referendum. Since the original and seceding states would be equal in law, it seems evident that the appropriate burden would be on a balance of probabilities.

Enforcement

The theories of secession in the literature cannot be applied without some means of enforcement. Avashai Margalit and Joseph Raz, for example, reason that the right of secession may be exercised on the understanding "that measures are adopted to prevent its creation from gravely damaging the just interests of other countries." (457) Harry Beran makes a similar comment and authors who base theories of secession on the right of self-determination generally adopt the same approach.

This is not merely a matter of policing new borders. It will be self-evident that accommodations like demilitarized areas, free trade zones, or the exercise of a joint authority will be of no assistance unless the relevant states are required to honour them. Nor is it possible to enforce arrangements which guarantee the safety of a captive population without intervening in the internal affairs of a state. In "Self-Determination in Practice", Daniel Philpott acknowledges the extra-constitutional character of these concerns when he writes:

> The question of future enforcement also arises here, for once a region has seceded, the status of sovereignty makes it difficult to enforce compliance with commitments from the outside. (23)

Once a constitution has been effectively rescinded, as it must be, in the instance of secession, the issues which arise in such a context are simply beyond its reach.

David Copp argues that the Security Council could pass a resolution requiring that an overholding state comply with a legal plebiscite. He also argues that sanctions might be used to persuade an unwilling state to accept the ruling of an international court. This is fine, as far as it

goes, and it seems difficult to argue with his contention that the use of military force should be avoided in most circumstances. This leaves it to states to decide for themselves whether they will accept a ruling , however, and leaves the question of secession in the political arena. It is difficult to see how this would persuade many states, particularly hostile states, to relinquish their hold on territory and might simply intensify a state's persecution of a minority.

The real problem lies in exactly these situations, where a state refuses to accept that it is obliged to respect a ruling against it. This is where the law needs to develop, in some conceptual sense. As it stands, sovereign states are not subject to the kind of compulsory rulings which emanate from domestic courts. The regulation of affairs between states is a political matter, which is governed by agreements and conventions rather than law. As a result, it cannot be stated with any certainty that a seceding state and its neighbours will be bound by the kinds of measures proposed by so many authors.

This is particularly true when a departing state is required to make such concessions in order to obtain its independence. It is another matter whether it will consider itself bound by such restrictions, once it has obtained its independence. There are a number of rhetorical arguments which are available to a recalcitrant state: the terms of separation were negotiated under duress, it was subjected to intimidation or coercion, and had no choice, other than to accede to terms which it did not accept. These kinds of arguments are relatively easy to make in the partial atmosphere of national politics. There is also the fact that the notion of a just cause seems to undermine the sanctity of such agreements. If the terms of separation are unfair, what does it matter if the new state agreed to them?

The legal scope of International Criminal Tribunals may ultimately determine whether there is room for enforcing any rulings with respect to secession, particularly if it is human rights

abuses which provide the essential grounds of a cause of action. The development of an international criminal law seems destined to erode the principle of sovereignty, since criminal courts derive their ultimate authority from moral principles. This is a philosophical observation: it is the essence of the criminal law that the authority of criminal courts derives from a moral order which takes precedence over the agreements between individuals and states. It is irrelevant whether an accused has agreed to be bound by a particular article of the law. A state is in an analogous position in the instance of secession: if the concept of legitimacy is employed, the question whether a state has agreed to abide by the common good is not a consideration in determining whether there is a legal right of secession.

The fundamental thesis of the present dissertation is that it is impossible to create a meaningful right to secession without bringing the internal affairs of sovereign states under minimal limits. This is not possible without reconsidering the principle of sovereignty. From a practical and philosophical perspective, this requires momentous changes in the jurisdiction of international courts. Many of the issues which arise in this context have already been canvassed in the previous chapters, but one of the strengths of a legal concept of legitimacy is that its application is determined by moral rather than political considerations. It therefore applies to any actors in the international realm, whether they are minorities, states, or overtly political bodies like the Security Council.

Chapter 10. An Action in Oppression

Introduction

The present chapter sets out a cause of action in oppression. It argues that the substantive approach to secession in the academic literature, rather than the procedural approach, provides the natural starting point for the development of a legal claim. On such a view, the gravamen of any cause of action lies in the injustice of the state. A satisfactory legal process will incorporate elements of both approaches, however, since the substantive model only decides whether there is a legal right to secede. The actual decision to secede remains a political decision, which can only be taken in the political arena.

The legal right of secession is an extraordinary right and the political right to secede exists independently of any legal rights. This does not dispense with the need for a supervisory legal authority, and the most important aspect of any development of a legal jurisdiction over secession may be that it comes with ancillary powers. If a court has the inherent authority to decide the legal question of legitimacy, it logically follows that it has the authority to decide the disputes which arise in those instances where a minority seeks secession in the political realm. This would give it the authority to supervise any political process which is used to resolve such questions.

The subject which has received the most attention in the philosophical literature is probably the issue of grounds. In spite of this, the academic work in the area fails to recognize the ordinary parameters of the fact finding process and raises a number of speculative questions that cannot be satisfactorily tried in a legal forum. It may seem an obvious point, but it is crucial to recognize what can be accomplished in an ordinary adjudicative forum, in setting out a legal theory. The rules and practices in such forums are governed by general legal and procedural principles, which set out the parameters of the evidentiary process, and these principles should be

consulted in setting out any cause of action.

The substantive ground of any action in oppression is discrimination. Although there are a variety of sources which might be used in any jurisprudence, it is notable that there are domestic legal sources which comment on the legal meaning of the term "oppression". In the common law, at least, the word has been used extensively in the instance of corporations and characterizes those situations where a minority shareholder is forced to accept an unfair disposition of assets or other examples of bad dealing. The word has also been used in a criminal and a constitutional context, where it raises the issue of proportionality which is so prominent in the context of discrimination.

Discussion

If a court at a preliminary inquiry rules that there is *prima facie* case to meet, the matter must be set for trial. There are at least two sets of issues that arise in this context. One set relates to evidentiary and procedural matters, such as the right of examination and cross-examination, the order of argument, the right of reply or rebuttal, and the admissibility of hearsay, expert and documentary evidence. The other set of issues, which are discussed in the present chapter, relate to the substantive issues in a trial.

It is not possible to deal with the former set of issues in the present context, and the formal or informal rules which govern the process before a court would need to be developed in the course of practice. Many of such rules can be taken from existing bodies of jurisprudence, with the reservation that the rules in a compulsory forum will differ from the rules in an arbitration. Some of the issues which arise in this context relate to the make-up of a court and the roles and prerogatives of panel members. There are questions, for example, whether the authority to decide procedural and evidentiary questions should come before a single judge, whether judges or lay members should determine the facts in a case, whether there is an obligation to prepare reasons,

and whether there would be a route of appeal.

Putting these issues aside, the essential question which arises on the trial of a cause of action is whether the applicant has proven the fact of oppression and thereby established the necessary grounds for a remedy in secession.[279] The legal concept of legitimacy is significant because it recognizes the legal force of the moral order and gives it ascendancy over the ordinary constitutional order. In spite of this, it needs to be said that there is a significant distinction between a moral and a legal concept of legitimacy. The legal right of secession is rooted in facts and evidence, and only arises where there is substantial proof of oppression. The oppression must be overt and palpable. The ultimate issue on an application for an order in secession is accordingly whether the state has visibly wronged a particular minority.

Substantive and procedural mechanisms

Allen Buchanan and a number of other actors make a distinction between a substantive and a procedural approach to secession. The primary impetus for a procedural model comes from those theories of secession which are premised on the right of self-determination. Like those theories, it gives considerable priority to freedom of association and usually calls for a democratic resolution of the question. Analogies have been drawn between a procedural model of secession and "no-fault" models of divorce, which do not require the petitioner to establish substantive grounds like cruelty or desertion before obtaining a divorce.

A substantive approach, on the other hand, would permit secession when a minority can establish that certain legal grounds have been met, such as historic unfairness, unsettled territorial claims, or the failure of the state to redress institutional inadequacies. [280] This usually implies some degree of blame and Buchanan draws an analogy between a substantive model of secession and a "fault model" of divorce.[281] The analogy with divorce has already been discussed, in the

context of setting out a legal theory of secession.

The cardinal feature of a procedural model of secession seems to have received a large measure of acceptance in the international arena.[282] Whatever the place of democracy in the world order, Antonio Cassese takes the position that a referendum must be held, under the international law, before a minority secedes. This is illustrated by the case of Quebec:

> Although . . . the legal rules do not grant any right to self-determination, international law has already played . . . a role as a guiding standard, in that all the parties concerned in Canada agree at least on one issue: any decision as to the future of Quebec must be taken by the people of the province by means of a referendum. (254)

This neglects the democratic tradition in Quebec and Canada, which seems more significant than the international law in this context.

Cassese also relies on the position adopted by the European Community in the instance of the former Yugoslavia. Cassese argues that the Arbitration Committee regarding Bosnia-Herzegovina saw

> . . . the holding of an internationally monitored referendum involving *the whole population* as an indispensable element for the granting of international recognition of Bosnia-Herzegovina as an independent State. The Committee thus elevated the referendum to the status of a basic requirement for the *legitimation of secession*. (272)

This deals with the question whether a seceding state should be recognized by other states, rather than the question whether it was entitled to secede in the first place. (349) As a result, it does not deal with the more fundamental issue, which is when a referendum must be held, and merely indicates that a minority cannot secede without obtaining the consent of the population in the territory which it is claiming.

The most prominent proponents of a procedural approach are probably Avashai Margalit and Joseph Raz, who argue that the members of a minority have the right to decide for themselves whether they want independence.[283] The problem with this position, as Christopher Wellman

writes,

> . . . is that political self-determination is not purely self-regarding; a nation's decision to form its own state affects not only the members of the seceding nation, it affects any nonnationals within the separatist state as well as all of those in the rump state.[284]

The difficulty is that democratic measures do not, in themselves, address the outstanding issue, which is whether the minority has a moral right to secede. A political exercise like a referendum merely establishes whether a majority within a particular group wishes to secede and does not decide the moral question.

This is an issue of long standing. Henry Sidgwick complained, a hundred years ago, that, any attempt to incorporate the "divine right of majorities" into political theories

> . . . would lead naturally to an indefinite disintegration of political societies; since a faction that was in a minority in the whole state would probably be in a majority in some districts, and might accordingly, on this principle, claim to be governed according to its wishes in these districts.[285]

Sidgwick sees this as a problem for any theory of government which relies exclusively on the principle of political legitimacy. Any minority will have the right, on such a view, "to secede and form a new state, when it is in a majority in a continuous portion of its old state's territory.[286] And some of those who hold that a legitimate government must rest on the consent of the governed," Sidgwick adds, "appear not to shrink from drawing this inference".

Sidgwick takes a common sense approach in holding that this kind of view is too divisive and impractical to be instituted in the existing state system. He accordingly argues that any "right of disruption" like a right to secede must be based on something more than the interests of those seceding, or the "sentiments of nationality".

> . . . some serious oppression or misgovernment of the seceders by the rest of the community,--i.e., some unjust sacrifice or grossly incompetent management of their interests, or some persistent and harsh opposition to their legitimate desires,--would be usually held necessary to justify the claim. (226)[287]

This takes us into a legal rather than a political process and the real significance of a substantive model is that it calls for a process of adjudication to decide the issue of oppression. The results of a referendum may decide whether a majority or minority consent to government, but they do not necessarily address the question whether the minority has been oppressed. This should be treated as a factual issue, rather than a question of opinion, which is open to proof and is best decided by a judicial actor.

The distinction between procedural and substantive approaches may seem misleading, in this context, since a referendum may be used to determine whether the relevant substantive criteria have been met. Even in the best of circumstances, however, the electoral process seems a poor venue for a dispassionate assessment of such claims, and the results of a referendum will probably depend on who is consulted. The substantive question has a normative side, moreover, which is not appropriately decided, in a legal arena, and the legal process would only addresses the legal question whether a minority has a right to secede. This does not answer the political question whether a minority wishes to secede, which remains a separate question conceptually. The legal question is whether the political question should be put to a minority, as a matter of justice, and a legal theory of secession, properly construed, would keep the political question in the political realm.

The violence associated with movements for secession, whether in Sri Lanka, the Sudan, the Basque region of Spain, the former Soviet Union, or the Indian states of Kashmir and Assam, may demonstrate the failure of our existing political structures to deal satisfactorily with such movements. At this point, however, the only alternative to a political campaign for secession lies outside the realm of law and politics, in violence, revolution and anarchy. And from a broader perspective, it is evident that the purpose of a legal action in oppression is to bring the lawless

region in which these violent events occur within the rule of law. This would provide a relatively peaceful alternative to violence, in those situations where the political actors within the state are unwilling to address the concerns of a minority.

There is an additional role for an international court in those circumstances where the contest over secession takes place within the political arena. The political process does not provide an effective venue to deal with disputes between a majority and a minority, and often encourages posturing by one side or the other. This increases the likelihood of conflict and raises the possibility of a political impasse, in which the forces ranged on both sides of the question are simply unable to accommodate the demands of the other side. As a result, there will always be issues, at least in controversial cases, which will have to be decided by a neutral third party.[288] It follows that any system which deals with secession will need to include some form of legal recourse to settle the disputes that arise between the parties. This is particularly important in the context of determining what relief is appropriate.

The question of Québec is revealing in this context. It is evident that an international court with jurisdiction over secession would need an ancillary authority to rule on issues regarding the mechanics of any referendum, such as the wording of any question put to the electorate, and the protocols that should be observed in conducting the vote.[289] Although there is much to be said for David Copp's suggestion that a referendum in Quebec should be subject to international monitoring, if not outright regulation, that is primarily because the validity of a referendum depends on its neutrality.[290] This is a matter of perception, if not substance: in the real world, the results of a referendum held by one side or the other will probably be subject to an attack from the other side.

The political right of secession

It is important to stress that the legal right of secession is an extraordinary right, that only arises in those situations where the conduct of the state takes the issue of secession outside the ordinary parameters of the political arena. This will only occur in exceptional moral circumstances and it is a mistake to think that the law can provide the normal avenue of relief for a minority seeking secession. The more conventional means of expressing national or ethnic aspirations for a separate state lies in the political realm, at least in those states which give groups and individuals a reasonable degree of freedom. This division of legal and political rights should be enough to meet the concerns of those authors who feel that a judicial body would have difficulty deciding a speculative question like secession.

Wayne Norman, for example, argues that the major advantage of a procedural approach is that it keeps the question of secession in a political arena.[291]

> Secessionists and unionists are likely to disagree about what kinds of incidents or events can give just cause to secede, about whether such events have occurred, about whether they have been or could be rectified by measures short of secession, about whether the particular violations were significant enough to justify secession, etc. We could never expect criteria for just cause to be spelled out in law, and this is yet another reason why we would not expect a tribunal or court to produce a decision that would not be open to doubt.[292]

This helps to explain why a legal right of secession would only be available in egregious cases, where Norman's concern regarding the doubtful nature of a legal decision in the area would be less pressing. There is the additional problem that a legal decision on the inherently contentious question whether a minority should secede would inevitably bring the court into disfavour with one side or the other and only intensify any political conflict.

David Miller adopts a similar position in suggesting that a constitutional provision regarding secession will have to favour procedural criteria.

> . . . the conditions justifying secession would need to be stated in a form that a judicial body could apply, and this immediately slants the discussion in favour of certain criteria

> and against others. For instance there is likely to be a bias in favour of procedural criteria (is there a majority in favour of secession in the territory in question?) whose application is relatively uncontroversial, and against substantive criteria whose application may depend upon difficult and contested matters of judgement (is the existing state suppressing or eroding the distinct culture of the minority applying to secede?).[293]

One of the most important features of a referendum is that it leaves open the possibility of secession on cultural grounds. This is not because there is anything in the procedural model which recognizes that cultural grounds would be sufficient: it is rather that such a model leaves the question of grounds to be decided on a democratic basis, and does not prevent a minority from raising such an issue in a referendum campaign.

From this perspective, it might well be argued that David Copp essentially sets out a political right of secession, based on a democratic vote, which is entitled to legal recognition. The difficult legal question in such an instance merely transfers itself, however, to the question whether a minority is morally and legally entitled to hold a referendum. Copp fails to distinguish between a legal and political right, and the right which he proposes would implicitly outlaw political initiatives which have not received the *imprimatur* of a legal body. This could easily give an oppressive state the grounds needed to prohibit the holding of a referendum on the issue.

None of this eradicates the need for legal supervision of the political process. The major problem with the procedural model remains, however, and there are many legal issues which need to be decided in the context of a referendum, such as the population that should be consulted, whether a question has been framed fairly, how the referendum should be administered, and so on. David Miller extends these concerns to territory:

> It is in any case implausible to think that a purely procedural theory of secession could be satisfactory. If we say, for instance, that a majority vote to secede is sufficient to justify secession, this immediately raises the question of how the constituency for the vote is to be established, and how the territory which the seceding group would take with them is to be defined.[294]

As Miller argues, the difficulty is that these kinds of issues need to be resolved before any vote is held. It is difficult to see how these matters can be resolved without some form of adjudication, and even if it is left to the parties, there will have to be some mechanism to deal with disagreements.

It follows that many of the substantive claims surrounding a right of secession will require some form of legal resolution, whether they are decided in the legal or political arena. The obvious example is a referendum. The difficulties that arise in this context are easy to imagine. How often, for example, can the parties hold a referendum? What if Quebec holds a referendum, in spite of the fact that the government of Canada refuses to recognize its validity? And what happens if public opinion changes and throws the results of a referendum into question?

This raises an important question about the ancillary powers of an international court. What happens in a situation where a minority wishes to secede, in spite of the fact that it has not been oppressed by the existing state? This is significant because there is a point where the number of individuals who favour secession is so great that it seems impossible to deny them that right. This is not the natural province of a legal right of secession, however, unless the overholding state oppresses the minority.

This does not affect the parties' right to seek a political resolution of the problem. The political and legal rights of secession are both moral rights, although they have a different provenance and find expression in different venues. The legal right is essentially a means of guaranteeing the political right, which is conceptually prior, in those circumstances where it supersedes the prerogatives of government. There is a sense in which the right to secede is only a political right. The issues that arise in a legal and a political sphere are substantially different, in spite of this, and deserve separate discussions.

The answer to the political question whether a minority has a right of secession is determined by the right of association rather than the principle of justice. It follows that there are independent political rights that give a minority a right to secede, whether it has been oppressed by the state or not. This does not necessarily deprive a minority with political rights from seeking legal recourse, since a state which continually prevents a minority from exercising its legitimate political rights can probably be characterized as oppressive. As a practical matter, it seems clear that the conduct of such a state will eventually constitute oppression, within the meaning of the legal term, and give rise to a legal right of secession.

Although I have not discussed the political right of secession at any length, it seems clear that the contractual analysis holds equally in the legal and the political realms. The issue on secession is not whether a minority consents to government, but whether it wishes to withdraw that consent. The discussion of these issues in the academic literature has overlooked the promissory nature of our consent to the civil or political contract. Any consent to such a contract extends into the future and it is a mistake to treat individuals or groups in an existing state as if they were in a position to accept or reject the restrictions of government. In either case, we are essentially dealing with actors who have already consented to the restrictions of government, and the question is whether they are now entitled to withdraw that consent.[295]

Although there are moral reasons why a population withdraw its consent to government, it is the manifest nature of this lack of consent which gives a minority the political right to secede. This is a functional issue: at some point, a minority's lack of consent is so preponderant that good government is difficult if not impossible. Perhaps this is the case in the Indian state of Kashmir, or parts of Indonesia and the Philippines. This does not affect the contractual analogy, since no one can be forced to honour a contract against their wishes. It is always open to a party

to revoke its contractual obligations and compensate the other party for its loss or sue for damages, as the case may be.

This analogy demonstrates the need for a legal apparatus to deal with these issues, whatever happens in the political sphere. It will always be difficult to decide issues like compensation satisfactorily in the political arena. A seceding state may confiscate the property of the original state, but that is an arbitrary exercise of force and there is nothing in such actions to guarantee their morality. This kind of analysis is open to considerable refinement. Although there is a sense in which, even in dire circumstances, the existence of the state establishes some level of consent, there are many cases where a minority's consent has been obtained under by duress. This occurs on many levels, since there is always an element of coercion in our obligation to accept the restrictions of the legal and political orders.

One of the major issues which arises in the political context is the size of any electoral majority that a minority needs on a referendum, in order to claim a political right to secede. Although this raises a question of political legitimacy, it also raises an issue of justice or fairness, which is ultimately a legal matter. The Supreme Court of Canada skirted the issue in the *Secession Reference*, where it held, at p. 293, that

> . . . a clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.

Elsewhere in the judgement, at p. 259, the court recognized that a constitution "is entrenched beyond the reach of simple majority rule".

This has become a source of controversy in Canada, since the government of Quebec has steadfastly taken the position that a majority of fifty percent plus one is sufficient to justify a unilateral act of secession. It has been argued that this is in keeping with international and

domestic norms. A simple majority was judged sufficient, for example, in the instance of the European states which held plebiscites on whether to enter the Mastricht Treaty . There is the additional factor that the province of Newfoundland entered the confederation of Canada on the same basis. There is room to argue, of course, that these precedents do not apply and something more than a plurality should be required in the instance of such significant constitutional changes.

For one thing, there is a fundamental distinction between the decision to join a political association and a decision to leave it. The Supreme Court of Canada was concerned about the position of internal minorities in the case of Quebec, but its decision also recognizes that secession affects the rights of other parties to the association.[296] It is impossible for the people in a territory to leave a federal state without affecting other groups and territories within the federation. Although the principle of self-determination weighs in favour of the majority within the territory, the principle of justice requires that these interests of other parties to the association be considered. This kind of factor, like the court's concern for the interests of internal minorities, weighs heavily against the use of a simple majority to decide such fundamental political issues as secession.

Justiciability

One of the deficiencies in the theories of secession in the philosophical literature is that they fail to recognize the limits of the legal process. This deserves attention. Legal bodies are usually charged with two fundamental tasks: one is to find the facts in the case; the other is to determine and apply the law to those facts. The practical difficulty, with most of the theories of secession in the academic literature, is that they fail to appreciate the limits of the process of finding facts.

A substantive regime based on historical injustice, for example, would require that a court

adjudicate on political issues outside the normal province of the judicial process. Whatever their normative implications, legal questions generally imply some degree of provability, and many cases of political injustice are beyond proof. The answer to the question whether Quebec has been treated unjustly in confederation is a matter of opinion, which will always be open to debate.

This is a problem which arises in the context of most theories of secession in the literature. Kai Nielsen, for example, suggests that national groups are entitled to secession unless the existing state demonstrates that it will treat the group fairly. But this is not a simple matter: it may be difficult to prove a past injustice, but there is a historical record, however partial or contested, and facts can be investigated and confirmed. The future is relatively empty and it is impractical to expect a court to make such a momentous legal decision on the basis of these kinds of predictions. It is clear, moreover, that this kind of task is self-defeating and will eventually embarrass the process, since mistakes will be made.

Authors like Avashai Margalit and Joseph Raz put similar conditions on any right of secession.

> The right is conditional on its being exercised for the right reasons, i.e., to secure conditions necessary for the prosperity and self-respect of the group. This is a major protection against abuse.[297]

This asserts an unenforceable legal test: for practical purposes, it is a rhetorical constraint which is not amenable to proof and does not provide a realistic legal standard.[298] It is simply unfair, as a matter of practice, to expect a court to find, as a fact, whether the new state is "likely to respect the fundamental interests of its inhabitants". (457)

In spite of this difficulty, David Copp introduces similar elements into his legal theory of secession, in arguing that the legal right to secede would only arise in situations where secession is 'intrinsically feasible'.[299] And there are similar problems with with his observation that an

international court would have a residual right to deny a minority the right to secede, where there were legitimate humanitarian concerns.

> A fair implementation of the right to secede in international law would permit the legal right to be overridden as well. For example, in some cases, secession by a group would predictably lead to human rights violations of various kinds; in still other cases, the group would not have qualified as territorial except for human rights violations, such as 'ethnic cleansing.' In such cases, the International Court ought to have the power to refuse to take the final step of according to a group the legal right not to be interfered with in forming a state unless the group implemented a constitution that guaranteed human rights, or unless it corrected the injustice. (237)

This is a relatively naive suggestion, which seriously overstates the speculative powers of legal institutions. And of course it is evident, legal issues aside, that the world is full of laudable constitutions, which are often honoured in their breach.

The same kind of problem arises in Secession: The Legitimacy of Self-Determination, where Lee Buchheit proposes a deceptively simple test for secession.

> Because secession inevitably involves a change in the status quo and any such change is a disturbance of sorts, it would be more realistic to approach this question from the perspective of whether secession, or a continuation of the present union, would be more disruptive of the general international harmony.[300] (231f)

This was published in 1978, well before many of the changes which seem to have occurred in the practice, if not the theory, of sovereignty. If nothing else, the growth of a global economy and the implementation of free trade zones has introduced a number of alternatives to secession, which makes the matter more complicated than it was when Buchheit made his comments.

While it raises some obvious difficulties with a theory of secession based entirely on a right of self-determination, the standard which Buchheit offers is essentially a functional standard, which can be adjusted to accommodate any theory of the state. It is extremely difficult to apply this kind of teleological standard in a legal context, however, since most of the factors to which

Buchheit refers are matters of opinion, which are not justiciable under ordinary standards of proof. Nor does it address the major ethical issue in the context of secession, which is whether a minority has been oppressed by the existing state. Although expert evidence is permitted, more and more, in the common law courts, those opinions must be based on facts which have been formally proved.

The same problem arises, in a different guise, in the context of theories of secession based on self-determination. Christopher Wellman, for example, postulates a right of secession based on the self-determination, which recognizes that secession may be detrimental to the interests of the original state. Daniel Philpott adopts a general standard of justice, which would restrict the application of the right to cases where:

> . . . the group's likely potential for justice--that is, its degree of liberalism, majoritarianism, and treatment of minorities--is at least as high as the state from which it is gaining self-determination; its claim is enhanced, and more justifiably takes the form of secession, when it suffers threats and grievances . . . (382)

This is an extremely difficult question to adjudicate. In situations where there is a serious concern about the effect of secession on the viability of the remainder states, a seceding state might be required to provide enforceable guarantees which would leave the remainder state in a position to maintain itself. This leaves open the further question whether such guarantees can be enforced in the existing international order.

From this perspective, remedial theories of secession are preferable to theories which are based on self-determination. That is because the latter theories usually contain qualifications that restrict the right of secession to those circumstances where a minority is willing to respect the rights of any minorities within its own ranks. This not only requires a court to predict the course of future events: it also raises questions about the seceding group's motivations, which are difficult to ascertain in a manner which satisfy normal standards of proof.

These kinds of tests go directly against the evidentiary principle that the courts should not make findings on speculative matters. It is a mistake to expect a court to enquire into a party's motivations in anything but the most obvious circumstances.[301] This is particularly difficult when a party is a collective or corporate entity, like a state or diffuse minority, composed of individuals with a wide variety of interests and inclinations. There is the additional problem that opinions with respect to the consequences of secession cannot be expressed with the kind of certainty needed to establish the proper basis for a legal decision.

There are serious limits on the kinds of issues which a decision-making body can adjudicate in a fair and accurate manner and there are good reasons why courts generally operate *ex post facto*. The measure of certainty required of legally binding decisions is not available in a process which requires a court to predict whether the state will treat a minority unjustly. As Donald Horowitz writes, in "Self-Determination: Politics, Philosophy, Law": "The inability to forecast the emergence of an illiberal regime with any degree of reliability renders this qualification on the right of secession illusory." (198) The trial of such uncertain issues is easily influenced by the errant political considerations which affect so many decisions in the political arena.. One of the ways to ensure the efficacy of a legal process is to keep it as close to the facts of the case as possible.[302]

There are similarities between the kinds of consideration which justify revolution and the considerations which provide the basis for a legal right of secession. This appears to raise the kinds of moral factors which have historically arisen in the context of *jus ad bellum*.[303] It may be relevant, for example, whether an existing state and the movement which opposes it have popular support, or whether other states have interfered in the relations between the different sides. These are only contributing factors, however, and there are significant differences between the doctrine

of just war and the legal theory of secession. Since the fundamental purpose of a legal theory of secession is to provide a relatively peaceful means for resolving such conflicts, a legal remedy should be available before conditions have deteriorated to the point of revolution.

There is also a point where a conflict regarding secession has progressed beyond the reach of any legal right of action. As Abeysinghe Navaratna-Bandara writes, there is a point where the process of civil disintegration seems difficult to stop.

> A determined secessionist campaign may lead to a lengthy social and political crisis at all levels of society. Militarization of political and social life may become unavoidable. As a result government will become ever more authoritarian and repressive. And the secessionist movements may *intend* just that.[304]

The most notable aspect of this development is probably that it does not depend on whether the secessionist movement is originally justified. At some point in the contest, the legal issue seems to be less a matter of determining whether there are grounds for secession than a matter of negotiating a just settlement of a revolutionary conflict.

The possibility of dealing with such matters under a legal regime for secession depends, to some extent, on the authority which is given to a court with the mandate for resolving such claims. There is no doubt that issues like viability or relief arise in both sets of circumstances and it is the principle of justice that appears to supply the appropriate standard in both situations. If an international court has inherent jurisdiction, there is no reason why it cannot deal with these kinds of issues on application by the parties, as a corollary to any jurisdiction which it has over secession.

Where does this leave us? From an evidentiary perspective, it is probably the correlation which Allen Buchanan draws between legitimacy and basic human rights which provides the most feasible grounds for a claim that a minority has a right to secede. That is because the proof of human rights abuses falls well within the ordinary parameters of a legal inquiry and is open to a

resolution in a juridical setting. The same cannot be said of the teleological questions proposed by Christopher Wellman and other authors in the area. The members of courts or international tribunals are not well placed to make a finding that a state will or will not function well in the event of secession.

There seems no reason to dispute Buchanan's call for a "progressive" interpretation of the principle of territorial integrity. This would hold that the principle of territorial sovereignty will only protect states which respect fundamental personal rights.

> According to the *progressive* interpretation, the principle that the territorial integrity of existing states is not to be violated applies only to *legitimate* states--and not all existing states are legitimate. There is, of course, room for disagreement about how stringent the relevant notion of legitimacy is. However, recent international law provides some guidance: States are *not* legitimate if they (1) threaten the lives of significant portions of their populations by a policy of ethnic or religious persecution, or if they (2) exhibit institutional racism that deprives a substantial proportion of the population of basic economic and political rights.[305]

Although Buchanan's view probably provides the best basis for the development of a legal right of secession, it rests on a benign interpretation of recent events in international affairs.[306] These events raise their own questions of legitimacy. There is no doubt, for example, that the present embargo on Iraq deprives "a substantial proportion" of the civilian population, in Buchanan's words, "of basic economic and political rights".

It is by no means clear that states are prepared to accept the concept of legitimacy set out by Buchanan. The concerns of the United States, for example, with respect to the International Criminal Court indicate the reluctance of powerful states to accept an extraconstitutional legal order. Buchanan's argument nevertheless appears to be the right one, in emphasizing individual rights, and it is the liberal literature which seems most likely to provide the essential grounds for a legal right of secession. This may seem paradoxical, since the right to secession is a collective right, which can only be exercised by groups. This is less important, however, than the fact the

legal right of secession, at least, arises most conspicuously when a state violates fundamental personal rights. It is the rights of the individuals murdered in a campaign of ethnic cleansing, to choose a flagrant example, which provide the most compelling basis for a cause of action in oppression.

Oppression

It has already been argued that any legal right of secession arises when a state acts illegitimately, in oppressing an identified minority. It will be evident that this is a relatively stark moral concept, which is amenable to the requirements of proof and comes well within the principle of justiciability. It also meets the kind of standard envisaged by an author like Allen Buchanan, which premises the principle of sovereignty and any corresponding right of secession on the rights of individuals. That is because the distinction between individuals and groups dissipates in a probative forum, and the only way of establishing whether the state has oppressed a minority is to examine its actions towards individuals.

This is another aspect of the principle of justiciability. The evidentiary process will inevitably focus on the experience of individuals, and metaphysical distinctions between groups and the individuals which compose them are of no assistance in the courtroom. The existence of a group like a minority, and its individual members, cannot be distinguished in a courtroom, any more than they can be in the ordinary events of life. As a consequence, it is necessary to prove two allegations on a cause of action in oppression. One is that the state has oppressed individual members of the minority in question. The other is that it has oppressed those individuals because they were members of the minority. It follows that the essence of oppression, in the context of secession, is discrimination.

There might appear to be situations where the right of secession arises in the absence of

discrimination. The most obvious case is where a government which oppresses the general population has difficulty exercising its authority over a region in the state. This raises a question of revolution, albeit one confined to a particular territory, rather than the country as a whole. This is not the kind of situation which would normally be dealt with in an application for secession, however, since it would be impossible to grant an application for secession without throwing the legitimacy of the entire government into doubt.

Although the proof of oppression seems a relatively simple matter, in the most grievous cases, it would be a mistake to discuss the kind of criteria which establish oppression without examining the existing law. This is in keeping with legal convention, which holds that the law, in its entirety, exists as a coherent whole. This is evident in the tendency of almost all courts to introduce novel principles by developing the theoretical premises of the existing case law. This maintains the coherence of the entire body of legal principles, even as it changes, and provides a more pragmatic approach to the legalities of secession than the theoretical approach adopted in the academic literature.

Although there are a variety of sources which might inform a court's use of a concept like oppression, it is notable that there is a considerable discussion of oppressive conduct in the common law. The word "oppression" appears regularly in Company Acts and has been used extensively in the context of corporations. This case law is helpful because it deals with the questions of prejudice which inevitably arise in the dealings between a majority and a minority. As one of the entries in the American Words and Phrases puts it:

> . . . in general, the term "oppression" suggests harsh, dishonest or wrongful conduct and a visible departure from the standards of fair dealing which inure to the benefit of the majority of shareholders and to the detriment of the minority. *Jackson v. St. Regis Apartments, Inc.*, Mo. App., 565 S.W. 2d 178, 183.

The notion of moral visibility is helpful, since any legal right of secession should be restricted to

those situations where a minority suffers serious and substantial discrimination.

The statement of the law in *Scottish Co-op Wholesale Society Ltd. v. Meyer* [1959] A.C. 324 (H.L.), at 342, is one of the points of departure for the discussion of the term "oppression" in the Canadian law. In that case, Viscount Simonds held that a company acted oppressively in selling one of its assets to a company controlled by the majority shareholder.

> It had the majority power and it exercised its authority in a manner "burdensome, harsh, wrongful" - I take the dictionary meaning of the word.[307]

Perhaps the most significant development in the corporate law is that the concept of oppression has developed in a manner which consciously includes the concept of discrimination.

There are a number of parallels with a question like secession, since the law recognizes the need to respect the legitimate authority of the majority. In *Brant Investments Ltd. v. Keeprite Inc.* (1987) 42 D.L.R. (4th) 15 (Ont. H.C.), at 50, for example, Anderson J. writes that a judge must consider the competing interests on both sides of the issue.

> On the one hand the minority shareholders must be protected from unfair treatment. That is the clearly expressed intent of the section. On the other hand the court ought not to usurp the function of the board of directors in managing the company, nor should it eliminate or supplant the legitimate exercise of control by the majority.

It is not enough that the policies of the company are unpopular with the minority.

The corporate analogy also has its limitations. The concept of "oppression" has been diluted in the context of corporations and now includes simple unfairness. In *Journet c. Superchef Food Industries Ltd.* [1984] C.S. 916, at 925f, for example, Gomery J. states:

> In Canada, the Court need only be satisfied that the business of the Corporation has been conducted in a manner that is unfairly prejudicial to the interests of some of the shareholders, or that unfairly disregards their interest. It is now no longer a question only of oppression: now the Court is asked to judge upon the fairness of the actions of management.[308]

It is difficult to see how this would be enough, in the case of secession, if there is a presumption

in favour of maintaining the existing political order.

There is another problem with the corporate suggestion that bad faith is one of the essential elements of oppression. This seems unnecessary in the instance of secession and would raise all of the difficulties in attributing mental and psychological states to impersonal entities. The decisive factor in proving a cause of action in oppression is injustice: the moral issue is whether a minority has been so unjustly treated that it is legally entitled to reject the legal and political order. This requires that a court determine whether a minority is entitled to redress and the motives and beliefs of the actors in the state only seem relevant if they establish the fact of oppression.

The American case law also makes use of the concept of oppression in determining whether punishment, for example, is unconstitutional.[309] This brings in the notion of cruelty, which raises the question of proportionality which arises in the context of discrimination. There is a sense of this in the English law, and Stroud's Judicial Dictionary makes use of the same concept, in stating that the word "oppression" refers to "a disregard of the essentials of justice and the infliction of a penalty which is not properly related to the crime of which the party stands convicted". The term has accordingly been used in the criminal law and arises, for example, in determining whether a confession is voluntary. As in most legal matters, the question whether there is oppression is specific to the circumstances of the case. It cannot be decided in an abstract manner, without an examination of facts.[310]

From a legal perspective, at least, the creation of a cause of action in oppression is a substantive development. This does not decide the philosophical issue regarding the nature of the principles which give rise to such a finding. If the courts are insistent about the substantive nature of their jurisdiction, it is primarily because they reserve the right to go beyond narrow procedural

questions. There is no subtlety here: no court is going to permit an act of secession without inquiring into the "substance" of any agreement between the state and a seceding minority. This is the essence of the ruling in the *Secession Reference.*

There is still the philosophical issue. As always, the legal process calls for a judgement as to the parameters in which power can be justly exercised, rather than a decision on public policy. The principle of equality is essential in determining whether conduct is oppressive and the legal right to secede arises from the fact that the members of a minority have been treated differently than other people. There is a sense in which the ownership of the sovereign power is a political rather than a legal question, which can only be decided by the people. There are no necessary answers here: there is only a question of choice and association, which can only be exercised in freedom. This can only take place autonomously, outside prescription.

Conclusion

The starting point of the present dissertation is clear enough: we are in dire need of a peaceful means of resolving the kinds of conflicts which have arisen when a minority within a particular state claims the right to secede. These conflicts have intensified in recent years, and present a serious threat to global stability and peace. The dissertation argues that it would be possible to create a neutral mechanism to deal with claims for secession, in a recognized legal system. It will be evident from the discussion in the previous chapters that it is impossible to set out the foundations for such a legal mechanism without traversing a large amount of territory.

After such a lengthy journey, in law and philosophy, it seems fitting to look back over the ground which we have covered and try to identify some the issues which arise out of such a discussion. The dissertation essentially provides the legal and philosophical foundation for a legal right of secession. It therefore inquires into the circumstances in which a minority is legally entitled to question the state's jurisdiction over a particular territory. There are two sides to this inquiry. One concerns the philosophical foundations of a right of secession; the other concerns its legalities.

On the philosophical side, the dissertation examines the concept of legitimacy and the notion of legality. On the first issue, legitimacy, the dissertation argues that it is possible to distinguish between a legal and a political standard of legitimacy. The political standard is based on consent and has been discussed extensively in the literature. The legal standard is based on principle, rather than agreement, *per se*, and allows us to determine whether the positive law is in accordance with fundamental moral values. Although the dissertation examines both standards of legitimacy, it focuses on the legal standard, which has not received significant attention in the

academic literature.

This explains the *modus operandi* in the common law tradition, at least, since the essential judicial task, in such a system, is to justify the decisions of the court on the basis of general principles. The essential argument in the first few chapters is that the courts determine the legal issue of legitimacy from their use of general moral principles which are generally accepted in society. The fundamental argument is that this legitimacy can be distinguished from the legitimacy that attaches to political institutions, which are generally held to be legitimate if they act with the consent of the populace. Although the courts cannot function credibly without a certain political legitimacy, the legitimacy of legal institutions derives from their use of accepted principle, rather than from the general acceptance of its rulings.

The question of legal legitimacy is essential, in the context of secession, since the most pressing cases of secession usually arise in those instances where a majority oppresses a minority. As a result, it is impossible to decide an issue like secession without some apparatus which allows us to question the moral character of a state's conduct, even where the state acts with the consent of the large majority of its population. The ostensible purpose of a legal right of secession is to take the issue outside the political process and determine whether the conduct of a particular state is in keeping with generally accepted moral principles rather than whether it has received the consent of a democratic majority.

The dissertation argues that a government which fails to respect the fundamental rights of a minority is no longer legally legitimate. It is accordingly open to a minority to challenge the validity of its title to the sovereign power. This is not possible, however, without extending the domestic notion of legality into the international realm. Under the historical doctrine, the authority of the courts derives from the political authority of the state. As a result, the political

order within a state, which provides the source of the legal order, is not amenable to external legal constraints. This view is still reflected in the international law, the English common law and the legal positivist tradition in philosophy.

It is also reflected in the historical tradition, which holds that the validity of the state's title to the sovereign power lies outside the reach of domestic courts. An act of secession creates a hiatus in the established order, on such a reading, and constitutes a form of revolution. This takes place outside the legal realm and is beyond the reach of legal constraints. Although common law courts have exercised a residual power to determine whether the sovereign power has changed hands, this is merely the power to determine, as a factual matter, who holds the right of government.

The overriding problem with any attempt to develop a legal right of secession is accordingly the simplest. It is that secession occurs outside the legal order, as it has been traditionally conceived. As matters stand, states are free agents, at least legally, and there is no source of law which would give a legal body the authority to order the division of a state into separate political entities. It follows that it is impossible to develop a legal theory of secession without altering the concept of sovereignty to encompass the possibility of a legal order above the state.

All of this raises practical legal problems. One of the problems is that disputes concerning secession arise between states and ethnic or religious groups within the state, which have no status in international law. The problem of secession usually occurs when an ethnic minority constitutes a majority in a particular region: the events in Kosovo and Sri Lanka provide good examples of such conflicts. It is impossible for other states to intervene in such conflicts, however, without committing something akin to an act of war against a sovereign state. Under traditional

Westphalian principles, states are entitled to pursue their internal affairs without interference from other states and there is no legal means of subjecting a state to formal constraints.

There are a number of developments in the international arena which suggest that this is changing, particularly in the area of human rights, and the International Court of Justice has held that states are legally obliged to respect the basic rights of their populations. The globalization of the economy, the formation of consortiums of states, like the European Union, with their own legal and political institutions, have all undermined the traditional state system.

Although we do not have a legal institution with the power to adjudicate disputes concerning a state's right to govern, the need for such an institution has become more and more apparent. That is primarily because the Westphalian concept of state sovereignty has begun to unravel and the international community has recognized that it has an obligation to protect the rights and interests of individuals living in oppressive states. This is evident in the use of multinational forces in places like Bosnia, Somalia, Kosovo and East Timor. Although we are a long ways from a consensus, the international community has accepted that it has an obligation to protect the fundamental rights of individuals, even if that means piercing the veil of sovereignty.

On the legal side of the discussion, the matter is more straightforward. The second half of the dissertation sets out a legal standard of justice and discusses a number of institutional issues which would arise in any legal action for secession. If there is to be a compulsory law, which takes ascendancy over the state, the authority of the law must find its source in something other than the political order. The natural source of such an authority can be found in generally accepted moral principles, which legally bind the actors in the political realm.

Allen Buchanan has already argued that illegitimate states, which contravene fundamental human rights, are not entitled to international recognition. The dissertation takes a similar

position, in arguing that the legal question on secession is whether a state has contravened the fundamental rights of the members of a minority. This raises a question of discrimination, which rests on the fundamental principle that individuals and groups within the state are entitled to some form of legal equality. The dissertation then goes further and provides the outline of a legal theory of secession, which would bring contested claims within the purview of an international court.

The legal theory in the dissertation is essentially a remedial theory, which rests on the thesis that legal institutions have an inherent authority to provide a minority which has suffered a historical wrong with relief. This is in keeping with the legalities of the situation, since secession is more properly conceived of as a remedy than as a cause of action. The theory in the dissertation contrasts with the legal theory put forward by David Copp, who argues for a legal right of secession based on a general right of self-determination. Although one would expect the latter theory to be more permissive, both theories recognize that a legal right to secession would only arise in circumstances which are morally compelling.

The dissertation recognizes that the matter is more complicated than either of these theories might suggest, since a minority may possess a political right of secession, outside of any legal rights. This may still require the intervention of an impartial legal body, on issues such as the placement of borders or the division of a national debt. A political right to secede may also crystallize into a legal right, if the overholding state prevents a minority from exercising such a right.

The last two chapters of the dissertation consider some of the technical issues which would arise in creating an cause of action in oppression in an international forum. Perhaps the most prominent of these is the principle of justiciability, which recognizes that courts do not

possess the institutional capacity to decide speculative political questions, which are a matter of opinion rather than fact. Since the stability of the existing international order needs to be protected, there should be a presumption in favour of maintaining the integrity of existing states.

This provides a map, at least, of the kinds of issues that need to be explored, if we wish to establish a legal mechanism to resolve conflicts over the issue of secession. The discussion in the dissertation is only intended as a precursory discussion, however, and there are many issues that require further investigation. This is true, on the legal and the philosophical side. We need a more extensive discussion of the limits of legitimacy, for example, and the question of what makes a state illegitimate. There is also the question of determining what sanctions should be available, if a state steps outside those ethical restrictions.

The fundamental point behind the dissertation is that states which disregard the basic rights of their citizens lose their right to govern. If this is to be a meaningful and a serious position, we accordingly need to develop criteria to determine at what point a state no longer possesses a valid claim to moral, political or legal validity. If the world wishes to develop legal institutions which can deal with such issues–and that is not entirely clear–we need to develop a body of general principle which can be employed in deciding such issues.

There is already an ongoing attempt to create "a global ethic" based on the major religious traditions and comparable work needs to be done in the legal arena. The principles employed by institutions with international jurisdiction must respect the moral, legal and political values of a transnational, inter-state community of peoples. Perhaps it is important to recognize that domestic courts have begun work on such a body of principle, in recognizing the universal character of statutory obligations in the area of human rights.

If there is to be a new International Court of Justice, with an independent and compulsory

jurisdiction, it is important to determine which principles of interpretation would govern the exercise of its powers. The first and most important of these principles is probably a principle of narrow interpretation, under which a world court would only exercise its jurisdiction in those circumstances where a fair hearing and appropriate relief are not available in other forums. The legal systems in the world are converging, to be sure, and there is also the question of integrating domestic systems of law, without depriving state courts of the right to assert and develop their own traditions of jurisprudence. This raises the question whether a new International Court of Justice might eventually be given an appellate function, which allows it to act as an umpire in cases where different legal systems and traditions come into conflict.

As a final matter, it is important to consider the political issues which lie behind these questions. The borders between individual states are dissolving and it is unclear whether states, in their present form, will survive the new world order. For one thing, the argument that states are the only legitimate actors in the international arena is no longer compelling. There are moves afoot, certainly, to establish a world Parliament and it is impossible to say whether the state system will survive the economic integration which is taking place in the world.

In these circumstances, it is important to examine the institution of the state, itself, and determine whether there are other forms of governance which are more suitable for the generations to come. There seems little doubt that others have already begun such an inquiry. In any event, it is evident that this requires an investigation into the philosophical foundations of the state and the practical realities that pertain to the exercise of political power. Although one can immediately see arguments on both sides of such an issue, it is impossible to say where it will lead.

Notes

1. This explains the common insistence, in revolutionary struggles, on the distinction between political and criminal prisoners.

2. There is no reason to believe that Yugoslavia's application to the International Court of Justice for an injunction to stop the bombing campaign by the NATO forces was a relevant factor in the events within Kosovo. The decision in the case merely attests to the poverty of the international legal system. A summary of the court's judgement on "provisional measures" is available at <http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm> The order itself, under the style of cause *Legality of Use of Force (Yugoslavia v. Belgium et al.)*, can be accessed at <http://www.icj-cij.org/icjwww/idocket/iybe/iybeframe.htm>.

3. There is no reason to take the matter out of the political arena, in the second kind of case, even if the chances of agreement seem remote.

4. Dworkin, "Liberalism", p. 126. The passage continues: "Suppose a limited amount of emergency relief is available for two equally populous areas injured by floods; treating the citizens of both areas as equals requires giving more aid to the more seriously devastated area rather than splitting the available funds equally."

5. There is the more complex problem of actions taken by one side or the other in the course of the events leading up to secession. Since some of these actions may be violent, they are difficult to accommodate within the western legal tradition, which generally sees violence as the use of force outside the rule of law.

6. Buchanan, "Recognitional Legitimacy", p. 17

7. WWWebster Dictionary: WWW Dictionary Accessed: June 18, 1999.
And see the Random House Dictionary of the English Language, which defines "legitimate" as "according to law; lawful: *the property's legitimate owner*".

8. Thomas Macaulay, in his essay on Milton, in 1880, speaks of the "doctrine of Divine Right, which has now come back to us, like a thief from transportation, under the *alias* of Legitimacy."

9. Crenshaw, "Introduction" to Terrorism, Legitimacy and Power, p. 32f: "For example, what legitimacy the Red Brigade possesses (undoubtedly small, but a quality which is impossible to measure) is surely attributable to the Italian government's corruption, general inefficiency, and inability to solve persistent social and economic problems."

10. Barnes, Military Legitimacy, p. 62

11. There is nothing to prevent us from arguing that a certain course of conduct is morally legitimate and politically illegitimate, but the latter question is a relative issue, and merely serves to tell us whether the conduct in question offends existing political conventions.

12. Gilbert, "Community and Civil Strife", p. 6

13. If a government acts in a manner which is immoral and oppressive, there is some room, at least, in which to argue that the use of random violence to achieve political ends might be morally justified, and therefore legitimate. Gilbert distinguishes between the view that terrorism is "political crime" and the view that it is "politically motivated crime", as Michael Walzer apparently suggests in Just and Unjust Wars (New York: Basic, 1973), at p. 199f.

14. See p. 3: Barring the extremes of anarchy and totalitarianism, government cannot exist unless the ruled voluntarily submit to the rules of their society and to the authority of their rulers. For the ruled to do this, they must believe implicitly that their rulers have the right to ask that they obey, that is, that they believe that their government possesses "political legitimacy".

15. The quotation is from R.A. Dahl, Modern Political Analysis, 3d (Englewood Cliffs, N.J., 1976), p. 61.

16. In footnote 2, at p. 321, Marston traces the derivation of modern theories of legitimacy to Max Weber's The Theory of Social Organization (New York, 1957; orig. pub. 1922). The reference to Carl J. Friedrich is to Man and His Government: An Empirical Theory of Politics (New York, 1963), at pp. 233-234.

17. Kittrie also argues for a decentralized state in which the smallest unit of government that can feasibly perform a given function is given the authority to do so. See p. 256: "Denominated *subsidiarity* and described as 'the ghastly Euro-word,' the doctrine promises to supply one of the supporting pillars for the building of legitimacy amidst diverse and potentially conflicting populations and interests. Having emerged in conjunction with the planning for a unified Europe (a continent to be united by an overriding parliament, executive, and judiciary), subsidiarity was advanced as a counterforce by the national groups fearing domination and oppression from above. The principle of *subsidiarity* 'means that the smallest unit of society which can properly perform a given function, should be allowed to do so. A larger organization should not take over a task which can be adequately accomplished at a lower level. . . .'" The definition of "subsidiarity" is taken from Joseph Dunner, ed., Dictionary of Political Science (New York: Philosophical Library, 1964). And ghastly it is.

18. Weber, "Legitimacy", p. 33

19. See Seymour Lipset, "Social Conflict", p. 88. Cf. Scharr, "Legitimacy", at p. 108, where he offers three "professional definitions" of the term "legitimacy": "(1) Legitimacy involves the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society. (2) In the tradition of Weber, legitimacy has been defined as 'the degree to which institutions are valued for themselves and considered right and proper'. (3) We may define political legitimacy as the quality of 'oughtness' that is perceived by the public to inhere in a political regime. That government is legitimate which is viewed as morally proper for a society." For a convenient book of readings in the area, see Connolly, Legitimacy and the State.

20. See Jürgen Habermas, Legitimation Crisis (Boston: Beacon Press, 1973) and the literature commenting on his work.

21. Scharr, "Legitimacy", p. 108

22. Connolly, "The Dilemma of Legitimacy", p. 224

23. At p. 8ff, Beetham cites Scharr, Hannah Pitkin, and Robert Grafstein, who have all criticised the reigning view.

24. Beetham argues that the "normative structure" of legitimacy has three different aspects: it includes a notion of "validity according to rules, the justifiability of rules in terms of shared beliefs, and expressed consent on the part of those qualified to give it". (97)

25. See Beetham, p.245f: "Just as social scientists cannot explain [changes to established norms of legitimacy] if they remain confined within the terms of a particular set of society-specific norms or beliefs, so neither can philosophers evaluate them, except from a standpoint which is outside the given tradition, and from which they might prioritise particular elements within it. For this reason I do not see how it is possible to avoid some external or transcendent position altogether in political philosophy, even if it remains implicit and unconscious."

26. Cotta, "Legitimacy: A Mirage?"

27. There is no question that this debate has an American character, which reflects a different attitude towards the legal and political order than the one which in jurisdictions like Britain or Canada. See the comment by Machan, at p. 502: "When the Black Panthers fought the police in the late 1960s, they or their leaders often argued on TV talk shows that they wholeheartedly disputed the moral authority of the officers of 'white America's law,' regardless of the wisdom or lack thereof of the particular matter at hand during some confrontation. It is when these sorts of challenges or protests are levelled that we are faced with what comes closest to a genuine questioning of political authority."

28. It is notable that Machan goes no further, in speaking of the need for government, than to assert that people "possess" the capacity to be evil. (505)

29. See Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse, p. 14: "The most distinctive features of our American rights dialect are the very ones that are most conspicuously in tension with what we require in order to give a reasonably full and coherent account of what kind of society we are and what kind of polity we are trying to create: its penchant for absolute, extravagant formulations, its near-aphasia concerning responsibility, its excessive homage to individual independence and self-sufficiently, its habitual concentration on the individual and the state at the expense of the intermediate groups of civil society, and its unapologetic insularity. Not only does each of these traits make it difficult to give voice to common sense or moral intuitions, they also impede development of the sort of rational political discourse that is appropriate to the needs of a mature, complex, liberal, pluralistic republic."

30. Carr, "The Problem of Political Authority", p. 484.

31.*Gibbons v. Ogden*, 9 Wheat. 1, 202 (U.S., 1824); *License Cases*, 5 How. 504, 582 (U.S., 1847)

32. This requires something approaching blind faith in the "free market" system. See *ibid.*: "Free market remedies could, most likely, replace the overweening regulatory framework our states now enforce. Building codes and fire codes could presumably be replaced quite easily by privately enforced codes drafted by insurance companies. Few developers would construct hazardous firetraps if they knew beforehand that they could not acquire insurance for their buildings. And as Bernard Siegan brilliantly demonstrated in his "Non-zoning in Houston," egregious, incompatible property uses will not often cohabit if land use regulations were summarily abolished. Restrictive covenants that run with the land,

renewable at intervals of several decades, could very expeditiously insure that a slaughterhouse will not locate in the middle of Shaker Heights, Beverly Hills, or Boca Raton."

33. Other authors, like Christopher Wellman, speak of an individual right to secede. This raises a question with respect to the ontological character of political rights. See Wellman, "Liberalism, Samaritanism and Political Legitimacy", at p. 219: "To emphasize: the reason that *I* have no moral right to be free from political coercion (to secede) is because, even if *I* would rather forego the benefits of political society, *I* have a moral duty to others . . ."

34. Buchanan, Secession, p. 76f

35. See Fishkin, Tyranny and Legitimacy, p. 4f, where he sets out three kinds of criteria: procedural principles "such as majority rule, unanimity, and theories of consent"; structural principles, "such as equality, utilitarianism, and Rawl's theory of justice"; and principles which hold that rights are absolute, "such as the famous recent theory of Robert Nozick."

36. See Fishkin, Tyranny and Legitimacy, p. 18: "*A policy choice by the government is an instance of simple tyranny when that policy imposes severe deprivations even though an alternative policy would have imposed no severe deprivations on anyone.*" And see the additional propositions at pp. 42f, 44 and 52.

37. Cf. Richard Taylor, "The Basis of Political Authority", p. 470, where he uses the same example: "And if there happens to be a prosperous and easily identifiable minority, such as the Asians in Kenya, then it is but a matter of time before they are virtually driven from the country and their property and business expropriated–by the official threats of a legislature which correctly claims to 'represent' the people, and thus express the dreadful will of the majority. We view outrages like this as corruption. We fail to see that it is simply democracy . . ."

38. The reference, at page 142, footnote 2, is to Joseph Schumpeter, Capitalism, Socialism and Democracy, 3d (New York: Harper & Row, 1950), pp. 240 and 242.

39. Barry refers to these as "agency" and "organic" theories. See "The State and Legitimacy", at p. 194: "The agency theory takes a purely subjectivist view of the state: it is a device or contrivance for transmitting individual choices into collective outcomes." And p. 200: "The organic theory of the state seeks to establish legitimacy by reference to authority rather than individual choice."

40. But see p. 201, where Barry writes that this does not make it "conservative in a *substantive sense*", and argues that it "can easily be made consistent with the features of a classical liberal order, private property, market exchange, the rule of law and so on". (201)

41. Paul, "Substantive Social Contracts", p. 528. And see page 527: "Any contractual process, whether hypothetical or actual, which aims at deriving legitimate principles regulating the liberties of its members cannot do so, by itself. Such a process already presupposes the legitimacy of a pre-contractual normative principle proscribing [*sic*] the self-ownership and autonomy of every contractor."

42. And of course the same kind of issue arises in the instance of majority rule, which binds the voters for some period of time into the future. The duration of such a period is an important issue in the context of a referendum on secession.

43. Riley, Will and Political Legitimacy, p. 124

44. See the discussion in Riley, Will and Political Legitimacy, at pp. 206-209

45. See Wellman, "Liberalism, Samaritanism and Political Legitimacy", at p.216. See Wellman's comment at p. 212: "Unfortunately, only wishful thinking supports the belief that existing states have garnered the morally valid consent of all of their citizens." And at p. 220: "Although the consent theory of political legitimacy historically has enjoyed a great deal of support, it has more recently been thoroughly discredited. This approach is doubly flawed since (1) citizens almost never consent to their governments, and (2) any act even resembling that which implies consent (like voting) is a moral nullity because it is performed under coercion (the voter in a political election will be–and has been–subject to the state's laws no matter how, or even whether, she votes)."

46. See *ibid.*, p. 216: "The state's right to coerce its citizens correlates to the latter's lack of rights to be free from political coercion, and this absence of rights stems from their samaritan duties to others. In short, our samaritan duties to others curtail our own political liberty." The assumption, as in most of the literature, is that the matter needs to be discussed from the perspective of personal rights, even where those rights do not exist!

47. Buchanan, "Recognitional Legitimacy", p. 27

48. Locke, The Second Treatise of Government, §119

49. Marston, King and Congress, p. 18. Marston continues: "By midcentury, Blackstone had incorporated the concept into his lectures and ultimately into his Commentaries, giving semilegal status to the idea that 'allegiance is the tie or *ligamen*, which binds the subject to the King, in return for that protection which the King affords the subject."

50. Campbell, "Obligation: Social, Political and Legal", p. 148

51. Harris, "The Moral Obligation to Obey the Law", p. 178f. And see the passage on p. 178: "The three conditions under which there is a general prima facie obligation to obey the law in a particular society (the institution of law is necessary to help secure the social conditions for a moral life for any moral person in that society, the law fulfills that function, and does so in accordance with the requirements of reasoned discourse and the respect due to moral persons) may be thought to constitute such a stiff test that it is unlikely that they could be satisfied by the way law operates in any large modern society, even a liberal democracy."

52. Martin, "The Character of Political Allegiance in a System of Rights", p. 212

53. Green, "Consent and Community", p. 101f

54. Hume, "Of the Original Contract", p. 445

55. "What necessity", Hume writes, ". . . is there to found the duty of *allegiance* or obedience to magistrates on that of *fidelity* or a regard to promises, and to suppose, that it is the consent of each individual, which subjects him to government; when it appears, that both allegiance and fidelity stand precisely on the same foundation, and are both submitted to by mankind, on account of the apparent interests and necessities of human society?" (455)

56. And there are extreme examples of this: the members of a minority, like the Palestinians, may choose to maintain a residence in a country like Israel, precisely because they dispute the legitimacy of the state in which they live.

57. This goes beyond the law, moreover, and enters the moral discourse. As a matter of common sense, we agree, in going into a theatre, that the theatre will be darkened when the film is shown. And we cannot complain if we stumble, merely because the lights are out. In a very real sense, we have consented to such a circumstance, merely in purchasing a ticket, and our personal knowledge of theatres is essentially irrelevant. The law of contract and negligence constantly addresses these kinds of issues and the limits of our capacity to agree are often determined by the question whether a particular event is foreseeable.

58. For a discussion of Kant's position, as it pertains to private property, see Kevin Dodson's article, "Autonomy and Authority in Kant's *Rechtslehre*". At p. 109, Dodson concludes: "Outside of civil society, there can be no juridical legislation compatible with the autonomy of moral agents."

59. Hume, "Of the Origin of Government", p. 114

60. See Christopher Wellman, for example, in "Liberalism, Samaritanism, and Political Legitimacy", at p. 217: "Put plainly, there will always be people unwilling to honour the moral rights of others if there were no legal repercussions of violating them. Moral rights will be respected and peace will be ensured only if police effectively protect individuals and recognized judges impartially adjudicate conflicts according to established rules."

61. Nielsen, "State Authority and Legitimation", p. 219. Nielsen's discussion moves away from such an argument, however, postulating "ideal speech conditions" in which an "undistorted discourse" might reveal the conditions under which we can "impute" the "rational consent" necessary to determine when the state has a legitimate *de jure* authority. (230) This is a highly conjectural argument, which Nielsen uses to argue that democratic forms of socialism deprive any capitalist state of its *de jure* legitimate authority.

62. Henry Sidgwick summarizes this view, which comes from John Austin, as well as anyone. See the Appendix to The Elements of Politics, at p. 651: "Austin's view may be briefly stated thus: Every Positive Law of any State is a general command to do or abstain from certain acts, which is issued directly or indirectly by the Sovereign of the State to a person or persons subject to his authority, the Sovereign being that determinate person, or body of persons combined in a certain manner, that the bulk of the members of the State habitually obey . . ."

The important factor for Austin, Sidgwick puts it, is that the power of the King "cannot be legally limited", since it is the unlimited nature of the sovereign power which gives him the authority to make and enforce the law.

Harry Beran distinguishes between "the fact of being obeyed" and the "right to be obeyed" but this kind of distinction simply dissolves in the traditional positivist analysis. It is the fact that the sovereign is obeyed which indicates that the personality of the sovereign has the right to be obeyed. See Beran, "What is the Basis of Political Authority?", at p. 489.

63. Dyzenhaus, "The Legitimacy of Law", p. 84

64. Even in the instance of judge-made law, of course, the legislature has the prerogative of overriding the decisions of the courts by statutory enactments.

65. If a court with the authority to decide secession was to derive its authority from a political order, it would accordingly require that we envisage a political order, over and above the state, from which a legal order with the jurisdiction to try a question like secession can derive its own authority. But the idea that we could premise the legitimacy of the relevant legal order in some form of world government does not address the insufficiencies of a political notion of legitimacy, or the fact that it seems impossible to base the legitimacy of many aspects of the legal process in a political authority.

66. <http://supct.law.cornell.edu/supct/html/91-744.ZO.html> Any page references are to the web document.

67. See p. 10 of the Rehnquist decision: "The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution. The doctrine of *stare decisis* is an adjunct of this duty, and should be no more subject to the vagaries of public opinion than is the basic judicial task." (10)

68. See Margaret Moore, "On Reasonableness", p. 17: "Even if we accept that people are not purely self-interested, and do exhibit a desire to justify their actions before others . . . it does not follow that those reasons are connected to the impartial point of view. There is a gap between the notion of justification, in the sense of offering reasons for one's actions, and the impartial standpoint of morality."

69. See p. 284: "The desire to be able to justify our actions to ourselves and others on a basis capable of eliciting free agreement is, as common experience attests, widely shared and deeply grounded. . . . It is indeed a curious and striking illustration of the strength of this desire that the beneficiaries of such institutions as slavery and racial discrimination seldom defend their position as a frankly unjustifiable assertion of superior power . . . Rather, we find elaborate defenses in terms suggesting, however implausibly, that even those on the losing end would, if they understood the position aright, find it reasonable to accept their status."

70. Available at: <http://www.droit.umontreal.ca/doc/csc-scc/>

71. See the comment of Friedman, in "Is There a Modern Legal Culture?", at p. 129: "Legitimacy is a procedural concept; and there is some evidence that people do value fair procedure for its own sake (Tyler 1990). But they may value *substance* more; and the courts, when they deliver the goods, can rank high indeed in public esteem. The elective or majoritarian principle is after all not totally beyond criticism or discussion (Offe 1984). Indeed, the whole concept of rights is a denial of the majoritarian principle." The point is that democratic principles, rather than legal principles, are procedural rather than substantive.

72. For example: is the principle of natural justice which states that a party affected by a decision has a right to know the reasons–the substantive reasons--for the decision a procedural or substantive principle?

73. There is no reason why we are forced to accept that there are ever "hard cases" in this sense of the term.

74. Applbaum, "Democratic Legitimacy and Official Discretion", p. 240

75. See the passage from Applbaum, on p. 251: "A purely procedural view of justice, in which justice is nothing other than the outcome of a specified procedure, may collapse into a view of legitimacy, where

the justice question of 'what to decide'–given substantive conflict of interests, beliefs, or values–cannot be separated from the legitimacy question of 'how to decide' or 'who is to decide.' But the procedural view will always raise an issue of legitimacy, and the significant question, in such a context, is whether it is sufficient to decide substantive issues.

76. See Applbaum, *ibid.*, p. 256, footnote 37, where he refers to an article by Amy Gutmann and Dennis F. Thompson entitled "Moral Conflict and Political Consensus" in *Ethics* 101 (1990): 64-88, and comments: "Gutmann and Thompson emphasize principles of public deliberation–consistency and mutual respect, for example–but substantive principles might govern legislative reasons as well: protect minorities, benefit the least advantaged, strengthen democratic institutions, and so on."

77. There are significant moral issues, like nuclear deterrence and the death penalty, which Nagel sees as properly within the public domain.

78. See *R. v. Oakes* [1986] 1 S.C.R. 103, an early case under the *Canadian Charter of Rights*, which sets out the procedure to be followed in determining whether legislation is a "reasonable limit" under section 1 of the *Charter*. The question of proportionality also arises, more directly, under section 12 of the *Charter*, which prohibits "cruel and unusual treatment of punishment".

And see *Dudgeon v. United Kingdom* (1981) 4 European Human Rights Reports 149 (European Court of Human Rights), at 165-168, where the court ruled that Northern Ireland laws prohibiting homosexual acts failed the proportionality test and therefore violated the petitioner's right "to respect for his private life" under Article 8 of the *European Convention on Human Rights*.

79. Habermas, "Human Rights and Sovereignty", p. 10.

80. Philpott, "Sovereignty: An Introduction and Brief History", note 3, p. 354. Philpott cites his sources as L. Oppenheim, International Law, vol. 1 (London: Longman, 1905), p. 103 and Richard Falk, "Sovereignty", in Oxford Companion to Politics of the World (Oxford: Oxford University Press, 1993), p. 854.

81. From F.H. Hinsley, Sovereignty, 2d (Cambridge: Cambridge University, 1986), at p. 26, as quoted in Biersteker, "The social construction of state sovereignty", p. 8.

82. The quotation is taken from R.P. Wolff, "The Conflict between Authority and Autonomy", in Joseph Raz, ed., Authority (Oxford: Basil Blackwell, 1990), p. 20

83. See Philpott, "Sovereignty", note 5, p. 355: "Here, I use legitimate in its descriptive sense not to mean justified or morally defensible, but as Max Weber meant it: Something is legitimate if it is assented to, or at least regarded as part of the normal, proper state of affairs. For Weber, authority attains its legitimacy either because it has tradition behind it, it has emotional power, it is rational or it is legal." He then cites Max Weber, "The Theory of Social and Economic Organization," in Talcott Parsons, ed., Max Weber: The Theory of Social and Economic Organization (New York: The Free Press, 1947), pp. 124-32.

84. Doyle, "Vitoria on Choosing to Replace a King", p. 46f. Doyle then quotes from Vitoria, in *Relectio de potestate civili*, as found in Teofilo Urdánoz, ed., *Obras de Francisco de Vitoria: Relecciones teologicas*, ed. crítica (Madrid, 1960), n. 5; p. 157: "For if all men would be equal and subject to no power, with each one tending by his own choice and opinion in a different direction, without some providence which would have common care and concern for the common good, the republic would

necessarily be pulled apart and the state would be destroyed . . ."

85. See Biersteker, "The social construction of state sovereignty", at p. 4. The quotation is from Hans J. Morgenthau, Politics Among Nations (New York: Knopf, 1967), p. 299.

In "Rethinking Sovereignty", Joseph Camilleri traces this view to the publication of Jean Bodin's De la République, in 1577. Bodin's . . . main contention was that such power had to be given legal recognition. It had to be endowed with *sovereignty*. Here he uses the words *souveraineté*, *majestas*, and *summa potestas* more or less interchangeably. For Bodin, sovereignty was "supreme power over citizens and subjects unrestrained by law" and therefore unlimited in extension and duration." The quotation is from Richard Knolles, trans., Jean Bodin, The Six Bookes of a Commonweale, (London: Impensis G. Bishop, 1606), p. 84.

86. Cf. Barkin, "The Evolution of the Constitution of Sovereignty", p. 236: "Although elements of the system had been developing for centuries, and remnants of the old feudal order were to remain in some areas of Europe for some time after, the Peace of Westphalia of 1648 is generally seen as the starting point of the modern state system." In this context, Barkin cites Leo Gross, 'The Peace of Wesphalia, 1648-1948', American Journal of International Law (1948) 42,1: 20-41.

87. See Buchanan, "Rawl's Law of Peoples", p. 5: "The Treaty of Westphalia also affirmed the principle that the head of state determines the religion of the people within the state. This principle was designed to prohibit religious imperialism with its inevitably destruction and instability, but helped to nurture a much more general principle prohibiting intervention against sovereign states that is a central tenet of the Westphalian system."

88. And see Gierke, p. 137: "So long as the State was simply treated as *societas perfectissima*, and so long as its theory was simply regarded as an illustration (if the best and completest illustration) of the general conception of *societas* already described in the previous subsection, the ideas which found most vigorous expression in natural-law theories of the State were merely the general ideas about the nature of Groups with which we are already familiar; and these general ideas were freely applied, whether their ingredients were consistent with one another or contradictory. But a new situation arose, and thinkers were confronted by fresh intellectual problems, as soon as they turned to face the conception of Sovereignty (which still continued to be the essential core of the theory of the State), and attempted to bring it into harmony with their conception of *societas*."

89. Christians would have a similar right to reject an infidel ruler and replace him with a Christian prince, on the basis that such a course of action was necessary to protect the common good.

90. As quoted by Noreña, p. 264.

91. Noreña continues: "Against Vitoria, however, Suárez, always bent on highlighting the formative power of human choices, maintained that such sovereign power is not immediately given by nature itself *(a natura profectum)*, but through an institutional act of the human will *(mediante voluntate humana et institutione;* DF iii.2.10). . . . This will is the will to form a community, which, according to natural law, cannot exist without such a power."

92. Introduction to Tuck, ed., *Leviathan*, p. xix

93. Cohen, "Structure, Choice and Legitimacy: Locke's Theory of the State", p. 313. The numbers in brackets refer to the first and second treatises.

94. The contemporary literature seems to assume that there are no difficulties in envisaging a democracy as a social contract, but the matter is more complicated than the usual formulations suggest, and there are a number of problems which arise in this context. Who, for example, are the parties to the contract? Logically, it cannot be the people and the government, since the government does not come into existence until after the contract has been formed. But see Gierke, vol. II, p. 335, note 9, where he discusses the theory that there is a contract between the "popular assembly" and the people.

95. The passage continues: "Even when the Roman conception of *just gentium* was actually retained, it usually lost any separate and independent significance; and it receded altogether into the background as an effective element in the constitution of the Sate(27). Thus there was gradually developed a theory of pure Natural Law, in which the conception of *just gentium* onhly appeared, in the entirely changed sense of international law, as the particular form of Natural Law which was valid among sovereign States(28)."

The page references in Gierke's text have been omitted in other quotations.

96. It is important not to overstate the religious aspects of the concept of the natural law. See Gierke, for example, p. 36: "It is true that, at first, the State was only incidentally mentioned in the works which dealt with the Law of Nature. But the ecclesiastical writers on Natural law, who generally belong to the Jesuit or the Dominican Order, are already [in the sixteenth century] constructing a system of political theory which is based entirely on the law of Reason." (Barker's interpolation.)

97. See Gierke, p. 341, note 36.

98. See Gierke, pp. 223ff.

99. This gives the sovereign has the authority to suspend the constitution, in the interests of public safety and security.

100.

101. See Gierke, p. 42: "In all forms of State indifferently, a distinction was drawn between the Ruler and the body of the Ruled: the legal basis of the Ruler's authority was regularly ascribed to a previous devolution of its own authority by the body of the Ruled; and in this way it was easy to produce a single formula, equally applicable to monarchies and to aristocratic or democratic republics, which expressed, in terms universally valid, the relations always existing between Ruler and People under the system of Natural Law."

102. Cotta, "Legitimacy: A Mirage?", p. 100

103. See Buchanan, "Theories of Secession", p. 35.

104. Hogg, Constitutional Law of Canada, p. 5-35. The reference to de Smith is cited as de Smith and Brazier, Constitutional and Administrative Law (6th ed., 1989), p. 67

105. See *Harris v. Minister of the Interior* (2) S.A. 428 (1952) and *Minister of the Interior v. Harris* (4) S.A. 760 (1952), cited in de Smith, note 1 and 2.

106. S.A. de Smith, "Constitutional Lawyers in Revolutionary Situations", 101f

107. And see Wade, "The Basis of Legal Sovereignty", p. 188: "When Charles I was executed in 1649 the courts continued to enforce the Acts of the Long Parliament, the Rump, Barebones' Parliament, and the other Commonwealth legislatures. For a revolution took place, and the courts (without any authority from the *previous* sovereign legislature) spontaneously transferred their allegiance from the King in Parliament to the kingless Parliaments. . . . This was a political fact from which legal consequences flowed. But in 1660 there was a counter-revolution: Charles II was restored, and it was suddenly discovered that all Acts passed by the Commonwealth Parliaments were void for want of the royal assent. The courts . . . shifted their allegiance back to the King in Parliament, and all the Commonwealth legislation was expunged from the statute book. . The "glorious revolution" of 1688 was, in its legal aspect if in no other, much like the revolution of 1649, for the courts, recognising political realities but without any *legal* justification, transferred their obedience from James II to William and Mary."

108. This may have reached its rhetorical height in the House of Commons in 1886, when James Bryce asserted: "There is no principle more universally assented to than the absolute omnipotence of Parliament . . ." See Wade, "The Basis of Legal Sovereignty", at p. 195.

109. Wade, "The Basis of Legal Sovereignty", p. 188

110. The idea is that the law only provides general rules or principles, which are unable to account appropriately for unexpected circumstances. As the Marquis de Condorcet and Immanuel Kant suggested. See Pasquino, "Locke on King's Prerogative", p. 201.

Pasquino's article is written as part of a larger attempt to isolate the differences between sovereignty and dictatorship, and thereby correct the mistakes in Carl Schmitt's Die Diktatur.

111. See section 147 of the Second Treatise.

112. Dewey, "The Security of Nations", p. 515. And see "Nationalism and Internationalism", p. 472f, where Dewey makes the same observations about the means for resolving international disputes: "For disguise it as one may, the doctrine of national sovereignty is simply the denial on the part of a political state of either legal or moral responsibility. It is a direct proclamation of the unlimited and unquestionable right of a political state to do what it wants to do in respect to other nations and to do it as and when it pleases.

113. Copp, p. 244

114. *S.T.*, I-II, q.96, a. 1

115. Finnis, Aquinas, p. 289

116. Aquinas, Summa, II-II; 105, 6

117. See Connolly, Introduction to Legitimacy and the State, p.3: "Perhaps the church will occasionally charge the secular authority with overstepping its divinely established limits; maybe a maverick philosopher will justify tyrannicide. But the very grounding of political authority, the basic character of established custom, and the existence of finely drawn hierarchies are not treated as variable conventions in need of legitimation. They provide the settled and unquestioned matrix within which issues of politics and legitimacy are marginalized. As John Huizinga tells us, 'the idea of a proposed and continual reform

. . . of society did not exist. Institutions in general are considered as good or as bad as they can be; having been ordained by God, they are intrinsically good, only the sins of men pervert them . . . Legislation . . . never aims . . . at creating a new organism . . . it only restores good old law . . . or mends special abuses." The quotation is from John Huizinga, The Waning of the Middle Ages (New York: Doubleday Anchor, 1954), at p. 38.

118. Camilleri, "Rethinking Sovereignty", p. 16. The quotation from Jacques Maritain is from Richard O'Sullivan, ed., Man and the State (London: Hollis & Carter, 1954), at p. 31.

119. Buchanan, "Rawls's Law of Peoples: Rules for a Vanished Westphalian World"

120. Gilbert quotes Henry Sidgwick, in the Elements of Politics, p. 648: "I think it important to dispel the illusion that any form of government can ever give a complete security against civil war. Such a security, if attained, must rest on a moral rather than a political basis . . . it cannot be found in any supposed moral right of a numerical majority of persons inhabiting any part of the earth's surface, to be obeyed by the minority who live within the same district". (13)

121. See Barker's introduction to Gierke, at p. lxxx.

122. With John Locke and Karl Schmitt among them.

123. From Grotius, 2 De Jure Bellis Ac Pacis Libri Tres: 6, 4, as translated by F. Kelley and quoted in Buchheit, Secession, p. 50. And see the sentence on the same page: "Employing the 'organic' terminology, 'the right which the part has to protect itself', he argues, is greater than 'the right of the body over the part.'" This might seem to controvert the passage in the Summa, at I-II: 96,4, but Grotius and Aquinas agree that the law is for the common good.

124. See Buchheit, *ibid.*, p. 53

125. From Grotius, *ibid.*, p. 53.

126. See Tesón, at p. 55, where he quotes from J.E. De Vattel, The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns [1758] (C. Fenwick transl. 1964), at 3, as follows: "[I]f a prince, by violating the fundamental laws, gives his subjects a lawful cause for resisting him; if, by his unsupportable tyranny, he brings on a national revolt against him, any foreign power may rightfully give assistance to an oppressed people who asked for its aid."

127. Though Tesón's definition of "humanitarian intervention" is much broader than this kind of moral argument would suggest. See the quotation at note 267, p. 326.

128. Tesón's views are polemical. See his own comment, at p. 7 of Humanitarian Intervention: "Over the last ten years there has been a revival of the debate about the moral justification of humanitarian intervention in philosophical and legal scholarship. The philosopher Michael Walzer, for example, has rejected as 'morally false' the claim that waging war on behalf of human rights is justified. Professor Oscar Schachter has argued that a re-interpretation of article 2(4) of the United Nations Charter which would allow for humanitarian intervention "should not be law." Professor Clark has asserted, along the same lines, that "the argument that intervention is justifiable on humanitarian grounds is simply not on . . . because . . . it is bad policy."

129. Cassese, Self-determination, p. 349

130. See Cassesse, p. 350: "As long as self-determination is perceived primarily as a right to independent statehood it will remain more a source of conflict than a substantive component in the settlement of disputes. States will continue to oppose with force peoples invoking their right to self-determination, characterizing the members of liberation groups as terrorists intent on dismembering the country. At the same time, those entitled to self-determination will lean towards rigidity and intransigence; convinced that the right to self-determination entitles them to absolute independence, they will be reticent to negotiate if sovereignty does not immediately appear in the offing."

131. So Cassese suggests, in Self-determination, at p. 359, that the discussion of "burning domestic issues" in an international forum helps to provide resolutions for such problems. But the opposite is often true: other states often pursue solutions to domestic issues which advance their own political agendas. This may only exacerbate the issues.

132. Authors in the field of international law distinguish between the "domestic" and "international" legitimacy of a state. See Tesón, for example, in Humanitarian Intervention, at p. 15, where he argues that "a government which engages in substantial violations of human rights betrays the very purpose for which it exists and so forfeits not only its domestic legitimacy, but its international legitimacy as well."

133. See Buchanan, "Recognitional Legitimacy", p. 2: "The judgement that a political entity is legitimate in the recognitional sense confers the status of being a member in good standing of the state system on that entity, with all the powers, liberties, claim-rights, and immunities that go with that status."

134. Buchanan sets out the attributes of independent statehood at p. 2: "The prevalent view among international legal theorists is that this includes the following: 1. the right to territorial integrity; 2. the right to noninterference in internal affairs (internal self-determination); 3. the power to make treaties, alliances, and trade agreements, thereby altering its juridical realtions to other entities; 4. the right to make (just) war; 5. the right to promulgate, adjudicate, and enforce legal rules on those within its territory (subject to certain restrictions)."

135. Buchanan wishes to add another condition, which would hold that a state which "comes into being by displacing or destroying a legitimate state by nonconstitutional means is itself illegitimate" if there are "institutional resources" available for constitutional change. This problem is that this is largely unenforceable and runs the danger of creating "illegitimate states" which are essentially left out of the world order.

136. See the comment at p. 233: "This is not to say that the international community will necessarily take decisive and immediate action against an illegitimate state. When dealing with Revolutionary France, for example, the European monarchies clearly had to take France's power into account as well as its legitimacy."

137. Perhaps there is an echo of this in Buchanan's comment, in "Recognitional Legitimacy", at p. 5, that ". . . legitimate entities are entitled to support for their territorial integrity and to noninterference in their domestic affairs, and ought to be allowed to participate in the basic processes of international law; entities that are not legitimate lack these entitlements." It is the corollary of this principle which is disturbing. And see p. 23 of the same paper: "Nevertheless, withholding recognition does have important consequences: an illegitimate state or government cannot validly claim that other states are bound to support its exercise of power and that they act wrongly if they provide aid to rebels or

secessionists. Also, as Rawl's emphasizes, an entity's lack of legitimacy makes it permissible for other states to try to reform it by measures that would be impermissible interferences if directed toward legitimate entities."

138. This is acknowledged, even in the public media, which regularly overstates the significance of recent developments in human rights. See the "Survey of Human-Rights Law" in the Economist, December 5, 1998, at page 15: "Even though public support has become more vocal, western governments still tend to condemn human-rights abuses in other countries where it suits them, and gloss over equally egregious abuses elsewhere. Strategic, military and economic interests still carry the most weight with national governments, as they always have."

139. Miller, On Nationality, p. 99

140. But Camilleri goes too far in "Rethinking Sovereignty", at p. 37, where he writes that "the state's traditional claim to be representative of a single national will or collective interest is increasingly divorced from reality." It only stands to reason that the interests of different classes or groups in society have always been in conflict.

141. See, for example, Michael Barnett, "Sovereignty, nationalism and regional order in the Arab states system", in Biersteker, State Sovereignty, pp. 148-189, at p. 176, along with the sources listed *ibid*, at note 117.

142. Bayefsky, "Cultural Sovereignty", p. 57

143. See the account in Bayefsky, "Cultural Sovereignty", p. 48f. The resolution in question became General Assembly Resolution 45/163, which was adopted by consensus on Dec. 18, 1990.

144. Or within the law of war, such as it is, without anything but minimal safeguards to protect the peace and security of an affected population. See Barnes, Military Legitimacy, p. 100, note 22: "In 1977 two protocols to the Geneva Conventions were adopted to address the inapplicability of the law of war to contemporary conflict. Protocol I extended the definition of war (international conflict) to include 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination', and Protocol II provided the protections of the law of war to conflicts "not of an international character."

145. Buchanan, "Theories of Secession", p. 35

146. At p. 224, Buchheit comments that the claim of the parochialist "ultimately rests on the association of certain transcendent benefits which attend self-rule" These "metaphysical advantages", he suggests, do not lend themselves to a judicial analysis.

147. Philpott, "Self-Determination in Practice", p. 2f

148. Wellman, "A Defense of Secession and Political Self-Determination", p. 142. And see footnote 2 on the same page, where Wellman writes that he is following the distinction which David Schmidtz has made between *emergent* and teleological justifications for the state.

149. Norman, "The Ethics of Secession as the Regulation of Secessionist Politics", p. 37

150. So there is nothing to prevent an author from extending a remedial right of secession to any collection of people which has been treated unfairly by the economic policies of a central government.

151. Beran, The Consent Theory of Political Obligation, p. 41

152. Beran tries to limit the extent of these reservations by arguing that the interests of the existing state should be accommodated by placing conditions on the new state, rather than by restricting the right of secession. This runs into many legal and practical difficulties.

153. See chapters 4 and 5 of Beran, The Consent Theory of Political Obligation, pp. 56-77, for a discussion of some of the variations in theories of consent.

154. Philpott, "In Defense of Self-Determination", p. 353

155. And see Buchanan, "Theories of Secession", p. 45: " [in the first place,] when an ethnic minority secedes, the result is often that another ethnic group becomes a minority within the new state. All too often, the formerly persecuted become the persecutors. Second, in most cases, not all members of the seceding group lie within the seceding area, and the result is that those who do not become an even smaller minority and hence even more vulnerable to the discrimination and persecution that fueled the drive for secession in the first place." This is accompanied by a footnote, which mentions the work of Donald Horowitz.

156. So the first two features are that the group "has a common character and a common culture", and that "people growing up among members of the group will acquire the group culture, will be marked by its character." Margalit and Raz, "National Self-Determination", p. 443f

157. Copp, p. 227f.

158. See Margalit and Raz, "National Self-Determination", p. 450

159. Moore, "The Cultural Argument for Liberal Nationalism", at p. 8

160. David Miller advances the argument about redistribution in On Nationality.

161. Moore, "The Instrumental Nationalist Argument". She is referring to Galston's book, Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State (Cambridge: Cambridge University, 1991). As Moore puts it, at p.7: "In Galston's view, the sacrifices necessary for the realization of the common good require an emotional identification with the state and its members."

162. This was a subject of some controversy in the American pragmatist tradition, which devoted considerable attention to the relationship between ethnic and racial identities, and the larger American identity. See the discussion, for example, in Nancy Fraser, "Another Pragmatism: Alain Locke, Critical 'Race' Theory, and the Politics of Culture" and Ross Posnock, "Going Astray, Going Forward: Du Boisian Pragmatism and its Lineage", in Morris Dickstein, The Revival of Pragmatism: New Essays on Social Thought, Law and Culture (Durham and London: Duke University, 1998), at pp. 157-175 and pp. 176-189.

163. Miller, "Secession and the Principle of Nationality", p. 65. Miller relies on the theory of nationality which he develops in On Nationality, where he sets out five criteria for a national identity. See p. 27: "These five elements together--a community (1) constituted by shared belief and mutual commitment, (2) extended in history, (3) active in character, (4) connected to a particular territory, and (5) marked off from other communities by its distinct public culture--serve to distinguish nationality from other collective sources of personal identity."

164. Kymlicka, Multicultural Citizenship, p. 49

165. Kymlicka suggests in Multicultural Citizenship, at p. 85, that Waldron is confusing ethnic cultural traits with national or "societal" cultural traits.

166. Waldron, "Minority Cultures and the Cosmopolitan Alternative", p. 95

167. Moore, "The Limits of Liberal Nationalism", mscrpt., p. 7

168. Kymlicka, Liberalism, Community and Culture, p. 254

169. Bauhn, Nationalism and Morality, p. 111

170. Nielsen, "Secession: The Case of Quebec", p. 31. Nielsen is relying on the work of Johann Göttfried Herder in this context.

171. And Per Bauhn adopts a remedial stance, in Nationalism and Morality, which contemplates a right of secession based on the same kind of cultural grounds envisaged by Kai Nielsen in the instance of Quebec.

172. Nielsen's historical summary includes the assertion--it is nothing more--that Canada has failed to protect national identities.

173. See footnote 6 at p. 35, where Buchanan writes that the remedial theory which he proposes includes the additional proviso "that the new state makes credible guarantees that it will respect the human rights of all those who reside in it." And see the discussion at 56f, where Buchanan writes that primary right theories generally share the "*liberal prescription in favour of political liberty*", which would guarantee the freedom to form a new political association. Compare Nielsen, for example, in "Secession: The Case of Quebec", p. 29, where he states that "persons who are extensively predominant in a distinct territory" have the right "to determine their common destiny provided they do not violate the civil liberties of others, including, of course, minorities who live in the same territory."

174. Norman, "Domesticating Secession", apparently a draft of "The Ethics of Secession and the Regulation of Secessionist Politics", p. 5

175. Compare Margalit and Raz, "National Self-Determination", p. 440: "Moral inquiry is sometimes understood in a utopian manner, i.e., as an inquiry into the principles that should prevail in an ideal world. It is doubtful whether this is a meaningful enterprise, but it is certainly not the one we are engaged in here. We assume that things are roughly as they are, especially that our world is a world of states and a variety of ethnic, national, trial and other groups."

176. This is a reflection of broader concerns in the philosophical literature. In "Justice and the Authority of States", for example, Robert L. Simon argues that the ideal conceptions of justice in the academic literature ignore the existence of states and the actual order in the world. As a result, they cannot be applied to the circumstances which exist in the world without compromising our existing obligations to other people in our own community.

177. Horowitz, "Self-Determination: Politics, Philosophy, and Law", p. 199

178. See Philpott, "Self-Determination in Practice", p. 8: "It could be that the world's political institutions, its international law and its domestic constitutions, are, at this stage in history, too blunt-edged, too bereft of judicial clout and enforcement capacity, to propound a law of self-determination that would . . . effectively cull the just claims, sift out the unjust ones . . . issue the partial and truncated approvals that many imperfect claims will require, determine the extent and amount of settlements, and perform judgments that would be heeded and respected . . . (8)

179. Wayne Norman argues, in a similar vein, that a modified "just cause" theory provides the best institutional theory of secession.

180. Norman, "Domesticating Secession", at p. 13

181. Norman, "The Ethics of Secession and the Regulation of Secessionist Politics", p. 11

182. Nor is ethics fundamentally different: in most cases, at least, moral theories explain or justify existing moral views.

183. See Brighouse, "Against Nationalism", p. 369f: "Liberals are typically not content with social institutions that merely deliver liberal justice. They usually believe that the state must do more -- it must also be *legitimate*. There is consensus on exactly what constitutes liberal legitimacy. But three features are common to many accounts. The primary concern is with the consent of the governed. If legitimacy rested on unanimous consent, that would give a veto power to the unreasonable, which may, in turn, make it impossible for liberal arrangements ever to be legitimate. So the consent requirement is usually spelled out in terms of some hypothetical contractual condition: the state has to be such that it would be endorsed by all reasonable and well-informed people who are interested in moral terms of association. Just as unanimous consent is too stringent a condition to be plausible, the hypothetical consent condition can look trivial. So it is usually strengthened by some concern that the state aspire for the actual consent of at least a majority, and preferably the vast majority, of citizens. Finally, conditions are placed on the means by which the state can permissibly seek the consent of the governed."

184. Pogge, "The Bounds of Nationalism", p. 489, at footnote 44.

185. It might even be argued that this is what has occurred, in the international order, when an organization like the North American Treaty Organization intervenes in a situation like Kosovo.

186. Section 1 of both covenants read: "1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

187. Buchheit, Secession, p. 84. Buchheit provides a good, if dated, introduction to the right of self-determination under international law and the practices of modern states on the issue of secession. See

pp. 58-137.

188. See Cassese, Self-determination, p. 40, where he writes that the Committee responsible for drafting the relevant provision of the Charter agreed on four points, the second of which was that the principle of self-determination "conformed to the purposes of the Charter only insofar as it implied the right of self-government of peoples and not the right of secession."

189. Documents like the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, GA Res. 2625 (XXV), 24 Oct. 1970, seem of particular note. But see para. 128 of the judgement in the *Secession Reference*, at p. 282f: "The *Declaration on Friendly Relations*, *Vienna Declaration*, *supra*, and *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, *supra*, are specific. They state, immediately after affirming a people's right to determine political, economic, social and cultural issues, that such rights are not to be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction . . ." And see Cassese, Self-determination of peoples, p. 6, where he refers to "such documents as the 1970 UN Declaration on Friendly Relations", which contain "formulations which characterize self-determination with the flowery and loose rhetoric of freedom and liberation and yet couch its operative terms in the dry and tight language of legal disclaimers, substantially excluding secession from existing States." Or Cassese, at p. 112: "Before embarking on a discussion of the language employed [in the *Declaration on Friendly Relations*], it must be emphasized that the overwhelming majority of States participating in the drafting of the Declaration took strong exception to the notion that peoples might have a right of secession." The same is true of other documents. At p. 288, for example, Cassese writes that Principle VIII of the *Helsinki Declaration* "recognizes that self-determination must not disrupt the *territorial integrity of States*." (288)

190. Cassese then quotes a written reply by the British Foreign Minister to a question raised in the British Parliament in 1983: "It has been widely accepted at the United Nations that the right of self-determination does not give every distinct group or territorial sub-division within a State the right to secede from it and thereby dismember the territorial integrity or political unity of sovereign independent States." (124)

191. The matter is complicated by the fact that colonial peoples have a larger right to political self-determination, which apparently includes a right of revolution. As a result, "liberation movements" have rights which are not available to minorities within larger states. See Cassese, Self-determination, p. 153: ". . . liberation movements have been given a *legal entitlement* which is less than a *right* proper but more than the *absence of any authorization whatsoever*. This position can be best expressed by holding that liberation movements, although they do not possess a *legal right* to enforce their substantive right to self-determination by resort to war, nevertheless have a *legal licence* to do so. This notion is intended to encapsulate the idea that wars for self-determination are not ignored by international law, or left in a legal vacuum as being outside the realm of law *qua* mere factual occurrences." In other words, an armed struggle by a liberation movement has a legal character which a revolution, in the traditional legal sense, does not possess.

192. And see Cassese, Self-determination, p. 360

193. GA Resolution 2625 (XXV), 24 October 1970

194. See Cassese, Self-determination, p. 299

195. Cassese acknowledges that States have "refused to grant" the right to secede contemplated by the *Algiers Declaration*. (302)

196. See Tesón, for example, who argues, with insistence, at 216f, that governments have an obligation to respect human rights under international law. The international law in the area has developed considerably since 1988, when Tesón's book was written.

197. Although Buchanan restricts the general right of secession, it should be noted that he still holds that there are "special" rights of secession, such as the rights provided by a constitution which permits a group or territory to secede. See Buchanan, e.g., "Theories of Secession", p. 34: "By a right in this context is meant a *general*, not a *special*, right (one generated through promising, contract, or some special relationship)."

198. There are historical reasons why the doctrine of natural law might not seem to provide an appropriate source for a right of secession. See Buchheit, Secession, for example, at pp. 46-57. These difficulties are relatively technical, however, and do not affect the general premise that there are moral precepts which apply in any human society. If this is a matter of consensus, there is no reason why such precepts cannot change over time, as moral views evolve. This kind of sceptical qualification can be found in the work of Oliver Wendell Holmes and would seem to be an inevitable part of the process of legal adjudication.

199. This is from De legibus II v 11, as quoted (and presumably translated) by Kretzmann, in "Lex Iniusta Non Est Lex", (1988) American Journal of Jurisprudence, pp. 99-122, at 100.

200. Aquinas, *Summa Theologica*, IaIIae, q. 93

201. See the *Summa*, IaIIae, q. 94, resp.: "Because in man there is first of all an inclination to good in accordance with the nature which he has in common with all substances: inasmuch as every substance seeks the preservation of its own being, according to its nature: and by reason of this inclination, whatever is a means of preserving human life, and of warding off its obstacles, belongs to the natural law."

202. Hobbes, *Leviathan*, p. 230 [174]

203. Locke, *Second Treatise of Government*, §222. The remark which follows immediately upon this suggests that Locke sees this as a safeguard against tyranny: "Whensoever therefore the Legislative shall transgress this fundamental Rule of Society; and . . . endeavor to grasp . . . an Absolute Power over the Lives, Liberties, and Estates of the People; By this breach of Trust they forfeit the Power the People had put into their hands . . . and it devolves to the People, who have a Right to resume their original Liberty, and by the Establishment of a new Legislative . . . provide for their own Safety and Security . . ." Locke then places the King under similar restraints.

204. The passage continues: "It is a Power, that hath no other end but preservation, and therefore can never have a right to destroy, enslave, or designedly impoverish the Subjects.

205. Ewin, "Peoples and Secession", p. 230. Ewin envisages a very limited right of secession, since he argues that such a right is restricted to groups who have already achieved some measure of autonomy.

This is a reflection of Ewin's view as to the source of nations: it is the fact, he argues, that a group of people is self-governing which makes them "into a people". But of course this prevents a minority which has never enjoyed self-government from seeking it.

206. This is undoubtedly why Allen Buchanan sees a right of secession as a relatively "moderate" alternative to a right of revolution, when revolution "is not a practical prospect". (36)

207. Henry Sidgwick expresses the traditional position in The Elements of Politics, at p. 645, where he writes that a "legal or constitutional right of insurrection is an absurdity". This does not interfere with "the moral right to resist and overthrow established rulers in extreme cases of misrule, under most forms of government . . ."

208. Dworkin is well known for recognising the role of principles in the law, a feature which was neglected in the work of H.L.A. Hart. And see Self-determination, at p. 128 and 320, where Cassese argues that principles have a singular importance in the development of international law.

209. E.P. Papanoutsos, "Law and Revolution", p. 207

210. Though it is interesting to note that this goes a long way in explaining the evolution of the idea of the state. See Gierke, vol. I, p. 160: "The principle that a moral person was a unity, which continued to exist through all the changes of its parts, produced, or helped to produce, a theory of the continuity of public rights and duties; and it began to be generally assumed that the State remained the same identical 'Subject' of rights not only when there was a change of persons or territory, but also when there was an alteration in the form of the government. A further consequence followed. In cases of the division of an existing State, or the union of several existing States (such cases being held to involve merely 'alterations' of the political situation, as distinct from the complete extinction of a State), rules were laid down which secured the transference of the rights and duties of the old 'Subject' of rights to the new 'Subject' which had taken its place." It is interesting that this development implicitly places the authority of the state above the political order, which could not, logically, be used to determine its legitimacy, any more than the domestic or internal law.

211. "The Evolution of Modern Western Legal Systems"

212. The majority suggests that the bonds were bought on speculation, in awareness of the fact that they might not be redeemed.

213., Law's Empire, p. 211

214. See the discussion of Gilbert in chapter 1.

215. The legal question of legitimacy arises on the basis that the state has the prerogative to govern and loses that prerogative when it fails to govern in *reasonable* accordance with the principle of justice.

216. Dewey, "Context and Thought" in vol. 6 of Jo Ann Boydston, ed. The Later Works, 1925-1953 (Carbondale, Ill.: Southern Illinois University Press, 1981-92, p. 5, as quoted in Festenstein, p. 25.

217. *Cf.* Charles Taylor, for example, in the introduction to Philosophy and the Human Sciences, at p. 8, where he writes: "The disengaged identity and its attendant notion of freedom tend to generate an understanding of the individual as metaphysically independent of society. Of course, it can allow for

views which see the individual as shaped by his social environment . . . But what it hides from view is the way in which an individual is constituted by the language and culture which can only be maintained and renewed in the communities he is a part of. . . (8)

218. Festenstein, Pragmatism and Political Theory, p. 23

219. The law takes a finer view of the issue, in distinguishing between actions taken by a group of individuals, severally, and actions taken by groups which represent the collective interest of the group. See *Syndicat catholique des employées de magasins v. Paquet Ltée.* [1959] S.C.R. 206 (S.C.C.), for example, at 355, where Justice Judson stated that a collective agreement cannot be construed simply as "the equivalent of a bundles of individual contracts between the employer and employee negotiated by the union as agent for the employee."

220. Dewey, "The Individual in the New Society", p. 410

221. Taylor, "Cross-Purposes: the Liberal-Communitarian Debate", p. 181. At p. 185, Taylor argues that it is possible to accept the premise that individuals are 'socially embedded' and give "individual rights and freedom" the same priority that they receive in the atomistic literature. This seems open to question.

222. The first sentence in the decision of the United States Supreme Court in *Planned Parenthood v. Casey*, cited *infra*, seems to catch a sense of this: "Liberty", the court writes, "finds no refuge in a jurisprudence of doubt."

223. And see p. 294: "A political majority at either level that does not act in accordance with the underlying constitutional principles we have mentioned puts at risk the legitimacy of its exercise of its rights, and the ultimate acceptance of the result by the international community."

224. See p. 270. It might be noted in this context that there are at least a few examples of uncontested secession, such as the dissolution of the union of Norway and Sweden in 1815 and the secession of Singapore from the Malaysian Federation in 1965. See Buchheit, Secession, p. 98f.

225. Perhaps it should be noted that the *Secession Reference* went before the court after Cassese's book was published.

226. Cassese, Self-determination, p. 253f.

227. And see the discussion in the Summa, at II-II; 57, where Aquinas says that the notions of justice and right rest on the principle of equality.

228. Dworkin, "Liberalism", p. 127

229. West, "The Failure of Justice as Impartiality", p. 5. And see Barry, Justice as Impartiality, at p. 133.

230. See Barry, 143: "As far as the great bulk of contemporary legislation and policy-making is concerned, justice as impartiality will have things to say about *how* the legislation or policy can be framed consistently with the demands of justice, but it is silent on the question of *what* the content of the legislation or policy should be. In all these matters, the neutrality inherent in justice as impartiality leads to an insistence on the point that the decision-making process should not give any special advantages to

certain conceptions of the good over others."

231. See Barry, Justice as Impartiality, p. 93: "We cannot, in other words hope to be able to specify the characteristics of a just constitution in purely procedural terms. For we must be concerned with the substantive justice of the laws and government policies that are produced within the framework for collective decision-making that it provides."

232. Barry also seems to make the mistake of thinking that the bare wording of a constitution is sufficient to decide such issues. This is misleading, since most of the substantive content of constitutional principles like freedom of religion will be found in the body of law interpreting the constitution.

233. The *parens patriae* jurisdiction in the common law provides a good example of this. See the decision in *Re Eve*, [1986] 2 S.C.R. 388, where the Supreme Court of Canada relies upon the value of maintaining a person's bodily integrity, the privilege of giving birth, and other ethical considerations.

The same general concern with substantive issues is apparent in *Winnipeg Child and Family Services v. G(DF)*, [1997] 3 S.C.R. 925, the recent ruling by the same court that the *parens patriae* jurisdiction cannot be exercised on behalf of a foetus. There is nothing neutral in such a stance: the court was favouring one conception of the good over another, for historical reasons, and the implicit assumption in such cases is that judges should refrain from making decisions which seriously undermine the standing moral order.

234. See the judgement of Ritchie J., at 1373. And note the reference to Stephen's Commentaries on the Laws of England at 1366.

235. "human rights", Enclyclopedia Britannica Online, <http://www.eb.com:180/bol/topic?eu=109242&sctn=3>

236.This is probably part of modern tendency to see law, in the words of Lawrence Friedman, in , at p. 123, as "*instrumental*": "By this I mean that people, groups, classes, occupations, strata, all conceive of law, and use law, as a weapon, an instrument, a tool for achieving economic and social ends; what is more, they think it is perfectly proper to do so."

237. See ibid, <http://www.eb.com:180/bol/topic?eu=109242&sctn=10>: "In the real world, despite differences in cultural tradition and ideological style, there exists a rising and overriding insistence upon the equitable production and distribution of all basic values. U.S. Pres. Franklin D. Roosevelt's Four Freedoms (freedom of speech and expression, freedom of worship, freedom from want, and freedom from fear) is an early case in point. A more recent demonstration was the 1977 Law Day speech by then U.S. Secretary of State Cyrus R. Vance, in which he announced the U.S. government's resolve 'to make the advancement of human rights a central part of our foreign policy' and defined human rights to include 'the right to be free from governmental violation of the integrity of the person, . . . the right to the fulfillment of such vital needs as food, shelter, health care, and education, . . . [and] the right to enjoy civil and political liberties.' Essentially individualistic societies tolerate, even promote, certain collectivist values; likewise, essentially cómmunal societies tolerate, even promote individualistic values. Ours is a more-or-less, not an either-or, world."

238. This may seem to come into conflict with the common belief that individuals have special obligations to their immediate family and other members of the same ethnic or national community. It is not immediately apparent, however, that our moral obligations to a particular group have to conflict with

our obligations to other people. There is no reason why these orders must necessarily conflict and it makes more sense to postulate that there are complementary sets of obligations, which nest within each other.

See Weinstock, for example, "National Partiality", p. 1: "Recent defenders of nationalism have pointed to the fact that most people feel that their obligations towards their compatriots are either more numerous or more stringent than those which bind them to people from other countries as evidence that something is seriously amiss with the universalism which allegedly underpins liberal theory. That people believe quite strongly that they have such special obligations is taken as a datum for which different theories of justice must somehow offer an account. It is to be taken to be a measure of the theoretical success of a theory of justice that what we might call the 'special obligations thesis' can be derived from it."

239. This explains the traditional reticence of the courts in awarding injunctions and other interlocutory relief, which are only available in an instance where the party in question would suffer irreparable damages.

240. See the comment of the majority in *Winnipeg Child and Family Services (Northwest Area) v. G.(D.F.)* (1997) 152 D.L.R. (4th) 193, at 202, also accessed at <http://www.droit.umontreal.ca/doc/csc-scc/> on November 7, 1999: "As this Court put it in *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, at p. 553: "The task of properly classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties–a matter which falls outside the concerns of scientific classification. In short, this Court's task is a legal one. Decisions based on broad social, political, moral and economic choices are more appropriately left to the legislature."

241. For a good example of the approach generally taken in the literature, see Darrel Moellendorf, "Liberalism, Nationalism, and the right to Secede", at p. 88.

242. Buchanan, Secession: The Morality of Political Divorce, p. 76f. The passage continues: "The same holds true for collective property rights and robust minority language rights. All of these are group rights in the sense specified above: they are ascribed to groups and must be exercised collectively, through political mechanisms, on behalf of the group."

243. Buchanan, "Recognitional Legitimacy", p. 6

244. This is true more generally: we appear to have come to the point in human history where it seems to be recognized that a population which is starving is entitled to assistance.

245. See Tesón's critique of the Rawlsian position at pp. 58ff,which provides a good summary of its major tenets.

246. Buchanan, Secession, p. 79

247. Wellman, "A Defense of Secession and Political Self-Determination", p. 170

248. Buchanan, "Theories of Secession", p. 46f

249. Norman, "The Ethics of Secession and the Regulation of Secessionist Politics", p. 6

250. See Buchheit, Secession, pp. 28-31, where he suggests that the general reluctance of states to endorse a rights of secession is usually justified by: 1) the fear of balkanization; 2) the fear that the process of secession may prove endless ("indefinite divisibility"); 3) the fear that secession will have a detrimental effect on the democratic system by providing an alternative to participation in the political process; 4) the fear of infirm states, which cannot support themselves; 5) the fear of "trapped" minorities; and 6) the fear of "stranded" majorities who find themselves impoverished by the loss of resources in the seceding state.

And see Sidgwick, at p. 649f, where he argues that there is no reason why a right of secession "should be limited by any consideration of the size or continuity of the territory in which the seceders were in a majority; consistency seems to require us to allow the whole community to be resolved into a congeries of separately governed groups, each member being free to select his own political government, without changing his residence, just as he is now free to select the ecclesiastical government that he will obey."

251. And see the references at Chapter 4, note 7.

252. Buchheit puts this well. See note 250.

253. See Buchheit, Secession, p. 25f

254. Cassese, Self-determination, p. 189. And see p. 335.

255. Copp, p. 239

256. In the criminal law, for example, the general rule is that courts have no jurisdiction to try an individual for an offence committed entirely in another jurisdiction.

257. This was essentially the situation in Eastern Slavonia in Croatia, after the break-up of the former Yugoslavia.

258. Young, Justice and the Politics of Difference, p. 64

259. See Barker's introduction to Gierke, for example, at p. xl: "When the reception of Roman law began to be achieved in Germany about 1500, and the civil law of Rome became a current law in the Empire and its principalities, the German interest in the *Corpus Juris* became very largely practical. The old Barolist tradition of adapting Roman law to the needs of actual contemporary life (which had been contradicted but not checked by the humanists of the sixteenth century, such as Cujas, who wished to understand Roman law as an historical fact of the past in terms of historical scholarship) assumed a new and vigorous life; and a *usus modernus*–a modernisation of the *Digest* or *Pandects* of Justinian, which its votaries called *Pandektenrecht*, but which a modern scholar has called 'Wardour Street Roman Law'–occupied the attention of scholars."

260. The issue of proportionality arises on both sides of this question, since the principle of equality includes the corollary that individuals and groups who are fundamentally different should not be treated equally.

261. See Hart, The Concept of Law, at p. 100, where he writes: ". . . the statement that a particular rule [of law] is valid means that it satisfies all of the criteria provided by the rule of recognition." And see p. 113, where he holds that a legal system must meet at least two conditions, the second of which is that "its

rules of recognition specify the criteria of legal validity . . ."

262. See chapter 8, note . Sidgwick recognizes this, in The Elements of Politics, at p. 227: "In most cases, a further strong argument against disruption would arise from the inevitable incompleteness of the local separations between the seceders and the rest of the community: the territory which secession would break off would usually contain a minority of inhabitants loyal to the old government, who would be likely to suffer seriously from the change whether they remained within the disrupted district or migrated from it."

263. The notable exception to this practice in Canada is probably the *Canadian Human Rights Act*, which has been given "quasi-constitutional" status by the courts. It could be argued, of course, that the *Act* derives its force from section 15 of the *Canadian Charter of Rights and Freedoms*, which guarantees equality before the law.

264. Norman, "The Ethics of Secession and the Regulation of Secessionist Politics", 18ff

265. Philpott, "Self-Determination in Practice", p. 11

266. See *Prosecutor v. Dusko Tadic* [1995] ICTY Yearbook, 54 (App. Chamber), at 59: "Indeed, the jurisdiction of the International Tribunal, which is defined in the middle sentence and described in the last sentence as "the full extent of the competence of the International Tribunal", is not, in fact, so. It is what is termed in international law "original" or "primary" and sometimes "substantive" jurisdiction. But it does not include the "incidental" or "inherent" jurisdiction which derives automatically from the exercise of the judicial function."

Such tribunals have the character of inferior tribunals in domestic law, which only possess the powers granted to them by their enabling legislation.

267. See Tesón, p. 5: "I define humanitarian intervention as *proportionate transboundary help, including forcible help, provided by governments to individuals in another state who are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive government.*" There is no real way around it: this kind of definition is full of moral evasions and legal judgements which render it extremely porous.

268. See the web site for the European Court of Human Rights, cited in the bibliography.

269. It might be noted that the word "minority" refers to a group which is smaller than the entire population of the state and should not be restricted to groups which are smaller than the dominant group in society. There may be situations where a "minority" is larger than the group which has control of the state.

270. WWWebster Dictionary, Accessed: June 16 1999.

271. At p. 230, note 13, Buchheit refers the reader to the "extreme" claim, in the Scientific Monthly, that the capacity for self-government can be measured "by weighing 350 indices of fitness for self-government derived from an equal number of 'objectively observable phenomena.'

272. As Margaret Moore writes, in "The Territorial Dimension of Self-Determination", at p. 3, Buchanan ". . . argues that to establish a right to secession, one must demonstrate that the state has lost its right to carry out the agency/trusteeship function implicit in the notion of territorial sovereignty, and that the

seceding group has to show that it has had or ought now to have territorial sovereignty. In this way, he grounds the right to secede in a deeper argument about the conditions under which territorial sovereignty can be forfeited or overridden."

273. The exact legalities of the state's authority over land will vary from state to state. And there will naturally be land, and attachments to land, which are actually owned by the state.

274. This explains a doctrine like eminent domain, which is an exceptional doctrine that provides for the seizure and expropriation of land in specific circumstances.

275. There is a difference between revolution and secession in this context. Secession is only appropriate when the state exercises legal authority over the territory in question. When this is contested, other remedies are preferable.

276. Allen Buchanan, Secession, p. 134. The reference to Hirschmann is to Albert O. Hirschmann, Exit, Voice, and Loyalty (Cambridge, Mass.: Harvard University Press, 1970), pp. 33-43.

277. See Kokott, for example, The Burden of Proof in Comparative and International Human Rights Law, at p. 13, where she distinguishes between the burdens in "adversarial civil lawsuits" and a human rights or constitutional forum. The arguments which arise in the latter instance generally favour complainants and run counter to the principle of order that is so pivotal in the instance of secession.

278. Buchheit quotes a statement made by a senator from the Philippines during the 1920s: "We would prefer a government run like hell by Filipinos to one run like heaven by Americans."

279. It is simply impossible, in such a brief outline, to canvass the manner in which evidence might be taken.

280. These kinds of distinctions always have their difficulties: the payment of a "fair" portion of the national debt might be treated as a substantive or a procedural ground.

281. Buchanan remarks that there is no absolute requirement that a substantive model make use of the concept of fault and a constitutional regime which recognizes the need to preserve a culture as a legitimate ground for secession "need not imply that anyone, including the state, is at fault for the precariousness of the group's cultural survival." (136) This seems open to dispute.

282. Though it should be remembered, as Cassese himself acknowledges, in another context, that "the majority of existing States are authoritarian entities which pay little attention to the aspirations of their populations". (349) And see p. 334, where Cassese writes that there are no democratic norms in international law. "In short, the relationship between the whole population of a sovereign State and its government is still regarded by customary international law as coming within the purview of its domestic jurisdiction . . ."

283. For Margalit and Raz, the question is whether independence would improve the "prosperity" of a minority's culture. Though the word "prosperity" seems unfortunate and a word like "viability" may have have served them better.

284. Wellman, Liberalism, National Self-Determination and Secession, p. 23

285. Sidgwick, The Elements of Politics, p. 648

286. For another historical view, cf. Cassese, Self-determination, at p. 17, where he summarizes the views of Vladimir Lenin: "For him, the self-determination of nations living in sovereign States was to be primarily realized through secession. Secession, however, was not necessarily to be carried out by forcible means, but could result from the free expression of a popular vote. In the case of territorial changes [within the state], self-determination of people could be implemented by a 'vote', that is, a plebiscite or referendum, whereas to attain self-determination, that is to say, political independence and international status, colonial peoples were entitle to engage in armed violence."

287. Sidgwick is of the opinion that a government's "forcible suppression of any such attempt at disruption" would be justified. (*ibid.*)

288. There is an element of this in the international political order, and major powers often play the role of brokers in regional disputes. In The Management of Ethnic Secessionist Conflict, for example, at p. 175, Abeysinghe Navaratna-Bandara examines the role of larger states, "Big Neighbours", in secessionist conflicts within an adjoining state. After examining the history of the conflicts in Sri Lanka, Lebanon, and a number of comparable situations, he concludes that such conflicts must always be considered ". . . in the context of the natural power relationships in the regional political environment. In this context, a Big Neighbour has been identified as the main stabilizing force of the external system on the conflict, though the conflicting parties, one way or another, may tend to resist its involvement in the process of conflict management." In each of the five case studies which he considers, Naravatna-Bandara finds that a Big Neighbour, while adopting a multiplicity of roles, has a moderating influence on the actions of the opposing parties.

289. In the *Secession Reference*, the Supreme Court of Canada makes it clear that these kinds of political decisions are subject to legal constraints.

290. See Copp, at p. 236f. Putting aside the example of East Timor, it seems unrealistic to argue that many states would welcome international supervision.

291. The primary concerns of a just-cause theory, in Norman's view, can be met by the establishment of fair rules, "which will make it relatively easy for those with genuine cause to secede, and relatively difficult for those without it to do so." (18)

292. Norman, "The Ethics of Secession and the Regulation of Secessionist Politics", p. 17

293. David Miller, "Secession and the Principle of Nationality", p. 63

294. David Miller, "Secession and the Principle of Nationality, p.4. This leaves the decisive moral issues to be decided by "a background theory about the circumstances which make a referendum on secession appropriate".

295. This is a complicated matter, since it is previous generations who have entered into the contract. This does not affect the obligations of the parties, at least in this respect, and the analysis holds.

296. The court refers, at paragraph 42, to the historical precedent of Nova Scotia, which attempted to secede from the Canadian confederation in 1867. The Colonial Secretarye in Britain rejected the Province's request, on the basis that the province of New Brunswick had entered into the same union "in

reliance on having with it the sister province of Nova Scotia; and vast obligations, political and commercial, have already been contracted on the faith of a measure so long discussed and so solemnly adopted . . ."

297. Margalit and Raz, "National Self-Determination", p. 459

298. The dangers in this position are evident in the fact that the decision of the seceding group must be respected, "even if wrong, even if the case for self-government does not obtain, provided the reasons that motivate the group's decisions are of the right kind." (459)

299. Copp, p. 229

300. And see Buchheit, Secession, p. 227: ". . . to use the perhaps unfortunate 'quantitative' image, the secessionists' demands will be considered legitimate only in circumstances indicating that the general 'amount' of world harmony would be increased by accepting secession." He immediately adds that this must not be done in a way which encourages violence on the part of "disaffected groups".

301. The courts may be prepared to dismiss certain cases, on the basis that they constitute an abuse of process, but that is in circumstances where an action is transparently frivolous or vexatious.

302. At the end of his paper, Miller argues that we need to look "at how minorities are likely to fare under various possible regimes". (17) This is probably enough, in itself, to render Miller's political criteria of little use in any juridical setting.

303. There are a variety of contexts in which this arises. For an example of the way in which the concept of just war has been applied in a contemporary context, see Geoffrey R. Martin, "The Immorality of the Contras' Resort to War: The Case of the Nicaraguan Democratic Force", in the Canadian Journal of Latin American and Caribbean Studies, (1988) XIII, 25: 71-87.

304. Navaratna-Bandara, The Management of Ethnic Secessionist Conflict, p. 14

305. Buchanan, "Theories of Secession", p. 50

306. Such as the military actions taken by western states to provide a "safe zone" for the Kurds in northern Iraq.

307. See *Dancey v. 22981 Alberta Ltd.* (1988), 40 B.L.R. 180 (Alta. Q.B.), at 185.

308. And see *Abraham v. Inter Wide Investments Ltd.* (1985), 51 O.R. (2d) 460 (Ont. H.C.), at 468f. Griffiths J. held that oppression refers to conduct "under which the shareholder is in effect coerced to submit to something unfair."

309. See the initial entry under "oppression" in the American Words and Phrases: "'Oppression' means an act of subjecting to cruel and unjust hardship, or unjust or cruel exercise of authority to power, especially by the imposition of burdens. *Roth v. Shell Oil Co.*, 8 Cal. Rptr. 514, 515, 185 C.A. 2d 676.

The American Words and Phrases is also sufficient to establish that the term "oppress" has been used, judicially, in the context of political rights.

310. See the comments of Spence J. in *Horvath v. R.* (1979), 7 C.R. (3d) 97 (S.C.C.), AT 117, where he quotes from the decision of Sachs J., in *R. v. Priestly* (1965), 50 Cr. App. R. 183 (C.A.).

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