
Can Constitutions Be of Use in the Resolution of Secessionist Conflicts?

MIODRAG A. JOVANOVIĆ*

I. Introduction	59
II. Secessionist conflict as political conflict	61
III. Is secession alien to constitutional law?	63
IV. Constitutionalism and secession—a reassessment	68
V. Why consent to a constitutional clause on secession?	76
1. Avoiding the Impasse of Ungovernability	77
2. Excluding Decisive Interference of International Actors	79
3. Enhancing Political Stability	81
VI. Protecting the values of liberal-democratic constitutionalism	82
1. The Rule of Law Value	83
2. The Extension of Democratic Rights Value	84
3. The Peace Among Communities Value	85
VII. Conclusion.....	86

I. Introduction

From the 1980s onward, political philosophers have offered a more rigorous treatment of the phenomenon of secession, concentrating largely on moral

* Associate Professor, Faculty of Law, University of Belgrade (miodrag@ius.bg.ac.rs) The first version of this article was presented at the 7th Congress of the International Association of Constitutional Law, Athens, 11-15 June 2007. This article summarizes the main arguments presented in my book, *Constitutionalizing Secession in Federalized States: A Procedural Approach* (Utrecht: Eleven, 2007), most notably those advanced in c. 1.

justifications of the *unilateral* right to secession.¹ In doing so, they have been more interested in justifying a *moral claim-right* to secede, which implies ‘a correlative obligation on the part of others not to interfere with the attempted secession’, than in grounding a *moral liberty-right* or a mere permission to secede.² It is Allen Buchanan who should be credited not only with having provided us with the aforementioned important distinction, but also with having classified all the normative work on unilateral secession,³ as well as with having created, in 1991, the first systematic account of this topic.⁴

Buchanan also introduces the concept of *consensual* secession, which ‘results either from a negotiated agreement between the state and the secessionists (as occurred when Norway seceded from Sweden in 1905) or through constitutional processes (as the Supreme Court of Canada ... envisioned for the secession of Quebec).’⁵ What political philosophy and theory have to address in this set of cases are the following questions: can *consensual* secession be considered recommendable for all countries faced with secessionist movements; should constitutional strategy for coping with secessionist conflicts be perceived as an instrument of a just institutional arrangement; would placing a right to secession into the founding document of a state be compatible with the values of liberal-democratic constitutionalism?

¹ See, e.g. Harry Beran, ‘A Liberal Theory of Secession’ (1984) 32 Pol. Stud. 20; Anthony H. Birch, ‘Another Liberal Theory of Secession’ (1984) 32 Pol. Stud. 596.

² Buchanan rightly observes that determining whether states and international organizations should refrain from interfering with a group’s unilateral attempt to secede from a parent state requires entering into ‘the domain of the philosophy of international law’, which implies reflection on the nature and purposes of the international legal system, including the role of states, and of international commitment to the preservation of their territorial integrity; Allen Buchanan, ‘Secession’ in Edward N. Zalta, ed., *The Stanford Encyclopaedia of Philosophy*, (Spring 2007 ed.) [Buchanan 2007], online: <<http://plato.stanford.edu/archives/spr2007/entries/secession>>. For one such inquiry into the domain of the philosophy of international law, see Allen Buchanan, *Justice, Legitimacy, and Self-Determination—Moral Foundations for International Law* (Oxford: Oxford University Press, 2003) [Buchanan 2003].

³ He initially divides all normative theories into two groups—Remedial Right Only Theory and Primary Right Theories. The former theory argues that a group has a right to secede unilaterally only if it has a just cause. The latter theory consists of two sub-groups—Ascriptive Group Theories, which state that groups with ascriptive characteristics (typically nations) have a right to secede irrespective of injustices; and Associative Group Theories, which focus on the voluntary political choice of any group to terminate its political affiliation with the state; Allen Buchanan, ‘Theories of Secession’ (1997) 26 Phil. & Pub. Aff. 31.

⁴ Allen Buchanan, *Secession: The Morality of Political Divorce From Fort Sumter to Lithuania and Quebec* (Boulder: Westview Press, 1991) [Buchanan 1991].

⁵ Buchanan 2007, *supra* note 2.

This article will dwell exactly on these issues. I will first argue that the constitutionalization of secession would be adequate only in countries that can be said to meet the ‘minimal liberal-democratic setting’ requirement. This is simply because the *necessary prerequisite* of the constitutionalization of secession is that in a given polity constitution is not treated as ‘a dead letter’, so that constitutionalism—as a set of specific liberal and democratic principles and practices—is taken seriously. I will further argue that although the right to secession is not completely alien to constitutional law—as is commonly assumed—its introduction into the constitutional order of a state is *only one possible strategy* that, under certain circumstances, stems not so much from justice as from reasons of political prudence. Finally, I will try to demonstrate that such a strategy would not contradict liberal-democratic constitutionalism; especially that version which, along with classical values, propounds multiculturalism, respect for ethnocultural diversity, and self-determination rights.

II. Secessionist conflict as political conflict

Let me start with the nature of secessionist conflict as a form of political conflict. Claus Offe distinguishes between three forms of conflicts that should be mitigated by state and legal instruments. The two traditional forms are *ideology-based* and *interest-based* conflicts over rights and resources, and the means for coping with these are various constitutionally guaranteed political and social rights. However, along with these two types of conflicts, the contemporary state has also to manage far more intractable *identity-based* conflicts over group recognition and respect.⁶ Offe says that ‘the antidote that constitutional democracies have available in order to cope with this type of conflict is group rights.’⁷

Without now entering the discussion over the plausible social and collective psychological incentives for secessionist mobilization,⁸ it seems

⁶ Claus Offe, ‘“Homogeneity” and Constitutional Democracy: Coping With Identity Conflicts Through Group Rights’ (1998) 6 J. Pol. Phil. 113 at 121.

⁷ *Ibid.* at 123.

⁸ As early as in the mid 1970s, Birch convincingly argued that it made more sense to treat social factors, such as ethnocultural loyalty and secessionist movements, ‘as given’ and ‘natural’, than to interpret them as mere ‘dependent variables’, explained ‘in terms of political discrimination, economic exploitation, relative deprivation, and so forth.’ He also emphasized that the extent to which ethnocultural minorities were content with their situation of political integration in a larger state depended on the balance of sacrifices and benefits that vary from place to place and from time to time; Anthony H. Birch, ‘Minority Nationalist Movements and Theories of Political Integration’ (1978) 30 World Politics 325 at 333-4.

obvious that the secessionist struggle inherently falls into this last category of conflicts, insofar as it presupposes—at least in the secessionists' perception—the ultimate lack of state recognition of and respect for the group to which those proposing secession belong. Furthermore, as pointed at by Heraclides, there are three elements which are 'fundamental and independent variables' without which any form of secession 'is inconceivable, indeed nonsensical.' These are: (a) a territorial base for collectivity, (b) the existence of a sizeable human grouping that perceives itself as distinct, and (c) the type of relationship between the centre and this collectivity.⁹ Consequently, if this sort of identity-based conflict¹⁰ is at all to be addressed by constitutional means, it would be in the form of the group or collective right to secession.¹¹

Secessionist politics may take various forms. Norman defines these politics as 'a continuous spectrum of activities' that might range

from the legally innocuous activity of advocating secession to the legally and morally dubious activities of unilateral declarations of independence (UDIs) and armed insurrection, encompassing in between the creation of political parties with secessionist platforms, the contesting of elections by such parties, their organizing referendums on independence when they form regional governments, and so on.¹²

The very aspiration of a territorially-concentrated population to challenge the authority of the central state and to eventually move the internationally

⁹ Alexis Heraclides, *The Self-Determination of Minorities in International Politics* (London: Frank Cuss, 1991) at 13.

¹⁰ Even though there are certain political theories of secession that deny that groups based on nationality and ethnocultural identity are superior to other allegiances and identities (see e.g. David Copp, 'Democracy and Communal Self-Determination' in Robert McKimm & Jeff McMahan, eds., *The Morality of Nationalism* (Oxford: Oxford University Press, 1997) at 278), they largely disregard the empirical counter-evidence that every serious secessionist movement in recent history has involved ethnoculturally distinct groups. Hence, secessionist conflict is almost inherently identity-based conflict involving ethnocultural majority and minority(ies). Cf. Monty G. Marshall & Ted Robert Gurr, *Peace and Conflict 2005: A Global Survey of Armed Conflicts, Self-Determination Movements, and Democracy*, (College Park, MD: CIDCM, 2005), online: <<http://www.systemicpeace.org/PC2005.pdf>>.

¹¹ Buchanan says that right to secession is 'a right, ascribed to a group, to engage in collective action whose purpose is independence from the existing state, where the coming to be independent includes the taking of territory'; 1991, *supra* note 4 at 75. There should be no principal distinction between the concepts of group and collective rights. On the legal nature of this type of rights, see Miodrag A. Jovanović, 'Recognizing Minority Identities Through Collective Rights' (2005) 27 Hum. Rts. Q. 625.

¹² Wayne Norman, 'Domesticating Secession' in Stephen Macedo & Allen Buchanan, eds., *Secession and Self-Determination* (New York & London: New York University Press, 2003) 193 at 203 [Norman 2003].

recognized borders 'inward', where there were none before, is certainly a reason for a major political conflict between the central state and its periphery. However, it might take a long time before this conflict turns into some more virulent form. As the recent history of certain Western liberal-democracies—most notably those with federal or federal-like structures—demonstrates, activities of credible pro-secessionist political organizations do not necessarily imply that disputes with respect to the future of a common state will move from the realm of politics into the realm of violence. In spite of all this, constitutional mechanisms are rarely used for regulating the terms of secessionist politics and for determining 'the issue of all issues'—whether a part of the territory will be separated from its parent state. Is this vigilance justified?

III. Is secession alien to constitutional law?

In a recently conducted comparative study, the European Commission for Democracy Through Law (Venice Commission) investigated issues of self-determination and secession as addressed by the constitutional law of Council of Europe member and applicant states, as well as South Africa and Kyrgyzstan. The results of the study reveal that although it would be an 'understatement' to say that secession is 'inimical to national constitutional law', none of the studied constitutional acts 'expressly employs the term "secession" to proscribe the phenomenon itself or its preparatory acts.' Instead, it is commonly taken that the prohibition of secession stems from other constitutional provisions referring to: indivisibility of the state (for example, Spain, Italy); state unity or/and national unity (for example, South Africa, Moldova); and, more commonly, territorial integrity (for example, Albania, Hungary, Lithuania). Where the external aspect of self-determination, that is, the status of a people in relation to another people or state, is explicitly stipulated in constitutional documents, it is almost exclusively done so as to express the right of that state 'to independence vis-à-vis the outside world' (for example, Germany, Croatia, Slovenia). The overall assessment of the Commission is that 'in very general terms secession is alien to constitutional law'.¹³

This allegedly self-evident conclusion might, however, prove to be only partially accurate. First, there are several historical and current examples of

¹³ European Commission for Democracy Through Law, *Self-Determination and Secession in Constitutional Law* (Report adopted by the Commission at its 41st meeting, Venice, 10–11 December 1999), CDL-INF (2000) at 2.

secession clauses in constitutional systems even in Europe, as well as in other parts of the world.¹⁴ Examples from the past include: (a) Chapter X of the 1947 Constitution of The Union of Burma;¹⁵ (b) the Soviet Union's 1990 *Law Concerning the Procedure of Secession of a Soviet Republic From the Union of Soviet Socialist Republics*, grounded in Article 72 of the 1977 Soviet constitution that stated: 'Each Union Republic shall retain the right freely to secede from the USSR';¹⁶ (c) a similar draft law proposed at the beginning of the conflict in the former Yugoslavia, which was supposed to be founded on the non-normative ideological proclamation contained in the 1974 Constitution's Basic Principles (Chapter I, para. 1) solemnly proclaiming the right of all Yugoslav nations to self-determination, including the right to secession;¹⁷ and (d) Article 60 of the *Constitutional Charter of the State Union of Serbia and Montenegro*, on the basis of which the smaller unit adopted the detailed legal procedure to eventually effectuate its constitutional right to secede and become an independent state.¹⁸

Present examples include: (a) the 1983 Constitution of St. Kitts and Nevis,¹⁹ (b) the 1994 Constitution of The Federal Democratic Republic of

¹⁴ All the mentioned cases are elaborated in more detail in c. IV of my book *Constitutionalizing Secession in Federalized States: A Procedural Approach*.

¹⁵ However with this example, in Duchacek's words, 'constitutional theory failed in reality' because different ethnic groups 'have engaged in constant guerrilla fighting', which eventually led to the instigation of the military regime that is still in power; Ivo D. Duchacek, *Power Maps – Comparative Politics of Constitutions* (Santa Barbara, Oxford: ABC – Clio Press, 1973) at 118.

¹⁶ In Cassese's opinion, the significance of the aforementioned law lies in the fact that 'it was the first piece of national legislation regulating the right of secession in a detailed way'; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995) at 265-6.

¹⁷ 'The peoples of Yugoslavia, proceeding from the right of every people to self-determination, including the right to secession, on the basis of their will freely expressed in the common struggle of all nations and nationalities in the National Liberation War and Socialist Revolution, and in conformity with their historic aspirations, aware that further consolidation of their brotherhood and unity is in the common interest, together with the nationalities with whom they live, have united in a federal republic of free and equal nations and nationalities and created a socialist federative community of working people.' On the treatment of the secession issue in the constitutional documents and theory of the former Yugoslavia, see Peter Radan, 'Secession and Constitutional Law in the Former Yugoslavia' (2001) 20 U. Tasm. L. Rev. 181.

¹⁸ More about the legal framework and the whole referendum process in Montenegro in Miodrag A. Jovanović, 'Consensual Secession of Montenegro – Towards Good Practice?' in Aleksandar Pavković & Peter Radan, eds., *On the Way to Statehood: Secession and Globalisation* (Aldershot: Ashgate, 2008) 133.

¹⁹ On the background of this case of the constitutionalization of secession, see e.g. Ralph R. Premdas, 'Self-Determination and Decentralisation in the Caribbean: Tobago and Nevis' (2000) at 1, online: University of the West Indies <<http://www.uwichill.edu.bb/bnccde/sk&n/>>

Ethiopia²⁰, as well as (c) provisions of the *Northern Ireland Act 1998* that clearly operate as a part of the United Kingdom's constitutional law and stipulate the right of this province to unite with the Republic of Ireland.²¹ Finally, Article 50 of the *Consolidated Version of the Treaty on EU*, part of the *Lisbon Treaty*, like its failed constitutional predecessor contains the so-called 'withdrawal clause', which regulates the exit-option from the European Union.²²

However, apart from these explicit constitutional provisions on the right to secession, the exit option might be sometimes *read into* the meaning of the constitutional text, by means of a non-positivist approach of 'broad constitutionalism.'²³ This became obvious in particular after the famous *Quebec Secession Reference* of the Supreme Court of Canada.²⁴ Sujit Choudhry and Robert Howse argue that the Court took the *dualist approach* in interpreting the Canadian Constitution.²⁵ In exceptional cases, like the one that was before the Court, a non-positivist approach rests on an idea of *constitutional evolution* (the Constitution as a 'living tree'²⁶), which does not sharply differentiate between constitutional amendment and constitutional hermeneutics, and which is grounded in underlying, unwritten constitutional principles. In the Canadian context, the Court found that there were four such principles: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities.²⁷ After reconsidering the

conference/papers/RRPremdas.html>.

²⁰ See e.g. Ahmednasir M. Abdullahi, 'Article 39 of the Ethiopian Constitution on Secession and Self-Determination: A Panacea to the Nationality Question in Africa?' (1998) 31 *Verfassung und Recht Übersee* 440 at 454.

²¹ Tierney argues that, concerning the British constitutional concept of parliamentary sovereignty and supremacy, the UK Parliament could, legally speaking, override the results of the pro-secession poll. 'In political terms, however, the pressure to pass the legislation promised in the Northern Ireland Act 1998, s 1(2) would, in the circumstances of a Yes vote, be overwhelming'; Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford: Oxford University Press, 2004) at 288.

²² For an analysis of the initial provision, which remained largely intact in the subsequent documents, see Raymond J. Friel, 'Providing a Constitutional Framework for Withdrawal From the EU: Article 59 of the Draft European Constitution' (2004) 53 *I.C.L.Q.* 407.

²³ See Alexander Reilly, 'Constitutional Principles in Canada and Australia: Lessons From the Quebec Secession Decision' (1999) 10 *Pub. L. Rev.* 209 at 211.

²⁴ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [*Quebec Secession Reference*]

²⁵ Sujit Choudhry & Robert Howse, 'Constitutional Theory and the Quebec Secession Reference' (2000) 13 *Can. J. L. & Jur.* 143 at 157ff.

²⁶ *Quebec Secession Reference*, *supra* note 24 at para. 52.

²⁷ *Ibid.* at para. 32.

operation of these principles, the Court came to several important conclusions. Namely, it noted that the Canadian federation was, in principle, not indissoluble,²⁸ and moreover, that such a political outcome was attainable through a constitutional amendment procedure.²⁹ However, the Court strongly underlined the necessity of prior negotiations between all relevant political actors; that is, the federal government, Quebec, other provinces, and, possibly, Aboriginal peoples.³⁰ After this decision, some commentators cautiously conclude that it 'creates a quasi-constitutional right to secession',³¹ while others more courageously argue that Canada has actually recognized a 'constitutionally mandated process for bringing about the secession of one or more of its provinces or states.'³²

At this point, it is also interesting to note the fairly neglected reasoning of the French *Conseil constitutionnel* in certain constitutional rulings concerning the secession of the overseas territories from metropolitan France. This might be intriguing simply because France is widely perceived as a country that vigorously protects its constitutional categories of state indivisibility (Article 2 of the Constitution of France) and territorial integrity (Article 5). In their thorough analysis of French constitutional interpretation and practice with respect to this sensitive issue, Alain Moyrand and A. H. Angelo conclude that gaining independence by the overseas territories has been taken 'by the Constitutional Council as being compatible with the constitutional principle of the indivisibility of the state.' However, these authors stress that

²⁸ 'The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada'; *ibid.* at para. 92.

²⁹ 'It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, although the Constitution neither expressly authorizes nor prohibits secession, an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements. The fact that those changes would be profound, or that they would purport to have a significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada ... The amendments necessary to achieve a secession could be radical and extensive'; *ibid.* at para. 84.

³⁰ 'The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire'; *ibid.* at para. 88.

³¹ Daniel Weinstock, 'Constitutionalizing the Right to Secede' (2001) 9 J. Pol. Phil. 182 at 188 [Weinstock 2001].

³² Peter Leslie, 'Canada: The Supreme Court Sets Rules for the Secession of Quebec' (1999) 29 Publius 135 at 135.

the word “right” in conjunction with the term “secession” bears little relationship to reality even though a number of writers speak of it. If it is true that overseas territories can evolve to a status of independence ... this procedure does not mean that its operation is for the peoples concerned a right.

The possibility of secession is rather ‘a discretionary matter for the government of the Republic which will be decided on the basis of political judgment. And so the term “right” ought not to be understood as referring to a legal regime of secession.’³³

Nevertheless, it was the practice of the *Conseil constitutionnel* itself that subsequently made room for a plausible wider applicability of this approach to constitutional interpretation, specially designed to handle the issue of decolonization. René Capitant introduced in 1966 a special constitutional doctrine, adopted by the *Conseil constitutionnel*, which eventually enabled certain overseas territories to acquire independence not through the original constitutional path,³⁴ but through the one created on the basis of an ‘inventive’ reading of Article 53(c). In the eyes of certain French scholars,³⁵ this doctrine provides for the legal possibility for any part of the French territory, including the metropolitan one, to secede. Namely, this provision, placed within Title VI (*Treaties and International Agreements of the Constitution*), reads as follows: ‘No cession, exchange, or adjunction of territory shall be valid without the consent of the populations concerned.’

What Capitant’s doctrine in essence assumes is that the transfer of title over the overseas territory to the local people (secession) might be construed to fall under the category of ‘cession’, even though the Constitution explicitly says that this shall be done only by means of treaty. The problem is that at the moment of putative cession no internationally recognized state, with

³³ Alain Moyrand & A. H. Angelo, ‘International Law Perspectives on the Evolution in Status of the French Overseas Territories’ (1999) 5 Rev. jur. Polynésienne 49 at 52, online: <<http://www.upf.pf/Revue-no-5-1999.html?lang=fr>>.

³⁴ The overseas territories could simply reject the Constitution by referendum on 28 September 1958, and become immediately independent (Guinea was the only territory to do that), or by virtue of Article 76, they could change their status within the period of four months from the date of the promulgation of the Constitution. Though this article did not lead directly to independence, it nevertheless opened the path to it, since member states could accede to independence by putting into operation procedures set out in Art. 86 of the Constitution (no overseas territory chose this option); *ibid.* at 53.

³⁵ Moyrand & Angelo mention François Luchaire, Dominique Rousseau, and Léo Hamon.

which such a treaty might be concluded, exists yet.³⁶ On the basis of this reasoning the aforementioned legal scholars argue that, if it is admitted that the term 'cession' in article 53(c) can be interpreted as opening room for the legislator to reduce the national territory for the benefit of an existing state (cession *stricto sensu*) or even to create one (cession in the broad sense, that is, secession), 'it is difficult to see why the notion of territory in article 53 relates in the first case to any part of the territory of the Republic and in the second case only to overseas territories.'³⁷

Whether this interpretation might be endorsed in a putative case of secession from metropolitan France is certainly arguable.³⁸ However, what this piece of French constitutional hermeneutics, along with other stated examples, demonstrates is that although referred to by the Venice Commission as belonging to an alien species, secession has more than once visited the planet of constitutionalism. Hence, the next sections of this article will more thoroughly explore the relationship between these two phenomena by trying to answer the following fundamental questions: does the right to secession indeed belong in the founding document of a state? Which values of liberal-democratic constitutionalism, if any, might be protected in the case of the constitutionalization of secession?

IV. Constitutionalism and secession—a reassessment

As Ulrich K. Preuss has demonstrated by comparatively examining the world's most influential traditions of constitutionalism—that of Great Britain, the United States of America and France—it is very hard to conceive of 'a clear cut, unambiguous and undisputed idea of constitutionalism.'³⁹ We

³⁶ The *Conseil constitutionnel* explicitly accepted this interpretation in its decision of 30 December 1975 (Décision n° 75-89 DC), in connection with the accession to independence of the Comores: 'considering that the provisions of this article [53, last paragraph] must be interpreted as being applicable not only in the hypothesis where France will cede territory to a foreign state or acquire a territory from a foreign state but also where the territory will cease to belong to the Republic in order to become an independent state'; *ibid.* at 55.

³⁷ *Ibid.* at 56.

³⁸ Admittedly, the *Conseil constitutionnel* stated in its subsequent decision of 2 June 1987 (Décision n° 87-226 DC) that the process of self-determination of peoples is 'specifically provided for the overseas territories by the paragraph 2 of the preamble'. In its decision of 9 May 1991 (Décision n° 91-290 DC), *Conseil constitutionnel* recalled again 'that the Constitution of 1958 distinguishes the French people from the peoples overseas to whom the right of free determination is recognised'; *ibid.* at 56.

³⁹ Ulrich K. Preuss, 'The Political Meaning of Constitutionalism' in Richard Bellamy, ed., *Constitutionalism and Democracy: American and European Perspectives* (Aldershot: Avebury, 1996) at 24.

are today witnessing constitutionalism as a concept 'burgeoning and spreading to parts of the world where it was previously unimaginable',⁴⁰ causing some authors, like Bruce Ackerman, to speak of 'the rise of world constitutionalism'.⁴¹ At the same time, it is obvious that 'the history of modern constitutionalism is a history still in need of writing.'⁴² At the beginning of the new century we may nonetheless legitimately ask ourselves, together with Thomas Fleiner, 'whether British constitutionalism born in the enlightenment period of the 17th century will be replaced by some new constitutional theories mainly targeting multiculturalism, globalisation, universality of human rights and democracy.'⁴³

In his illustratively named paper 'Ageing Constitution', Fleiner suggests that the answer to the aforementioned question must be affirmative and that, consequently, constitutional drafters should have in mind several precepts for a modern world of tomorrow. He argues that constitutions should, first, 'provide tools for conflict management among the diversities of society.' Hence, besides individual liberties and rights, their objective should also be peace among different communities. Second, they should shift their attention from the principle of the general universality of human rights to ask, 'to what extent particularities may be universally acceptable'. This necessarily implies taking seriously the issue of collective rights. Third, democracy should be understood not just as a mechanism for achieving efficient and legitimate government, but as the framework for the realization of the rights to self-determination and local self-government. Fourth, modern constitutions have to 'reconsider the principle of representation as part of the modern global communication society.' Finally, constitutional drafters of tomorrow have to extend their horizons beyond the nation state, and to situate their concerns for democratic legitimacy, rule of law, and accountability at the regional and international level.⁴⁴

⁴⁰ Louis Henkin, 'A New Birth of Constitutionalism: Genetic Influences and Genetic Defects' in Michael Rosenfeld, ed., *Constitutionalism, Identity, Difference, and Legitimacy (Theoretical Perspectives)* (Durham & London: Duke University Press, 1994) at 51 [Henkin].

⁴¹ One of the central tenets of Ackerman's article is to underline the rising significance of the comparative constitutional approach—both for scholars and judges—and to criticize Americans for failing to observe this trend; Bruce Ackerman, 'The Rise of World Constitutionalism' (1997) 83 Va. L. Rev. 771.

⁴² Horst Dippel, 'Modern Constitutionalism, An Introduction to a History in Need of Writing' (2005) 73 Legal Hist. Rev. 153 at 168.

⁴³ Thomas Fleiner, 'Ageing Constitution', paper presented at the Concluding Conference of Summer University, Institute of Federalism, 14 September 2001, at 3 [Fleiner].

⁴⁴ *Ibid.* at 14-15.

Another challenge to the classical doctrine of constitutionalism comes from the German scholar Erhard Denninger, who suggests that traditional basic values of Western constitutionalism, emanating from the French revolutionary slogans—*liberté, égalité, fraternité*—are today to be supplemented with new, post-modern constitutional paradigms—*security, diversity and solidarity* (*Sicherheit, Vielfalt und Solidarität*).⁴⁵ He underlines that these paradigms ‘ought not to be misunderstood as “basic values” for a new generation of constitutional texts’, but rather ‘as constitutional ideals’, which ‘bear the character of a more or less *concrete Utopia*.’⁴⁶ Louis Henkin also points out that besides being embedded in and reinforcing traditional values of popular sovereignty, representative democracy, separation of powers, limited government, and protection of individual rights, constitutionalism nowadays ‘may also imply respect for “self-determination”—the right of “peoples” to choose, change, or *terminate* their political affiliation.’⁴⁷ Consequently, it seems that we are witnessing a theoretical shift in the study of constitutionalism, a shift that is largely triggered by the need of societies to meet the challenges and demands of new times.

Provided that the new precepts of constitutionalism are indeed multiculturalism, respect for diversity and self-determination⁴⁸—and I believe that one may find credible indicators that this is indeed the worldwide trend—and notwithstanding the fact that certain states did or do

⁴⁵ See, Johannes Bitzer & Hans-Joachim Koch, eds., *Sicherheit, Vielfalt und Solidarität. Ein neues Paradigma des Verfassungsrechts? Symposium zum 65. Geburtstags Erhard Denningers am 20. Juni 1997*, (Baden-Baden: Nomos, 1997).

⁴⁶ Erhard Denninger, “‘Security, Diversity, Solidarity’ Instead of “Freedom, Equality, Fraternity”” (2000) 7 *Constellations* 507 at 519 (emphasis in original). For a critical stance, see, Jürgen Habermas, ‘Remarks on Erhard Denninger’s Triad of Diversity, Security and Solidarity’ (2000) 7 *Constellations* 522.

⁴⁷ Henkin, *supra* note 40 at 42 (emphasis mine).

⁴⁸ For obvious reasons, this paper cannot go into a deeper discussion over the core principles of liberal-democratic constitutionalism. Yet, even authors like Rosenfeld, who proceed from a rather traditional understanding of constitutionalism as requiring the imposition of ‘limits on the powers of government, adherence to the rule of law, and the protection of fundamental rights’, argue that the underlying ‘constitutional identity’ of the contemporary state has to be understood as a complex ‘interplay between identity and diversity’, between individuals and collectives, majority and minority(ies); Michael Rosenfeld, ‘Modern Constitutionalism as Interplay Between Identity and Diversity’ in Michael Rosenfeld, ed., *Constitutionalism, Identity, Difference, and Legitimacy (Theoretical Perspectives)* (Durham & London: Duke University Press, 1994) at 7. This, on the other hand, does not mean that they would be ready to fully endorse the reading of constitutionalism advanced in this article. See e.g. Rosenfeld’s critique of Denninger’s ‘post-modern constitutional paradigms’; Michael Rosenfeld, ‘American Constitutionalism Confronts Denninger’s New Constitutional Paradigm’ (2000) 7 *Constellations* 529.

provide for a constitutional right to secession, does it still follow that such an instrument of constitutional law is compatible with liberal-democratic constitutionalism?

Cass Sunstein believes that it is not. At just about the same time as Buchanan published his book on secession, in which one chapter was devoted to the possible constitutionalization of secession,⁴⁹ Sunstein published an article sending a completely opposite message. There, he claims that despite the fact that secession might sometimes be justified as a matter of politics or morality, 'constitutions ought not to include a right to secede.'⁵⁰ His objection is grounded in the normative concept of constitution as a specific *precommitment strategy* to a certain course of action. The central goal of constitution is, thus, 'to ensure the conditions for the peaceful, long-term operation of democracy in the face of often persistent social differences and plurality along religious, ethnic, cultural, and other lines.'⁵¹ In that respect, the role of constitution might be compared to that of marriage, insofar as the political community ought not be divisible for the simple reason 'of current dissatisfaction, but only in extraordinary circumstances'. Providing an exit option only in exceptional cases can, in turn, 'serve to promote compromise, to encourage people to live together, to lower the stakes during disagreements, and to prevent any particular person from achieving an excessively strong bargaining position.'⁵² Consequently, the ultimate objective of the supreme law, according to Sunstein, is to 'prevent the defeat of the basic enterprise'.⁵³ A constitutional right to secession would, on the other hand, produce just the opposite effects, insofar as it would

increase the risks of ethnic and factional struggle; reduce the prospects of compromise and deliberation in government; raise dramatically the stakes of day-to-day political decisions; introduce irrelevant and illegitimate considerations into those decisions; create dangers of blackmail, strategic behavior, and exploitation; and, most generally, endanger the prospects for long-term self-governance.⁵⁴

⁴⁹ Buchanan 1991, *supra* note 4 at 127-49.

⁵⁰ Cass R. Sunstein, 'Constitutionalism and Secession' (1991) 58 U. Chicago L. Rev. 633 at 634 [Sunstein 1991].

⁵¹ Cass R. Sunstein, *Designing Democracy—What Constitutions Do* (New York: Oxford University Press, 2001) at 96 [Sunstein 2001a].

⁵² Sunstein 1991, *supra* note 50 at 649.

⁵³ *Ibid.* at 633.

⁵⁴ *Ibid.* at 634.

Furthermore, Sunstein argues that if the right to secede is justified as a remedy for oppressive and discriminatory practices towards a sub-state group—and this is a largely exploited argument in moral theories of secession, especially in Buchanan's—then the same objective might be promoted through other means, such as federalism, checks and balances, entrenchment of civil rights and liberties, and judicial review. And, 'if these protections are inadequate, it is highly doubtful that a qualified right to secede will do the job.'⁵⁵ Finally, if the ultimate goal of a sub-state group's protection is unattainable through the mentioned measures, then the preferred solution is again not the constitutionalization of secession, but a negotiated agreement or a right of revolution. These two options 'would provide a remedy against most of the relevant abuses without raising the continuous risks to self-government that would be created by a constitutional right to secede.'⁵⁶

The two scholars that have most forcefully tried to refute this position are Daniel Weinstock and Wayne Norman. They claim, albeit using somewhat different lines of argumentation, that a constitutional right to secession should be treated as a relevant institutional response to secession politics and as compatible with constitutionalism.⁵⁷ Weinstock's point of departure is radically different from that of Sunstein. First, he proceeds from a different normative concept of constitution. In Weinstock's opinion, the key role of the constitution is to create institutions that will 'block the destructive potential' of certain 'passions and interests to which humans are prey', and to channel 'them in socially productive directions.'⁵⁸ Second, in an attempt to justify a constitutional response to the secession controversy, Weinstock takes an even broader 'two-stage view', insofar as he distinguishes between the *abstract question* of whether a group possesses a moral right to secede and the *legal question* of whether it ought to be granted such a right in internal or

⁵⁵ Sunstein 2001a, *supra* note 51 at 112.

⁵⁶ Sunstein 1991, *supra* note 50 at 635.

⁵⁷ Weinstock's key articles are: 'Toward A Proceduralist Theory of Secession' (2000) 13 Can. J. L. & Jur. 251 [Weinstock 2000]; and Weinstock 2001, *supra* note 31. Norman's main works in this field are: *Negotiating Nationalism—Nation-Building, Secession and Federalism in the Multinational State* (Oxford: Oxford University Press, 2006) [Norman 2006], Norman 2003, *supra* note 12; 'Secession and (Constitutional) Democracy' in Ferran Requeio, ed., *Democracy and National Pluralism* (London & New York: Routledge, 2001) 84 [Norman 2001a]; and 'The Ethics of Secession as the Regulation of Secessionist Politics' in Margaret Moore, ed., *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998) 34 [Norman 1998].

⁵⁸ Weinstock 2001, *supra* note 31 at 192.

international law.⁵⁹ This issue is analyzed through lenses of the general *normative* claim ‘that there is a case to be made for making legal provision for people to engage in behaviour they have no moral right to engage.’ This claim is justified provided that the following three conditions are satisfied: (a) *the inevitability condition*, which says that irrespective of legal regulation, it is ‘overwhelmingly likely’ that people will engage in the given behaviour; (b) *the moral threshold condition*, which requires that the said behaviour does not imply ‘violation of an absolute moral prohibition’; and (c) *the consequentialist condition*, which assumes that the consequences of legally unregulated behaviour ‘are likely to be worse’ than in the opposite case of properly defined legal confines for the behaviour in question. After testing this model on the issue of secession, Weinstock concludes that ‘prudent’ constitution-makers will have good reasons to enact a ‘judiciously formulated’ secession procedure.⁶⁰

Furthermore, Weinstock tries to refute Sunstein’s opinion that such a right would have undesirable consequences.⁶¹ Namely, Sunstein argues that in the case of constitutionalization potential secessionists would be tempted to use the threat of secession as the strategic tool of their everyday politics (*blackmail threat*), while the state—that is, the majority population, faced with the possibility of disintegration—would in return nip in the bud every request for territorially based self-government (*threat of oppression*). Contrary to this, Weinstock stresses that the unregulated state of this issue, common for the vast majority of present constitutions, makes the costs of raising secessionist threats quite low. First, since no sanction is attached to the making of such threats, they could be freely used in everyday politics, even for gaining advantages on some unrelated policy debates.⁶² Second, in such a situation, ‘there are no limits on the frequency with which the threats are made.’ Accordingly, ‘a carefully regulated right to secede actually removes

⁵⁹ *Ibid.* at 182-6.

⁶⁰ *Ibid.* at 188.

⁶¹ In a direct debate with Weinstock, Sunstein says: ‘It is plausible to fear that any effects in “steadyding the hand of trigger-happy secessionists” would be much more than counter balanced by the legitimating effects of a secession right’; Cass Sunstein, ‘Should Constitutions Protect the Right to Secede—A Reply to Weinstock’ (2001) 9 T.J. Pol. Phil. 350 at 355 [Sunstein 2001b].

⁶² Dion reports that ‘in Canada in recent years, political figures in different provinces have brandished the threat of secession to make their case in connection with such current issues as a budget deficit, a budget surplus, a scholarship program, health care funding, dwindling salmon stocks, ratification of the Kyoto Protocol, and so on’; Stephane Dion, ‘Democratic Governance and the Principle of Territorial Integrity’ (2003), online: Government of Canada Privy Council Office, Intergovernmental Affairs <<http://www.pco-bcp.gc.ca/aia/index.asp?lang=eng&Page=archive&Sub=Articles&Doc=20030716-eng.htm>>.

some of the incentives which are presented to political actors in an unregulated state.⁶³ In addition, those who hold that the mere existence of such a legal provision would endanger the stability of the state tend to exaggerate the power that legal norms might have 'in generating motivation *de novo*.' In fact, 'they assume that once we have decided that there are reasons for a legal system to grant a right, it will simply state, without further qualification, that the right exists. And of course, such a coarse instrument as the simple recognition of a right can have quite disastrous consequences.' This is why Weinstock eventually calls for the 'judicious formulation of the procedure which must be followed to avail oneself to the right.'⁶⁴ In sum, Weinstock convincingly demonstrates that, in the context of a major secessionist conflict, not constitutionalizing the right to secession might actually lead to exactly those undesirable consequences that Sunstein attaches to the constitutional right to secession, e.g. interethnic struggle, blackmail and strategic behaviour, reduced chances for compromise.

Norman develops both pragmatic and normative grounding for the constitutionalization of secession. In the introductory part of his article on domesticating secession, Norman qualifies as 'curious' the fact 'that the most enthusiastic case for constitutionalizing the right of secession has been made by theorists with little sympathy for secessionists (at least for those in a reasonably just democratic state).' While making the case for a constitutional right to secession, proponents of this idea at the same time 'hope that the groups entitled to secede will not want to take advantage of this opportunity.' In fact, what they commonly suppose is that entrenching the secessionist clause in a constitution 'can make secession and the disruption of secessionist politics *less*, not more, likely.'⁶⁵

However, in the last instance, 'whether secessionist politics would be more likely to be *fuelled* or *choked* by "legalising" secession ... is a question for political psychology and sociology.'⁶⁶ In polities that are not seriously

⁶³ Weinstock 2001, *supra* note 31 at 188.

⁶⁴ *Ibid.* at 196.

⁶⁵ Norman 2003, *supra* note 12 at 193 (emphasis in original). Glaser, for instance, believes that he managed to prove that 'it is logically possible for liberal egalitarians to recognise and oppose secession more-or-less simultaneously, depending on who it is that they are addressing (the existing state or the secessionists), whether they are talking about the right to secede or the worthiness of a choice in favour of secession, and whether they are discussing the legitimacy of opposing a secession or the legitimacy of the means that might be employed to suppress it'; Daryl J. Glaser, 'The Right to Secession: An Antiseccessionist Defence' (2003) 51 P Pol. Stud. 369 at 383.

⁶⁶ Norman 2001a, *supra* note 57 at 87 (emphasis in original).

exposed to secessionist pressures, the constitutionalization of secession might prove to be a fuelling mechanism, whereas in those states that face a credible secessionist threat, such a rule might function as a choking mechanism. And, in Norman's opinion, it will primarily serve that role 'by being more demanding than the implicit "democratic" threshold of a simple majority which secessionist leaders would insist upon in the absence of a formal constitutional provision.'⁶⁷

Consequently, the central tenet of the normative part of Norman's justification concerns the genuine value of the rule of law approach in this subject matter. Since it is empirically confirmed that secessionist politics will occur, even in well-established and fairly just liberal democracies and irrespective of the constitutional prohibition or silence, he argues that it is the logic of constitutionalism itself that requires clear rules in this political game. The reason for this is that, 'if unchecked, this political contest can eventually find itself progressing into an arena where there are no clear or agreed rules for deciding the winner of the contest.' This contest 'can look like an ordinary democratic process all the way along; but without any rules for an end-game it will have to end up as mere power politics (or potentially worse), not constitutional democracy.'⁶⁸

This is certainly not the only normative justification for the constitutionalization of secession. In fact, Norman points out that making such a case requires a unique 'normative cocktail', made up 'of considerations of justice and minority rights, democracy, recognition, stability, pragmatism and group-interest.' This cocktail 'need not look arbitrary', and Norman thinks that 'there are grounds for believing that, at least under favourable conditions, representatives of national minorities and majorities could agree on both a clause and its moral and political rationale.'⁶⁹

The issue of whether the right to secession was inherent to the constitutional order of a federal state was widely debated in American antebellum constitutional theory, and it was only after the defeat of the secessionist South that it largely, though not completely, disappeared from the theoretical discourse. As this brief summary demonstrates, the constitutionalization of secession is again one of the hotly discussed topics among political theorists and scholars of constitutional law. While it is too

⁶⁷ *Ibid.* at 88.

⁶⁸ Norman 2006, *supra* note 57 at 196.

⁶⁹ *Ibid.* at 215.

early to conclude whether the arguments in favour of the constitutionalization of secession will significantly affect constitutional practice, it is at least obvious that this theoretical position is gaining more credibility, which was up until recently hardly imaginable.

V. Why consent to a constitutional clause on secession?

In this section, I present my own case in favour of the constitutionalization of secession. In doing so, I follow the general lines of Weinstock's and Norman's reasoning. Nevertheless, the differences between our approaches lie in the nuances of the structure of argumentation. In that respect, the first caveat concerns the fact that not all states exposed to secession politics are equally good candidates for this institutional approach. It is recommended only for polities that meet the '*minimal liberal-democratic setting*' requirement.⁷⁰ These are polities in which, generally speaking, political power is peacefully transferred through free and democratic elections, where there is a widely shared support for the democratic regime—including the commitment of all relevant political actors to nonviolent strategies for the realization of their goals—and where fundamental individual rights and vital minority rights are constitutionally guaranteed and effectively protected.⁷¹

However, even if this precondition exists, the *key question* remains: why would a liberal-democratic state in the first place constitutionally consent to an exit option for its constituent parts? I will argue that there are several reasons stemming not so much from *normative necessity* (that is, justice), but rather from *political prudence*.⁷² Let me, for that matter, import from the well-developed literature in democratic transition and consolidation the notion of the 'stateness problem'. In dealing with polities that are in the process of democratization, Juan J. Linz and Alfred Stepan note that 'in some parts of the world, conflicts about the authority and domain of the *polis* and the

⁷⁰ A list of countries that might qualify under the mentioned conditions for the constitutionalization of secession would, for example, be more extensive than Norman's, since this author restricts his case to 'just, democratic constitutional orders'; Norman 2003, *supra* note 12 at 85.

⁷¹ The more elaborated list of conditions that indicate the presence of the 'minimal liberal-democratic' requirement can be found in c. I of my book *Constitutionalizing Secession in Federalized States: A Procedural Approach*.

⁷² This would be one of the major differences between Norman's and my approach, even though, as we saw, Norman does not disregard pragmatic and prudential considerations at all. On the other hand, political prudence in this case is deeply connected to, if not rooted in, several normative explanations about the phenomenon. Furthermore, my approach clearly differentiates from Weinstock's more broad 'two-stage view'.

identities and loyalties of the *demos* are so intense that no state exists. No state, no democracy.⁷³ In other words, consolidation of a liberal-democratic regime is next to impossible in the context of 'stateness problem', that is, unregulated questions of the proper territorial unit of democratization and the community of persons whom one owes the ultimate loyalty. But what happens if things go the other way, as is actually the case with certain states? What if a stable liberal-democratic state is faced with the *credible possibility*⁷⁴ of 'stateness problem'? Would such a state be *morally obliged* to let go those who do not consider it 'our own state' anymore and who do not perceive some fellow citizens as belonging to 'us'? The answer to this question largely depends on normative considerations about the sources of political authority.⁷⁵ However, as I already indicated, irrespective of the normative stance one may take in this case, I assume that, in the aforementioned circumstances, it would be *politically prudent* for such a liberal-democratic state to establish, in advance, clear rules under which the exit option might eventually be constitutionally exercised by a seceding group.

1. *Avoiding the Impasse of Ungovernability*

Systematic neglect of the possible rise of secessionist sentiment amongst a population that is territorially concentrated might lead the central government into an *impasse of ungovernability*. In order to elucidate this argument, let me employ Judith Shklar's well-known distinction between obligation and loyalty. Generally speaking, every governing process is based upon political obligations, that is, 'laws and lawlike demands, made by public agencies.' In liberal-democratic states, the reasons for accepting or rejecting these obligations 'are said to derive from consent, explicit or tacit'. Hence, '[t]he very word legitimacy reminds us of the law-bound character of

⁷³ Juan J. Linz & Alfred Stepan, 'Toward Consolidated Democracies' (1996) 7 J. Democ. 14 at 14.

⁷⁴ What may count as 'credible possibility' is a completely contextually-bounded, empirical question, which in the last instance should be recognized as such by the political leadership of a state.

⁷⁵ In political philosophy, one may come across several theories about the ultimate source of the political authority of state. These include *consent*, *political benefits*, *fairness*, and *natural duty* theories, as well as certain hybrid ones. For a brief sketch of the main ideas and deficiencies of each one of them, see e.g. Christopher Heath Wellman, 'Toward a Liberal Theory of Political Obligation' (2001) 111 Ethics 735. Only the pure consent model of political obligation might imply *prima facie* moral obligation on the part of a state to allow secession of a group of people that withdraw their consent. This was indicated by Harry Beran, as early as 1977, in his article 'In Defense of Consent Theory of Political Obligation and Authority' (1977) 87 Ethics 260 at 266, and he later defended it in a more thorough way. For a critique of this implication of the consent theory on the issue of secession, see Buchanan 1991, *supra* note 4 at 70-3.

political obligation.⁷⁶ However, whereas political obligation has 'rational rule-related character', loyalty 'is deeply affective and not primarily rational.' In comparison to fidelity, which is given to individuals, loyalty represents 'an attachment to a social group.'⁷⁷ Consequently, she comes to the conclusion that the difference between political obligation and loyalty emerges as soon as the question arises of whether one should or should not obey. In such situations, 'we cannot ignore the difference and the ways in which loyalty can both sustain and undermine public rules.'⁷⁸ The aforementioned 'stateness problem' can be defined precisely as a situation in which the loyalty towards a certain group—most often one with a distinct ethnocultural character⁷⁹—outweighs the loyalty towards the state as a whole, in such a way that the decision not to obey laws and law-like demands made by the larger state is primarily driven by the emotional stance that the issuing authority is no longer 'our' state.⁸⁰ When the described situation involves a substantial portion of the population that is territorially concentrated, one may speak of the impasse of ungovernability.

As noted, two former communist federations—the Soviet Union and Yugoslavia—had actually tried to legally regulate the intensified secession politics of their federal units, but the reaction was belated. Both federal countries had already reached the point of no return and were not able to control the situation on the ground.⁸¹ Canada came on the verge of

⁷⁶ Judith N. Shklar, 'Obligation, Loyalty, Exile' (1993) 21 *Pol. Theory* 183 at 183.

⁷⁷ *Ibid.* at 184.

⁷⁸ *Ibid.* at 187.

⁷⁹ Shklar draws a rather general conclusion that loyalty towards ethnoculturally-based nationality and political obligation towards state 'must conflict, because there is no single territorial state, except perhaps Iceland, that is not multiethnic and multinational or could be or have been'; *ibid.* at 186.

⁸⁰ Unlike Norman, I do not think that the Rawlsian concept of justice would be of much help in addressing the problem of secessionist politics in multinational states; cf. Wayne Norman, 'Justice and Stability in Multinational Societies' in Alain-G. Gagnon & James Tully, eds., *Multinational Democracies* (Cambridge: Cambridge University Press, 2001) at 108 [Norman 2001b]. In fact, I subscribe to Ewin's opinion that traditional contract theories are not very helpful in clarifying cases of secession crisis. Namely, these theories 'can really play no useful part until we know who the potential contracting parties are or who it is with whom we are deciding or not to consent.' Consequently, he argues that 'loyalty is in some ways a more basic part of the social glue than is any contractual calculation'; Robert Ewin, 'Peoples and Political Obligation', (2003) 3 *Macq. L. J.* 13 at 19, 20.

⁸¹ As Monahan and Bryant note in discussing these cases: 'We do not suggest that prior agreement on the process of secession would have avoided these consequences. We do believe, however, that the absence of such a consensus made some form of impasse virtually

experiencing a similar sort of impasse of ungovernability⁸² while passively waiting for the 1995 referendum results in Quebec. This was the reason why two years before the Supreme Court's *Quebec Secession Reference* Patrick J. Monahan and Michael J. Bryant, in their intriguing article 'Coming to Terms With Plan B: Ten Principles Governing Secession', suggested to the Canadian public that

like homeowners who purchase fire insurance even though they believe the risk of fire may be remote, prudent Canadians should contemplate the possibility of the dismemberment of their country in the hope of containing the calamity and rebuilding a new country if the worst should come to pass.⁸³

Before reaching the 'terminal phase' of the governing process, liberal-democratic states might utilize various means—even coercive ones, as in the case of the United Kingdom's policies towards Northern Ireland—in order to prevent the aforementioned scenario. However, at some point in time it becomes prudent for a larger state to control the erupting secessionist politics by providing a legal path for the exercise of the exit option. In that respect, the UK government entitled the Secretary of State for Northern Ireland, under the *Northern Ireland Act 1998*, to issue an order directing the holding of a referendum if 'it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.'⁸⁴ I believe that avoiding the impasse of ungovernability was precisely the major incentive for this move.

2. *Excluding Decisive Interference of International Actors*

One of the advantages of the constitutionalization of secession consists in preventing the *extreme and decisive interference of international actors*. The basic assumption is that any state would rather take more than less control over its own internal affairs, and that, after all, states still assume the primary responsibility for the overall well-being of their citizens. This is so even in the area of human rights protection, where states most often tend to abdicate

unavoidable'; Patrick J. Monahan & Michael J. Bryant, 'Coming to Terms With Plan B: Ten Principles Governing Secession' (1996) 83 C.D Howe Inst. Comm. 1 at 20 [Monahan & Bryant].

⁸² Certainly, with the notable exception of any violent actions taken on the ground, as was particularly the case with the former Yugoslavia.

⁸³ Monahan & Bryant, *supra* note 81 at 6.

⁸⁴ *The Northern Ireland Act 1998* is available at <<http://www.hms.o.gov.uk/acts/acts1998/19980047.htm>>.

their responsibilities—the fact of which has led to the internationalization of the human rights regime in the past few decades. Discussing the activism of the global human rights movement, Ignatieff stresses that ‘it is utopian to look forward to an era beyond state sovereignty’, because we actually have to ‘appreciate the extent to which state sovereignty is the basis of order in the international system, and that national constitutional regimes represent the best guarantee of human rights.’ Consequently, ‘[i]t can be said with certainty that the liberties of citizens are better protected by their own institutions than by the well-meaning interventions of outsiders.’⁸⁵

An alternative to the internal management of the secessionist conflict would be to leave its resolution to the international community.⁸⁶ As for the current international legal treatment of secession, even Buchanan—as the staunch propagator of this approach—plainly acknowledges, ‘existing international law regarding secession is dangerously flawed.’⁸⁷ Detmar Doering, for his part, notes that the present practice of international law concerning recognition of secession resembles a ‘game of lottery’. He finds three deficiencies in that practice: (a) non-existence of legal instruments and institutions to evaluate secessionist activities and their legitimacy; (b) ongoing primacy of the state as a protector of rights, which is accompanied by the international legal principle of ‘non-interference’; and (c) the fact that the international community ‘is composed of member-states with their own interests and equipped with very varying degrees of power to push through these interests.’ In the end, ‘power, not rights decides the issue.’⁸⁸

The international involvement in the secession crisis in the former Yugoslavia powerfully demonstrates that the lack of an adequate and timely internal, constitutional response to secessionist politics might indeed trigger an extreme and decisive interference of international actors.⁸⁹ To be sure, the

⁸⁵ Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton and Oxford: Princeton University Press, 2001) at 35.

⁸⁶ The other alternative, today less likely in liberal democracies, would be ‘to argue that the national government will resist secession under any and all circumstances, even to the point of using military force’; Monahan & Bryant, *supra* note 81 at 21.

⁸⁷ Allen Buchanan, ‘A Principled International Legal Response to Demands for Self-Determination’ in Igor Primoratz & Aleksandar Pavkovic, eds., *Identity, Self-Determination, and Secession* (London: Ashgate, 2006) at 139. Hence, he delivers the proposal for a thorough moral reform of international law; Buchanan 2003, *supra* note 2.

⁸⁸ Detmar Doering, ‘Secession Rights in a Liberal Perspective’, paper presented at the Liberal Think Tank in Dakar, Senegal, 23 October 2003, at 4.

⁸⁹ See, e.g. Peter Radan, *The Break-up of Yugoslavia and International Law* (London and New York: Routledge, 2002).

former Yugoslavia was not a liberal-democratic state, and I do not imply that the scenario from that case would be repeated in the context of a more stable liberal-democratic polity.⁹⁰ However, it also cannot be denied that such a state would exercise much stronger control over the whole issue by constitutionalizing the secession procedure than in the absence of clearly established internal rules. Instead of letting the power politics of international actors prevail in deciding the secession crisis, constitutional rules on secession might in fact influence the more principled stance of international actors with respect to recognition policy, inasmuch as only those entities that successfully overcome constitutional hurdles could legitimately claim international recognition by existing states.⁹¹

3. *Enhancing Political Stability*

The third argument is that the legal regulation of this otherwise explosive political issue may in the long run even *contribute to the political stability* of a state. In Norman's opinion, legally prescribed procedural hurdles, which 'would make secession difficult but not impossible', would primarily serve not to rule out the possibility of secession but simply to distract regional political leaders to use secessionist politics 'to bolster their demands for more autonomy.' Simultaneously, 'the central government might be willing to accord more autonomy to the region in the first place if it could be assured that this would not make secession more likely.'⁹² Similarly, Weinstock argues that one of the 'pragmatic virtues' of the constitutionalization of secession might be that it would 'alter the relevant actor's motivations in a

⁹⁰ However, the tactic of 'internationalization' was already taken up by the Government of Quebec, which in 1992 commissioned a report, prepared by five well-known international law experts, on the issue of this federal unit's international borders in the event of its independence. The study was written by Allen Pellet (who also served as Badinter's international law consultant in the case of former Yugoslavia) in close collaboration with Thomas M. Franck, Rosalyn Higgins, Malcolm N. Shaw, and Christian Tomuschat; *The Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty* (Report prepared for Québec's Ministère des relations internationales, 1992) trans. by William Boulet, online: Independence of Québec <http://english.republiquelibre.org/Territorial_integrity_of_Quebec_in_the_event_of_the_attainment_of_sovereignty>. The underlying idea of this move was, at least in part, to instigate a wide international academic debate about the borders of a would-be independent Quebec, and the pro-independence camp gained initial advantage by the mere fact that widely recognized international scholars argued in favour of territorial inviolability of this federal unit's borders.

⁹¹ A potentially new moment for the internationalist strategy might come with an advisory opinion of the International Court of Justice, which has to address Serbia's question 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?'

⁹² Norman 2001b, *supra* note 80 at 107-8; cf. Norman 2003, *supra* note 12 at 223-8.

unity-promoting manner.⁹³ He believes that 'in many relatively just and prosperous multinational states, one of the principal irritants creating secessionist feeling is precisely the fact that the right to secede does not exist.' When such a clause is incorporated into the supreme law, one may expect that the potential right-holders would more easily avail themselves to 'a cold and lucid cost/benefit analysis of the relative advantages of seceding or remaining within the larger state', and that in relatively fair and well-off liberal democracies this analysis would most often 'favour remaining.' Simultaneously, in the same context, central authorities 'will be less tempted to ride roughshod over the collective rights of minority nations than it would be if it felt it could do so with impunity.'⁹⁴

Furthermore, from all we empirically know about secessionist movements around the globe, it seems arguable that when clear and legitimate rules are in place, the uncertainties and risks of violence—as a regular accompanying phenomenon of secession politics—will be significantly minimized.⁹⁵ This is not to suggest that all potential violent conflicts would be prevented by a mere constitutionalization of secession procedure, especially in those states where such a regulation is not embedded in the minimal liberal-democratic societal and institutional setting. However, in cases where these requirements are met, constitutionalizing the right to secession would knock the bottom out of the arguments of those secessionists who would be prepared to use violent means, claiming that their political goal is impossible to be realized through regular channels of democratic politics—as might currently be the case with certain followers of the Basque separatist movement in Spain.⁹⁶ Consequently, removing the possible causes of group dissatisfaction and hostility enhances the prospects for stability of the given polity.

VI. Protecting the values of liberal-democratic constitutionalism

If in the aforementioned circumstances political prudence points to the direction of the constitutionalization of secession, this still does not imply that such an institutional response is compatible with liberal-democratic

⁹³ Weinstock 2000, *supra* note 57 at 261.

⁹⁴ *Ibid.* at 262.

⁹⁵ Cf. Norman 1998, *supra* note 57 at note 41.

⁹⁶ Moreover, the route of political violence can easily gain currency after the ban of those Basque political parties, which are supposedly connected to the ETA terrorist activities. See Leslie Turano, 'Spain: Banning Political Parties as a Response to Basque Terrorism' (2003) 1 *Int'l J. Const. L.* 730.

constitutionalism per se. Hence, the fundamental question is which values of liberal-democratic constitutionalism, if any, might be protected in the case of the constitutionalization of secession. I believe that there are at least three such values. I will briefly sketch each one of them.

1. *The Rule of Law Value*

As for the first of these values, proponents of the constitutionalization of secession maintain, I believe with good reason, that taking this issue from the sphere of power politics and putting it within the established legal framework 'would ensure that there was never a break with the rule of law.'⁹⁷ In particular, a constitutional right to secession would promote *legal certainty*, as the vital part of the rule of law concept, insofar as 'it would regulate a form of politics by specifying clear criteria for success and failure.' In that respect, a secession clause would have a similar purpose as constitutional rules on elections and the amending procedure.⁹⁸ Consequently, as Norman points out, this institutional device may not only 'minimise the risk of violence, but beyond that it can be thought of as an almost intrinsically worthy aim in a constitutional democracy.'⁹⁹

Whereas some opponents of the constitutionalization of secession are ready to admit that—especially in the liberal democracies of today—the moral right to secession 'is so deeply embedded that it cannot be easily overridden',¹⁰⁰ they are not willing to provide this recognized moral right with constitutional protection. Instead, they try to justify this somewhat contradictory position by pointing to the 'real question'; that is, 'whether a constitutional right to secede would significantly increase the level of secession activity, or whether a constitutional ban on secession would significantly decrease the level of such activity.'¹⁰¹ However, from all we know from the real-life experience of liberal democracies, 'secessionist politics will occur anyway, regardless of legal silences and prohibitions'.¹⁰² If that is the case, there are good reasons to believe that its occurring in a legal vacuum will be far more detrimental than were it to occur within a well crafted legal procedure.

⁹⁷ Norman 2001a, *supra* note 57 at 91.

⁹⁸ Norman 1998, *supra* note 57 at 48.

⁹⁹ Norman 2001a, *supra* note 57 at 91.

¹⁰⁰ Kai Nielsen, 'Liberal Nationalism, Liberal Democracies, and Secession' (1998) 48 U.T.L.J. 253 at 253.

¹⁰¹ Sunstein 2001b, *supra* note 61 at 353-4.

¹⁰² Weinstock 2001, *supra* note 31 at 196.

2. *The Extension of Democratic Rights Value*

As for the second value, one should be aware of the fact that in most Western states, which are commonly considered to be stable liberal democracies, it is possible to locate credible, even parliamentary represented, political organizations that propagate secession. This means that the said democratic systems, as a rule, do allow secessionists to organize and electorally compete, as long as they use non-violent means for the realization of their political goals. Hence, Norman accurately observes 'the difficulty of fixing an arbitrary stopping point for the legality of secessionist politics.' For, 'if it is permissible to advocate secession, to form parties with secessionist platforms, to have those parties form provincial governments', then it is hard to understand why the right to secession itself would not be legalized as well.¹⁰³

To illustrate how odd the current situation is, let us imagine a polity whose major source of energy comes from a nuclear power plant. In that state, however, also exists a credible anti-nuclear power movement. Suppose that the state allows this movement to politically organize and to participate in elections, and to represent its views in the national parliament. Let us now assume that this state's constitution has an explicit ban on closing the nuclear power plant. How meaningful could the political activities of the aforementioned movement be in the given political setting?

To use this case as an analogy with an unrecognized constitutional right to secession might at first glance appear simplified, since virtually no constitution has an explicit ban on secession. However, this absence of prohibition is due to the fact that constitutional drafters around the world still hold to Lincoln's saying that '[p]erpetuity is implied, if not expressed, in the fundamental law of all national governments.'¹⁰⁴ Consequently, parliamentary-represented secessionist parties in liberal-democracies without a constitutionalized right to secession eventually come very close to the described position of the anti-nuclear movement.

¹⁰³ Norman 2003, *supra* note 12 at 207.

¹⁰⁴ Abraham Lincoln, *The Collected Works*, Vol. 4, (New Brunswick: Rutgers University Press, 1955) at 252. After all, the Canadian Supreme Court acknowledged that Quebec's secession would not contradict the concept of *constitutionalism* as such, but that it would not be possible unless if the current constitution is amended as to allow for such a possibility.

Finally, liberal-democratic constitutionalism codifies democratic rules of the game, inasmuch as it defines who can vote and on what issues.¹⁰⁵ Accordingly, in the context of the already recognized democratic potential of secessionist political parties, putting the exit option on a voting menu would represent nothing more than the extension of already existing democratic rights.

3. *The Peace Among Communities Value*

In the first post-Cold War decade, not inter-state conflicts but 'ethnonational wars for independence ... were the main threat to civil peace and regional security'.¹⁰⁶ Most of these conflicts involved ethnocultural (minority) groups waging war with the central state. Therefore, in the present-day world national peace is no longer secure if only inter-individual relations are pacified, as once presumed by Hans Kelsen.¹⁰⁷ In order to prevent such violent conflicts, the state has to appease *inter-group tensions* as well. The further difficulty, in that respect, stems from the fact that the central state is often perceived by minorities not as a neutral and impartial peace-maker, but as an active player, representing a dominant ethnocultural group. Even liberal-democratic states are commonly portrayed in such a way by ardent supporters of local secessionist movements. 'This outbreak of nation-consciousness', Thomas M. Franck writes, 'increasingly manifests itself in efforts to secede from, or bring about the disintegration of, multinational civil societies and established states.'¹⁰⁸

Consequently, one of the roles of contemporary constitutions is exactly to 'provide tools for conflict management among the diversities of society'.¹⁰⁹ As already indicated, a constitutional right to secession should not be understood as an instrument that could be directly derived from the principle of 'ethnocultural justice'.¹¹⁰ To the contrary. Even Norman

¹⁰⁵ Richard Bellamy & Dario Castiglione, 'Constitutionalism and Democracy—Political Theory and the American Constitution' (1997) 27 Brit. J. Pol. Sci. 595 at 595.

¹⁰⁶ Cf. Monty G. Marshall & Ted Robert Gurr, *Peace and Conflict 2003: A Global Survey of Armed Conflicts, Self-Determination Movements, and Democracy* (College Park, MD: CIDCM, 2003) at 1, online: <<http://www.systemicpeace.org/PC2003.pdf>>.

¹⁰⁷ Hans Kelsen, *Peace Through Law* (Chapel Hill: The University of North Carolina Press, 1944) at 4.

¹⁰⁸ Thomas M. Franck, *The Empowered Self—Law and Society in the Age of Individualism* (Oxford: Oxford University Press, 1999) at 21.

¹⁰⁹ Fleiner, *supra* note 43 at 14.

¹¹⁰ Will Kymlicka, 'Nation-Building and Minority Rights: Comparing East and West' (2000) 26 J. Ethnic & Mig. Stud. 187.

explicitly acknowledges: 'I am not arguing that a just multinational federal constitution *must* contain a secession clause but only that such a clause is potentially beneficial in a number of ways that matter in multinational democracies.'¹¹¹ That is, in certain circumstances—for instance, in the context of the substantial constitutional refounding of a state¹¹²— a secessionist clause might be a tool to enhance the peace among major communities.

VII. Conclusion

This article tries to show that the constitutionalization of secession should not be discredited as incompatible with liberal-democratic constitutionalism, at least with that form of constitutionalism that takes seriously certain imperatives of the new century, such as multiculturalism, respect for ethnocultural diversity, and self-determination. After all, the issue of whether the right to secession was inherent to the federal form of state was widely debated in American antebellum constitutional theory. It was only after the defeat of the secessionist South that it largely, though not completely, disappeared from the theoretical discourse. Consequently, this topic is certainly not novel for constitutional scholars, at least for those of federal or federal-like countries. These polities are still the ones most affected by secessionist politics, and hence are probably the best candidates for the constitutionalization of secession.¹¹³ The position taken here is not to be equated with the stance that federal units are inherently vested with the right to unilaterally withdraw from the larger state, but with the one that holds that such a constitutional option *might be deliberated* between the centre and the periphery.¹¹⁴

¹¹¹ Norman 2003, *supra* note 12 at 227 (emphasis in original).

¹¹² Cf. Norman 2006, *supra* note 57 at 210.

¹¹³ In the absence of such a constitutional clause, the specific institutional capacity of a federal unit to produce a secession crisis might easily become a strategic advantage if it wants to become an independent state. In such a scenario, the central state—even the liberal-democratic one—may no longer be the sole master of its internal political dynamics. Further, in the post-Badinter era, which brought with it the impression 'that the internationally recognized statehood of a federal state is somehow less solid than that of a unitary state' (Hurst Hannum, 'Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?' (1993) 3 *Transnat'l L. & Contemp. Probs.* 69), this might even open the room for the internationally brokered break-up of the respective polity. This is probably why all stated examples of the constitutionalization of secession come from federal or federal-like countries. For more detail see c. II of my book *Constitutionalizing Secession in Federalized States: A Procedural Approach*.

¹¹⁴ Hence my recommendation throughout the article to constitutional drafters and statesmen that this strategy might at times be prudent *does not* imply the suggestion that this clause should be *imposed* by the central state. To the contrary, the legitimacy of this clause, as of any other

Finally, if such a clause is incorporated in the constitutional system of a state, I argue that the *procedural* model of constitutionalization is preferable to the *substantive* one, where secessionists would have to demonstrate that they have been treated unjustly by the state. The most important advantage of the procedural model is that it largely avoids plausible conflicts over the legal interpretation of stipulated conditions for secession.¹¹⁵ This procedural model will have to deal with a number of serious issues, such as the definition of the potential bearer of the right to secession, the appropriate territorial unit for the exercise of such a right, the problem of the 'recursive secession' of dissenting minorities in a seceding area, the clarity of the referendum question, the eligibility to vote, the majority threshold and so on. However, to tackle all these issues here would be to go outside the intended scope of this article,¹¹⁶ which is to demonstrate that the constitutionalization of secession is not only at times a prudent strategy to cope with secessionist conflicts, but it is the one that is compatible with the new precepts of liberal-democratic constitutionalism.

clause in a liberal-democratic constitution, will largely rest on the approval of all relevant stakeholders. Nevertheless, nobody can deny that in the present state of affairs, when constitutions worldwide are commonly silent on this subject-matter, the mere willingness of the central state to avail itself to such a procedure might represent a significant starting advantage in the deliberation process. This, in turn, might directly influence the final design of a secession clause.

¹¹⁵ If substantive criteria are adopted, 'secessionists and unionists are likely to disagree about what kind 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 as measures short of secession, about whether the particular violations were significant enough to justify secession etc'; Norman 1998, *supra* note 57 at 50.

¹¹⁶ For a detailed analysis how one plausible procedural framework for the constitutionalization of secession might look like, see c. V of my book *Constitutionalizing Secession in Federalized States: A Procedural Approach*.