

Informe



National Self-determination in Times of Shared Sovereignty: **Goals and Principles from Catalonia to Europe in the 21st Century**

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 - it is about a claim to a collective right about forms of government that are exercised through democratic mechanisms (elections, referendums). exercise to sovereignty: claim to authority
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1. The Ambiguity of Sovereignty

The controversy surrounding the right of the Catalan government to organise a referendum on independence in late 2017 can be understood as emanating from a fundamental conflict over rival claims to *national sovereignty* by Catalan nation and the Spanish nation.

As we will see in greater detail in the Section 2 below, the Catalan government, assuming the mantle of a government elected to speak on behalf of a majority of the Catalan nation, claimed to embody that nation's right to sovereignty, that is, a right to express a collective will over the choice of its political authority. By defending this right, it expressed the view that sovereignty a property of *nations*. Behind the acrimonious confrontation with which the Spanish government opposed this claim, it expressed a similar view that sovereignty was a property of a nation but contended that the relevant sovereign body was the nation of Spain.

This conflict was produced by the fact that the concept of sovereignty suffers from inherent *ambiguity*. The meaning of sovereignty has evolved over time, so that there are different interpretations of what sovereignty entails and what kind of entities- states, peoples or nations- can advance legitimate claims to being sovereign. As a result, both the Catalan and Spanish government were asserting what were perceived to be equivalently legitimate claims to *national sovereignty*, albeit at different scales of authority. It is this ambiguity in the very term of sovereignty that constituted the first source of the deadlock, since it is this ambiguity that gave rise to the conflicting claims to sovereignty we witness today in multinational states.

State sovereignty: the classical conception

The first thing to appreciate is that sovereignty has no clear empirical referent, in the way that one can denote, for example, a concept like a bureaucracy or a legislature by pointing to the civil servants and representatives working to prepare reports and pass law in a Ministry or a Chamber of Deputies. Rather, the classical conception of sovereignty argues that it is a *grundnorm*, a basic 'norm' or set of rules that defines both the units that comprise the international system ('constitutive' rules) and the interaction between these units ('regulative' rules) (Rawls 1955, cited in Philpott 1995: 358). Since sovereignty refers to norms which have to be developed, announced, enforced and adhered to by actors, it is fundamentally a *socially constructed* concept that is produced and reproduced through social practices and, moreover, the social practices of **states**. (Ruggie 1993; Philpott 2001).

What emerges from a historical reading of how sovereignty emerged as a political and legal concept regulating the international order during the early modern period in Europe (1555-1648) (Spruyt 1994; Osiander 1994) is that sovereignty is a property of **states**. To describe a state as sovereign is to say that there is a *supreme* and *absolute* political authority that legitimately exercises power within a specific territory and that is *independent* of the external influence of other states (Philpott 1995b: 357). If we move from conceiving of sovereignty as the property of a state to sovereignty as a property of the system of which it is part, it can be defined as "the institutionalization of public authority within mutually exclusive jurisdictional domains" (Ruggie 1983: 280). This definition leverages a distinction between the two faces of sovereignty- the internal and the external- that often underpins this classical conception.

Internal and external dimensions

The internal dimension, or what Krasner (1999) calls ‘domestic’ sovereignty, refers to the presence of a singular body- which historically was a monarch but which can, theoretically, also be a republican government- with *absolute* and *supreme* authority over the inhabitants of a specific **territory**. This authority is *absolute* in that it covers all possible areas and sectors of public life which can be subjected to regulation.¹ Second, this authority is *supreme* insofar as it exercises the final authority to pass laws. This means that there exists no other body above it that can abrogate and amend those laws or pass laws of its own (Hinsley 1986: 26). Supremacy also includes what German constitutional scholars referred to as *kompetenz-kompetenz*: the authority of a body to define the scope of its own competence as well as that of other bodies in the political system (Lapidoth 1992: 328).

It is important to underline that while sovereignty does refer to the attributes of a specific body, it also a *relational* concept that describes a the relationship that results from those attributes: namely, a hierarchical relationship between a ruler that commands authority and the ruled who must obey the ruler’s commands (Lake 2003: 304-05).

The external dimension of sovereignty is equally relational but refers to the horizontal ‘regulative’ rules that shape the relationship between states. What has been labelled international ‘legal’ sovereignty (Krasner 1999) or ‘juridical’ sovereignty (Jackson 1990) thus refers both to the properties of states in the international system, which are understood to be *independent* and *equal* (Morgenthau 1948: 345-47), and to how those properties shape the behaviour of states towards each other.

Independence entails that a state has exclusive authority over a territorial jurisdiction in the choice of its constitution and economic system, in the nature of its domestic political and administrative arrangements, in the enactment of laws that it wishes to pass for its citizens, as well as in its conduct in foreign affairs. This means that no state should rely on another state for making these decisions and that no state should seek to influence or intervene in those decisions, let alone impose them. Moreover, all states recognize each other’s independence and treat each other with sovereign *equality*, irrespective of their relative size, power or ideological differences. Thus, when states enter in relations, coordinate their action, establish treaties, and so on, they do so not in a relationship of hierarchy but in a relationship of judicial equality.

Both these principles of independence and equality are articulated in the U.N. General Assembly Resolution (2625) Declaration, the Declaration on ‘Friendly Relations’, which stipulates that all states have the “inalienable right to choose their economic, political and cultural systems” and that “all states enjoy sovereign equality”. As a result of the operation of these principles, the society of states is considered ‘anarchical’ (Bull 2012), because there is no overarching authority to regulate their relations.

It is difficult to over-emphasize what a pervasive and powerful grip this classical conception of state sovereignty has held over the imagination of both rulers in the state system and scholars studying that system. There is, after all, an elegant and attractive simplicity to a political map produced from parcelling out the world into discrete and exclusive territorial enclaves, each of which is ruled by a singular recognizable body

¹ We can conceive of ‘absolute-ness’ as the scope of affairs over which a sovereign body governs: in the EU, member-states are sovereign in certain policy areas like defence, but not in others like trade. Their sovereignty is less absolute than other countries that are not in the EU. In the classical conception however, sovereignty means absolute sovereignty, i.e. sovereignty in all possible matters (Philpott 1995b: 358).

that exercises comprehensive domestic control and represents the external face of that jurisdiction.

As we shall show in section 3 below, this classical conception of sovereignty has been especially influential in the fields of international relations and international law for this precise reason. Both disciplines twinned the internal and external dimensions of sovereignty by identifying that domestic *supremacy* means international *independence* and thereby turned the sovereign state into the node of international interactions, as well as the source of international law. Despite its appeal however, this classical conception has been challenged both on the internal front and the external front by entities other than states asserting a claim to sovereignty.

Does sovereignty belong to states, peoples or nations?

The first principal challenge to the classical conception of sovereignty was directed at its domestic dimension. It emanated in the long shadows cast by the American and French Revolutions from the novel idea that sovereignty was a property, not of territorial states, but rather of peoples and, more specifically, **nations**- groups that shared a common history, culture, identity as well as a vision of their future, what Max Weber defined as “communities of sentiment” (cited in Barkin and Cronin 1994: 111). In order to understand the nature of this challenge, it is useful to explore first the ‘genealogy’ of sovereignty (Bartelson 1995) to unpack how it was thought to work in the domestic sphere and how this led to sovereignty being assigned to peoples and nations, rather than territorial states.

Popular Sovereignty

If we return to the relational aspect of domestic sovereignty mentioned earlier, we will recall that it was premised on a hierarchical relationship between ruler and ruled. The obligation of the ruled to follow the commands of the ruler was over time, however, made conditional on the obligation of the ruler to fulfil the responsibilities of the office he occupied.

This line of first reasoning was articulated in the early 17th century by thinkers that advanced a *populist* theory of sovereignty. They opposed the *absolutist* theory of sovereignty, pronounced by thinkers like Bodin, according to which a monarch was vested with sovereignty by the ordination of God. Intrigued by the system of government prevalent in ‘free states’- commercial republics like Venice or the United Provinces, they advanced a rival idea: original sovereignty was lodged with the ruled, i.e the people. In Hobbes’ (1985) influential account, the multitude of individuals comprising the ‘body politick’ come together to form a ‘covenant’ that delegates authority to the monarch. The monarch is thus authorized to act by the ‘commonwealth’ of people, as well as on behalf of that ‘commonwealth’.

Although Hobbes forcefully endorsed the existence of an absolutist monarchy, what stands out from his fictional account is that a monarch’s reign is first brought into existence by the *consent* of its subjects. Moreover, the sovereign has the fundamental obligation to act in such a way as to procure the common interest and to ensure legitimacy of governmental action over time (Skinner 2010: 39). Thus, from its very origins, the *populist* theory of sovereignty was loaded with a theory of legitimate government as government by *consent*.

In the liberal philosophy later articulated by Locke (1988), *consent* was upheld as the critical legitimating device of government because it was founded upon an individual's right to *self-determination*. The foundation of this philosophy was the individual human being, living in a condition of liberty and endowed with natural rights over his or her own body and property. An individual was thus free to determine the course of his or her own life, to dispose of his or her property, without interference by other individuals. To better preserve this liberty, Locke argued that individuals entered a social contract and gave their consent to the establishment of a civil government charged with the administration of natural law. Their right to determine their 'selves' was nevertheless preserved under civil government; any curtailment of this natural right by a government gave rise to a right to withdraw consent, to resist the government, and even to revolt against it, if necessary.

Locke did not offer an original theory of sovereignty. But his account of how civil government comes about and of what are the proper boundaries of its actions did serve to correct the classical understanding that domestic sovereignty was a purely hierarchical relationship between ruler and ruled. Rather, the transfer of authority to the ruler and the exercise of that authority was conditional upon and always limited by the *consent* of the ruled, which was, in turn, justified by their enduring right to *self-determination*.

The relationship between individual self-determination and sovereignty was established by Rousseau in his *Social Contract*. Like his predecessors, Rousseau deployed a fictional contractarian theory in order to establish the standard for legitimate government. His key idea was that individuals renounced their natural rights by submitting, not to a specific institution like a monarch or civil government, but rather to the 'general will' of the collection of other individuals in the community. In his view, all individuals endowed with the capability for rational thought would be able to identify the common interest of a community on any given matter, so that all rational individuals should arrive at the same opinion about what particular course of action to follow. That collection of opinions was termed the 'general will'. It was the role of the government to pass laws that embodied that 'general will' and it was those laws that were considered sovereign, in other words, supreme and absolute in their authority.

Rousseau's account was crucial in developing the idea of *popular sovereignty*. It first revealed how the collection of individuals in a community could be conceived as a singular and homogeneous entity; it then justified why, under a legitimate government, individuals had to consent to submit to the will of the community and, thus, to each other; finally it argued that, for these reasons, it was the 'people' that were vested with supreme authority.

This set of propositions was packed with revolutionary ferment because it assailed the prevailing notion that it was the monarch or the state that was sovereign, and instead advanced the claim that it was the 'people' that were sovereign and that their sovereignty was to be articulated through democratic government. This ferment simmered until the explosion of the American War of Independence (1776-1783) and was finally given institutional embodiment during the Philadelphia Convention (1787) that drew up the constitution of the United States.

The right to *self-determination* was invoked as the principle for the US states to break-away from Great Britain. Grounding their claims in Lockean notions of natural rights and the legitimating function of *consent*, the American colonialists refused to accept the imposition of direct internal taxes without being granted a corresponding voice in the British parliament and the associated power of holding the British government accountable. They also claimed this matter was the jurisdiction of the state

parliaments. When this demand for responsive government was met with the reply that there could only be a single sovereign, i.e. a supreme decision-making authority, and that the sovereign body was in this case the imperial parliament, the American colonialists decided that this authority should therefore be wrested from the British parliament and vested instead in the parliaments of their states (Wood 2011: 343).

After the independence of the US states was achieved, there was a desire to strengthen the increasingly dysfunctional confederation they had established to coordinate their war effort against the British. But there emerged an un-reconcilable dispute between Federalist and Anti-Federalists factions about whether sovereignty should continue to reside with the states or instead be conferred to a new federation. To transcend this dispute about the location and divisibility of sovereignty and overcome the reluctance of state legislatures to yield their sovereignty, James Madison shifted the focus of attention on *who* was sovereign (Ackerman 1991). He argued that sovereignty was instead endowed in the American 'people' who delegated their authority to state and federal parliaments (Morgan 1989: 267). The constitution was then conjured as device for regulating the details of the relationship between the people and their representative institutions (Grimm 2015).

But in performing this skilful move, Madison also raised a paradox (Jackson 2007: 77): if the constitution emanated from 'We the People of the United States' and was then 'ordained and established' by the 'people', who in fact were the 'people', if the only reference to the 'people' was in the constitution? Did the people exist prior to the constitution?

National Sovereignty

At the time, the pragmatic answer to this question was the inhabitants of the different US states which, acting through their representatives in state legislatures had ratified the US Constitution and which, as a result, had now become a singular body of fully-fledged citizens of the United States, endowed with a protected set of rights and embarked together on a journey to forge a more 'perfect union'. Not long afterwards, in France, the answer to the question became more abstract, and this singular body became termed the 'Nation'.

The revolutionary movement in France was equally inspired by a deep-seated belief in the natural freedom and equality of men, and by a similar desire for a government that was more responsive than the aloof and inept absolute monarchy that the Bourbon dynasty had become. But the target of this upheaval was different. Rather than seek greater self-government and, eventually, independence from a distant imperial overlord, as did the American colonialists, the French revolutionaries wished mainly to constrain and direct the King's behaviour. Following the ideas expounded by Rousseau, they did so by wresting away the absolute sovereignty of the King and placing it in the hands of the 'people' of France. The 'Third Estate' - a parliamentary body representing the mass of the population - congregated as a 'National Assembly' that gave itself the task of writing-up a constitution that would regulate the relationship between ruler and ruled and thus bind the monarch's decisions and actions.

This constitution was conceived as an instrument of what Abbé Sieyès called the 'constituent' power of the 'Nation' over the 'constituted' power of the government. Constituent power was the original and permanent authority that the 'Nation' possessed in virtue of its sovereignty. This authority existed prior to law and was a source of law.

The Declaration of the Rights of Man and the Citizen (1789) stated in Rousseau's terms that: "all sovereignty rests essentially in the Nation" and that "law is the expression of the general will". The Constitution of 1791 later stated that: "sovereignty is one, indivisible, unalienable, and imprescriptible; it belongs to the Nation; no group can attribute sovereignty to itself nor can an individual arrogate it to himself". The 'constituted power', on the other hand, was a government, a delegated authority whose scope of action was circumscribed by the letter of the constitution. The constitution thus served as "a juridical instrument deriving its authority from a principle of self-determination: an expression of the constituent power of the people to make and remake the institutional arrangements through which they are governed" (Loughlin 2014: 2019). But, if the revolutionaries believed that the 'Nation' was the repository of sovereignty and the basis of 'constituent' power, *who* did they think belonged to the 'Nation'?

'Nation' was not understood at the time in cultural terms; it did not possess any of the ethnic or linguistic characteristics that it later acquired in the Romantic period. Rather, the 'Nation' was constituted by the 'people' of France- the body of individual citizens inhabiting the territory of France who became a 'Nation' in the exercise of their individual and collective right to self-determination and in their engagement with democratic participation and representation (Kedourie 1985).² This consciousness of the 'Nation' as a singular body of equal citizens was reinforced over the course of the French Revolution with the creation of a mass citizens' army to fight the coalition of external anti-revolutionary forces at war with France and with the uniform application of common laws by the centralized state administration.

The unique quality of the French Revolution was that the sovereignty of the French 'Nation' was conceived and put into practice within the confines of an existing and much older territorial state. This was a matter of historical contingency. But, nevertheless, the historic overlap between membership of individuals to the French 'Nation' and to French state, between citizenship and nationality cemented the union between nation and state. This union legitimated the ideology of nationalism that flourished in the 19th century, according to which the boundaries of the nation and the state should be the same (Gellner 1983). From that moment onwards, it was believed that sovereignty, understood as the collective self-determination of the nation, should result in statehood.

-conclusion

2. Conflicting Claims to National Sovereignty

The Liberal-National Revolution

The way in which the ideology of nationalism drove political change in Europe during the 19th century is well known. Encouraged by the emergence of Romanticism as an artistic movement, different communities in Europe began to value the particularistic and traditional aspects of their society and to think of themselves increasingly as 'nations'. This was not understood in the purely rational sense defined by French Revolutionaries, but in the more subjective and organic sense defined by Weber: individuals felt they belonged to the same 'community of sentiment' because they

² National Sovereignty vs Popoular Sovereignty. Work by Carre de malberg

inhabited the same homeland and shared the same culture and history, an experience that also constituted the basis for a common fate. This slowly emerging consciousness was also lathered by the more instinctive popular impulse to repel foreign rulers- the invading Napoleonic armies and the titular heads of state they imposed, but also the longer-standing autocratic regimes, such as the vast Habsburg and Ottoman Empires, which ruled over plethora of national communities. This collective feeling of belonging was eventually layered atop of the abstract principles of legitimate government promised by the French Revolution.

The manifestation of this amalgam was visible in the wave of Liberal-National Revolutions which swept through Europe in 1848. Inspired by the ideal of 'national sovereignty', this outburst saw several attempts to establish limited, accountable and democratic governments. But there was a strong nationalist element to these revolutions since the 'people' considered to be sovereign- and thus free to determine and control their government- was the 'nation'.

These revolutions fostered two types of transformations in the European political order. The first were attempts by liberal forces to introduce government by *consent* by establishing constitutional parliamentary governments whose powers were conferred and defined by the sovereign people. The second was the attempts to forge new states. This was achieved either by unifying nationalist movements, such as those witnessed in the formation of Germany and Italy from pre-existing states, or by the dis-aggregative nationalist movements felt in multinational empires, where different nations (Magyars and Slavs in the Habsburg Empire; Greeks, Romanians and Bulgarians in the Ottoman Empire) pressed for independence.

Despite their different origins, what these nationalist movements had in common was their purpose, fuelled by the belief that sovereignty belonged to 'nations' and that this essential endowment not only existed prior to statehood but also justified statehood. National sovereignty thus became not just a claim about *who* within a state was vested with 'constituent' power but a claim about legitimate *state creation* based on the sole criterion of nationality.

National Sovereignty in Spain

These transformations posed special difficulties for the political stability and territorial integrity of solid *ancient regimes* and old established states like Spain. The primary aims of the several- and repeatedly failed- liberal revolutions in Spain during the 19th century were, as it was earlier in France, to wrest absolute sovereignty from the monarch and put it in the hands of the 'Nation', to protect the fundamental rights of citizens, and to make the form of government participatory, representative, accountable and limited by a constitution.

To achieve this aim, the liberal progressive political forces repeatedly returned for inspiration to the Constitution of Cadiz, written in 1812 during the Napoleonic occupation of the Iberian peninsula, which provided a deeply symbolic template of how to conceive of national sovereignty and its relationship with political authority.

Inspired by the Jacobin spirit of the French Revolution, Article 3 declared that: "sovereignty resides essentially in the Nation and to it the belongs exclusively the right to establish its fundamental laws". The Nation was detailed in Article 1 as the "reunion of all Spaniards", while "Spaniards" were defined in Article 6 as "all free men born and living in the dominions of Spain". The 'Nation' was thus understood in the objective and abstract terms pronounced during the French Revolution. It was for this reason equally revolutionary because it identified, for the first time in the history of Spain, a

new political and legal subject: the 'Nation'- the repository of sovereignty and basis for 'constituent' power. This conception of the sovereign Nation raised two controversies.

The first, and most fiercely debated issue at the time, was generated by the vehement opposition of conservative and royalist political forces, who maintained resolutely that only the monarch could be vested with sovereignty, which was understood in constitutional terms as the supreme authority to form and dissolve governments and to pass laws. This opposition resulted in recurring political struggles- marked by the occasional intervention of the military in the deposition and restoration of monarchs- and in the frequent constitutional turnovers that occurred between 1812 and 1936 (Tura and Aja 2009), albeit mostly within the set-piece of a constitutional monarchy.³ It was only during the rare episodes when this issue was settled in favour of the sovereignty of the 'Nation'- during the short-lived republican regimes of 1873 and 1931-36- that there appeared the second controversy of *who* belonged the 'Nation'.

This question was not without consequence in Spain which, despite the appearances given by liberal constitutions of the presence of a single homogeneous population of 'Spaniards', was composed of a variety of distinct historic territories and nations. This included minority nations like the Catalans, 'communities of sentiment' whose national consciousness awakened during the 19th century and who conceived themselves as sovereign nations, endowed with a right to collective self-determination. Now, Catalan nationalism at this stage was singularly focused on state creation. But the claim to national sovereignty still presented a serious intellectual challenge to the notion that there is a single sovereign exercising 'constituent power'. If the unified, supreme and absolute sovereignty of the monarch had been successfully transferred to the 'Nation', how could the 'Nation' be anything other than a singular homogeneous body of citizens, defined simply as those individuals born on the territory of the dominions of Spain?

The answer to this question, first put forward during the First Republic (1873), was that the nation of Spain was composed of different 'states' which together forged a federation.

The cover second Republic (1931-36)
Then democratic Spain (1978)

defined simply as those individuals born on the territory of the dominions of Spain,

- Basically: rival claims to authority, contest is over who/which body is the proper bearer of such authority.
- Especially the case of multinational states. What if there are several 'nations' within the nation that is sovereign?
- Rival claims to authority
- E.g. Scottish and Catalan examples. Original power vs. Spanish constitution- Spanish people are sovereign. Even though Spanish Constitution was itself ratified by referendum.
- rather than in the more subjective and emotional that evolved during the 19th century.

³ the sovereignty of the monarch was re-asserted in Estattu Real of 1834 and 1845, while the sovereignty of the Nation was either muted in 1837, forcefully affirmed in 1869 or 'shared' between the parliament and monarch in 1876- the constitutional formula that proved to be the most enduring.

3. National Minorities do not have a Right to Self-Determination.

The first source of the deadlock that we identify is that under current international law, national minorities and stateless nations, such as the Catalans, do not enjoy a right to self-determination. This is especially if the latter entails secession from a parent state and the creation of an independent sovereign state. Current international law does provide for a right of self-determination, but only for ‘peoples’ living in former colonial territories.

Initially established in the UN Charter (1945), a ‘peoples’ right to self-determination attained, by the late 1970s, the status of norm (*jus cogens*), legal principle and customary law (Cassese 1995). This was achieved through the gradual accumulation of the International Covenants on Civil and Political Rights (1966) and the ratification of General Assembly Resolutions 1514 (1960) and 2625 (1970), and through the practice of existing states of recognizing the creation of new states. This evolution represented a remarkable progressive shift in international norms as it legitimized the creation of newly independent states out of former colonial territories. The way in which the principle has been interpreted however remains a product of the context in which it was born.

The conventional view

The conventional view that emerged during this period, and that has persisted ever since, was that the object or unit to which the right to self-determination applied was territorial: ‘peoples’ referred exclusively to peoples living in overseas colonial territories, rather than to objectively or subjectively identifiable national groups.

The term ‘peoples’ was left undefined in the UN Charter and in subsequent covenants and resolutions. But because of the pressing political imperative of decolonization in the post-war period, the right to self-determination became de facto linked to the dismantling of overseas European empires, as well as to the liberation of

oppressed majorities, such as the blacks living under apartheid in South Africa. By the mid-1960s, self-determination thus applied primarily the ‘peoples’ experiencing colonialism and other forms of “alien subjugation, domination and exploitation” and resolutions. In practice, the term ‘peoples’ came to refer to ‘non-self-governing territories.’ This right belonged to the entire population existing within the borders of a colonial territory which, according to the principle of *uti possideti juris*, would be transformed into the international frontiers of the newly independent sovereign state (Shaw 1997: 492-95). Moreover, in accordance with the norm of *pacta sunt servanda*, the different national or ethnic groups existing within that population exercised their right to self-determination during the creation of a new sovereign state, thereby relinquishing any residual right to secede (Emerson 1964: 28-30). In other words, the different ‘peoples’ living in a single territory under colonial rule could claim the right to self-determination. But the borders of the new state would be those of the former colonial administration and internal cultural differences within the population could not give rise to further claims to national self-determination.

National sovereignty in the inter-war period (1919-1939)

This conventional view of the right to self-determination stood in remarkable contrast to how the right was conceived when it was first formulated during the Paris Peace Conference (1919). President Woodrow Wilson’s understanding of national self-determination was that the right applied to national groups, i.e. national minorities and ethnic communities defined by common language, culture and history, living within the boundaries of existing states. When he introduced the concept to the League of Nations, Wilson described self-determination as “the right of every people to choose the sovereign under which they live, to be free of alien masters” (Hannum 1993: 4). Wilson’s view was that this right was universal. However, it was applied for practical purposes mainly to the different nationalities of Europe, especially those inhabiting the defeated land-based German, Austro-Hungarian, and Ottoman Empires. Self-determination for all nationalities became the paradigm for political organization and for drawing territorial boundaries for new state states in Europe during the inter-war period. Adherence to the principle resulted in the resurrection of old states like Poland, the creation of new states like Czechoslovakia or Turkey, and the adjustment of territorial boundaries between existing states, such as between Germany and Denmark. But, the right to national self-determination was widely perceived, even at the time, to be ‘loaded with dynamite’, as Wilson’s secretary of state Robert Lansing (1921) put it, mainly because it was so subversive of the existing order of states, so complicated to apply consistently for all nationalities and so conflicting with other priorities such as national safety or economic interests.⁴

The Westphalian model

⁴ What is notable about the principle of self-determination in this period is how incompletely and inconsistently it was applied in the different Peace Treaties, with respect to the creation of new states or autonomous regions (e.g. German-speaking South Tyrol was annexed by Italy, the Kurdish autonomous region in Turkey was never implemented) and with respect to the application of plebiscites for ascertaining the wishes of minority groups and settling border disputes (e.g. South Schleswig and the Saar region returned to Germany after plebiscites in 1920 and 1935, but no plebiscite was held in Alsace-Lorraine which was returned to France).

In the aftermath of the Second World War, limiting the scope of application of the right to self-determination to territories rather than to national groups, was motivated by similar pragmatic and legal reasons. To understand these motivations, it is necessary to recall that the concept of self-determination was born during the American and French Revolutions as a legitimating concept for representative government and evolved within the confines of the territorial sovereign state, namely France after 1789 (Sureda 1973). The self-determination of citizens and their right to be ruled by popular consent became equated with the sovereignty of the French nation- the body of citizens that lived in France (Kedourie 1985). From that period, the overlap between citizens of the state and members of the nation cemented the relationship between nation and state, legitimated nationalism as the principle for state-making and crystallized the relationship between self-determination, statehood and sovereignty.

As a result of this contingent historical association between self-determination, sovereignty and statehood, it was assumed that the exercise of self-determination by national minorities would result in secession and the creation of a new sovereign state. The main practical concern which clouded this scenario was that if this right were applied to all ethnic communities, it would lead to instability in the international system and to the unacceptable fragmentation of states. The legitimation of such demands would give way to the recurrent re-adjustment of territorial boundaries and to the border conflicts which this would occasion. In any case, there were too many ethnic groups or national minorities for each one to claim a right to establishing a viable state (Gellner 1983). Self-determination could be justified under 'extraordinary' circumstances, when sovereignty itself was in question. This included decolonization or the rapid dissolution of the Soviet Union or Yugoslavia that followed the end of the Cold War.⁵ But it could not be justified under otherwise 'normal' conditions.⁶

The cautious approach adopted towards widening the scope of application of self-determination was not merely practical however, it also had some important legal foundations. The order of the international system that emerged from the mid-17th century onwards was structured upon the interaction between sovereign states. The substance of these interactions- treaties, alliances, wars- was grounded on the mutual recognition of the internal and external sovereignty of states. This meant each state recognized and respected the authority of central rulers over an exclusive territorial jurisdiction and over the social and political forces contained therein. States thus became the founts and bearers of international law. Moreover, statehood in such a system was conceived solely as a legal personality, an authoritative decision-making structure functioning atop of artificial communities, rather than the embodiment of authentic communities sharing a sense of belonging (Koskenniemi 1994, 252-3). What

⁵ The legal understanding of what constitutes 'extraordinary' as opposed to 'normal' circumstances was defined by the jurists reporting to the League of Nations, when it was called upon to adjudicate the dispute between Finland and Sweden over their claims to the Aaland Island. Exceptional circumstances were upheavals in which situations of fact cannot be met by the application of rules of positive law because political turmoil has disrupted a clearly defined sovereignty authority and suspended the application ordinary legality (Berman 1988: 73)

⁶ Even under the most propitious circumstances the right to national self-determination was not upheld. Under the benevolent inter-war international regime which sought to uphold Wilsonian principles and under the 'extraordinary' circumstances occasioned by Finland's independence from Russia in 1917, the Commission of jurists reporting to the League of Nations during the Aaland Islands case argued that positive international law did not recognised the rights of national groups to separate themselves from a state.

mattered most for international law was that this personality exercised sovereignty over a territory.

So, granting the right of self-determination to colonial territories was acceptable precisely because it did not threaten the existing system of states; it simply rapidly increased the number of states in the international system. In contrast, accepting that national identification alone should be applied to the external organization of the international system posed a real threat to statehood by challenging existing territorial boundaries that unevenly or partially respected the principle of self-determination (Griffiths 2003: 34). Concerted efforts were thus made to contain the potentially destabilizing consequences of the right to self-determination.

Territorial integrity

This concertation resulted in a series of legal instruments, judicial rulings and state practices that sought to raise the importance of countervailing principles- like *national unity*, *territorial integrity* and *non-interference*- to dilute the strength of self-determination as an enforceable right. The UN General Assembly Resolution 2625 (1970), the so-called “Friendly Relation” Resolution, and the Final Act of the Helsinki Conference on Security and Cooperation in Europe (1975), both proclaimed that the *territorial integrity* of states was to be protected *if* states conducted themselves in compliance with the principle of equal rights and self-determination. In other words, a state was protected against the direct use of force by another state and against the indirect interference of another state through, for instance, the support of domestic secessionist groups. In addition, a people’s right to self-determination could not lead to the dismemberment of an existing state, and so would not automatically lead to secession. However, this safeguard only held *if* a state took measures to ensure that ethnic groups and minority nations were adequately represented and enjoyed a measure of *internal* self-determination, i.e. territorial autonomy. Outside of the decolonization process, the right to self-determination was subordinated to the principle of territorial integrity, albeit with certain caveats about the obligations of states towards their national minorities.

This line of reasoning was closely followed during the decolonization of Africa. In 1963, the heads of the newly independent states grouped together in the Organization of African Unity (OAU) and pledged “to respect the frontiers existing on the achievement of independence”, in the hope of quelling irredentist and secessionist tendencies (Ratner 1996: 595-96). The principles of *uti possidetis juris* and *territorial integrity* were thus upheld from the beginning of independence. The UN General Assembly did recognize the independence of Namibia from South Africa in 1968, but this was because of the discriminatory system of apartheid instituted by the latter, which constitute a ‘material breach’ of the mandate which had been bestowed upon it by the League of Nations and of its obligations under the UN charter (Berman 1988: 76-9). The ICJ also recognized the substantive right to self-determination for the people of Namibia in its 1971 ruling. But the Security Council refused to accept claims for separation in non-colonial settings, such as in the break-away states of Katanga in Congo or Biafra in Nigeria. In 1970, in the middle of the violent Biafra conflict, the UN Secretary General U Thant upheld the primacy of territorial integrity, stating: “the United Nations attitude is unequivocal. As an international organization, the UN has never accepted and does not accept and I do not believe will ever accept the principle of secession of a part of its member-state” (cited in Emerson 1971: 464). In the more ambiguous Western Sahara case, over which there were conflicting sovereignty claims issued by Morocco and the

Mauritanian entity, the ICJ noted that the presence of overlapping legal ties made it difficult to disentangle original claims and ruled that these should not affect the implementation of self-determination. In this rare instance, the right to self-determination trumped any competing claim to territorial integrity put forward by another state. But, in its ruling the ICJ also diluted its understanding of self-determination from an enforceable substantive right to a procedural principle, defined more by a process that pays regard to people's expressed will (Klabbers 2006: 194-96).

'Remedial' secession

The pronouncements made by UN bodies shaped the dominant interpretation of what international law had to say about self-determination. In sum, the cases in which it would bring about secession, the separation of a territory from an existing state, were rare indeed.

They also inspired the 'remedial' theory of secession developed most prominently by Allen Buchanan (1991b). This normative theory sought to identify the conditions under which secession could be legitimated by performing a delicate balancing act that weighed the rights of minority groups to justice against the legitimate concerns of those groups that might suffer the consequences of a territorial separation. Buchanan originally argued that a group could secede mainly to rectify a past injustices including: the illegal military invasion and occupation of that group's territory, the exploitation of the group's territory and natural resources by a colonial power, and the instituting of a discriminatory retributive system that systematically disadvantages the group. He also grants that secession may be a legitimate way of ensuring the preservation of a group's culture if the latter is under existential threat and other means of preserving it are not available. Recognizing that the safeguard of territorial integrity was conditional on the granting and preservation of *internal* self-determination, Buchanan (2003) later argued that any serious violation of intra-state autonomy agreements by the central government, for instance in the case of Kosovo or the Kurdistan Regional Government, would also constitute a condition for a unilateral right to secede. Buchanan however adds some important caveats to these conditions: that the seceding group makes a valid claim to the territory on which it seeks to create a homeland that is not disputed by other groups including the parent state (see also Brilmayer 1991), that it is not bent on creating an illiberal regime that would violate individual rights and that it is prepared to compensate the parent state for the losses incurred as a result of separation. The overarching concern for maintaining the stability of the international system meant that the right to a legitimate secession was narrowed to a limited number of circumstances. After this, as Rupert Emerson (1971) put it: "the room left for self-determination in the sense of the attainment of independent statehood is very slight".

4. The Persistence of Claims to Self-Determination

The conventional view of the circumstances under which the right to self-determination could legitimately be defended has become a matter of consensus among legal scholar and practitioner. Unsurprisingly, however, it has failed to command such a following among the ‘peoples’ to which it does not apply, e.g. stateless nations and national minorities such as the Catalans. Indeed, what is striking today is the discrepancy between law and fact, between the success of international law in furnishing the principle of self-determination with the force of customary law and the disregard it simultaneously manifests toward an important number of other claimants to self-determination, in both post-colonial and non-colonial settings, that are politically mobilized. This discrepancy is the second source of the current deadlock.

The persistence of self-determination claims

The resilience of ethnic and national consciousness and the political expression of this consciousness in the form of demands for self-determination was already identified by Walker Connor (1967) in the mid-1960s, almost as soon as the decolonization was process was near-completed. Across vast tracts of Africa and Asia, the rulers of newly independent states were firmly opposing the demands of their own minorities for self-rule, a trend that was lived with equal fervour, albeit less violently, in developed multinational democracies such as Belgium or Canada. Neither autocratic nor democratic government appeared capable of containing such forces, whether they employed assimilationist or autonomist strategies. The continued broad-scale appeal of ethnic consciousness was confirmed after the end of the Cold War, when Michael Walzer (1992) pointed to the outbreak of a 'new tribalism' which led to the dissolution of multinational federal states such as the Soviet Union or Yugoslavia.

These dramatic events are symptomatic of a broader trend in warfare in the international system, where the majority of wars are internal civil wars often with an ethnic component. Of the 111 conflicts that occurred during the post-Cold War decade (1989-98), there were 92 were civil conflicts, in half of which the protagonists were struggling to gain or oppose statehood (Wallenstein and Sollenberg 2001). International law's conservative pronouncements have therefore not resulted in an abatement of ethnic and national consciousness. They have merely generated 'friction' (Lieberman 2002) between the legal framework and the idea of self-determination propounded by myriad ethnic groups.

Critique of the conventional view

An important marker of the discrepancy between law and fact is how the conventional view of international law and the 'remedial' theory of secession have been criticized for the poverty of their thinking about how to constructively engage with contemporary claims to national self-determination put forward by stateless nations and national minorities.

Prevailing international legal norms have been labelled as unfit as a compass for navigating the turbulence produced by the persistence of self-determination claims. (Cass 1992; Nanda 1981). By making the territorial jurisdiction in which the right to self-determination was to be exercised coterminous with the existing administrative boundaries of colonial territories, international law simply perpetuated the arbitrary nature of those boundaries, thereby also rendering the exercise of that right morally arbitrary. International law offers no moral justification for accepting that the existing external administrative boundary of a colony- rather than its internal cultural and territorial subdivisions or its greater, continent-wide boundaries- is the proper jurisdiction for the exercise of self-determination.

This arbitrariness is matched by the logically and ethically contradictory nature of international law. It upholds the right of self-determination for 'all peoples' as a fundamental principle, but simultaneously affirming the sanctity of the territorial integrity and denying the right to external intervention in the internal affairs of states. In cases of a conflict between these principles, the practice of existing states and international organization has consistently been to privilege the latter, thereby effectively voiding the former of any meaningful content.

But even in cases where such a right existed unequivocally- for instance the Palestinians living in territories under Israeli military occupation or the blacks in South

Africa living under the apartheid regime- the enforcement international norms were overlooked in favour of accepting facts on the ground, highlighting a painful inconsistency in the manner of their application (Collins 1980). The same conclusion is reached when examining how break-away territories were recognized according to the success of their efforts. The first successful secession- that of Bangladesh in 1971- did not fall within the confines of a decolonization exercise, but it was nevertheless subsequently recognized by states, “as a *fait accompli* achieved as a result of foreign military assistance in special circumstances”(Crawford 1999: 114). Once more, the application of legal rights was eschewed in favour of recognizing the brute nature of political reality, giving groups that hold the aspiration to determine their fate little choice but to force a new reality upon the rest of the world.

What remains a more fundamental limitation is the way in which the substantive content of international law remains deeply bound to the pressing concerns of the epoch in which it was born. As a result of a blanket rejection of the right to self-determination beyond the specific context of decolonization, international law is incapable of repressing claims to self-determination where they continue exist, nor is it able to furnish a morally appropriate approach to consider when self-determination might be legitimate (Nanda 1981) and nor does it provide a set of legal tools and mechanisms for managing demands for secession when they are legitimate. The remedial theory of secession aims to address this lacuna by offering a conservative set of guidelines for identifying those groups that might have a legitimate claim to secede. However, this ‘remedial’ theory remains highly circumspect in its ambition.

That is because the conditions which render a secession legitimate appear upon scrutiny to be neither necessary nor sufficient. The justice of remedying a historical grievance as apparent as a military invasion- for instance that of Lithuania by the Soviet Union or East Timor by Indonesia- would not trouble any sound mind. Nor would it be difficult to endorse the independence of a group that is has been systematically oppressed and excluded- as the tribes of South Sudan have been under the Arab-dominated Sudanese central government.

The main question that these cases do raise however is: must it really come to that? If we accept reasoning by analogy (pace Aronovitch 2000): does a marriage have to necessarily feature domestic violence before one partner decides to separate? Would separation not, in fact, be a way to prevent violence from occurring in the first place? And would the desire for a satisfying relationship- where a partner’s persona is able to flourish- not also be a reasonable condition for maintaining one? By setting the grievance threshold for legitimate secession so high, the remedial theory allows many unhappy marriages to simmer and potentially boil over into open conflict as the price to pay for maintaining the stability of borders.

In other circumstances, for instance where there is discriminatory redistribution or a unilateral change in the federal relationship, it may be asked whether such conditions can justify secession. Many existing democratic states, including federations such as Germany, implement tax and spend schemes whose effects move resources from one territory to another with the objective of equalizing life chances and standards of living across a country. Other states like the USA will deploy economic and trade policies with the goal of promoting certain sectors clustered in certain parts of the country to the detriment of others. But does this alone act serve as a justification for secession? There may be several exceptions that would hamper this condition from being credibly put forth: the targeted population may not perceive it; the targeted population may perceive it but may approve of it or, conversely, the targeted population may perceive it to be far worse than it actually is.

The same kind of scepticism can be maintained in the face of violations of autonomy arrangements by the central government. These breaches may occur at the margin of the law, where interpretation about appropriateness and culpability are ambiguous. They may occur out of necessity, for instance to battle an economic crisis. And they may thus be approved by some constituent units and, indeed, by a Supreme Court charged with hearing legal challenges to the central government's over-reach.

What is important, above all, is that the central governments' discrimination or breach of autonomy be *perceived* as such by the targeted population and that this be used as an accessory for strengthening a sense of identification with a minority group against the policies of the state. The conclusion that follows therefore is that without a deep emotive, psychological bond that binds individuals of a community together and provides them with a sense of belonging, any discrimination or breach may persist unchallenged or may be insufficient to mount a challenge that would amount to a legitimate secession. These bonds therefore need to feature more prominently in a theory of political divorce.

The 'primary rights' theory

Efforts seeking to offer an alternative to the remedial theory of secession have therefore engaged with ideas about how individuals' belonging to national groups gives rise to rights to national self-determination. The gist of the predominant philosophical alternative— the 'primary rights' theory— is that all nations are endowed with a fundamental right to self-determination in virtue of being nations exercising their democratic rights. There are thus two components to this theory: identity and democracy.

The point of departure of this theory is the individual. Individuals must have the liberty and capacity to behave in a way that is consistent with their values and to carry out activities which meet the life goals they have set for themselves. This is what political philosophers refer to as the 'conception of the good life'. Autonomy is a crucial aspect of this ideal view of the individual life: without the ability to govern themselves and their lives, individuals are incapable of pursuing their conception of the good life.

But this autonomy is just as important to groups as it is to individuals. The reason is that individuals do not exist in a cultural vacuum; they are not atomized beings that generate motivations *ex nihilo*. Rather, individuals develop tastes, formulate aspirations and select options in accordance with the values that are espoused by the groups to which they belong, what Margalit and Raz (1990) refer to as 'encompassing groups'— ethnic, linguistic and national communities that exert a profound and pervasive influence over all aspects of an individual's life. Moreover, individuals conduct themselves in a manner that is strongly influenced by the range of norms and expectations set by their cultural context (Kymlicka 1991).

If the morality of individual autonomy is to preserve the space for individual action, action that is guided by that individual's identity and group membership, then it follows that groups should enjoy autonomy as well, in order to exercise "at the collective level the equivalent of autonomy at the individual level" (Miller 1988: 659). The moral importance of self-government for 'encompassing groups' thus derives from its value to individuals: its purpose is to project the political manifestation of a group identity and thereby to protect and nurture the identity that is so vital to individuals' well-being (Nielsen 1993).

The way in which the self-government of groups is to be exercised is through a democratic process, such elections to representative institutions or a referendum. The

democratic perspective on self-determination finds its roots in the American War of Independence and was originally separate from considerations of national identity. American Revolutionaries were culturally identical to their British imperial counterparts; independence was a struggle for obtaining democratic rights, and self-determination was conceived as a democratic exercise, not as platform for cultural assertion and protection (Kohn 1967).

The contemporary advocates of the democratic theory of self-determination (Beran 1984; Gauthier 1994) have maintained this liberal and individualistic perspective. They ground their argument in favour of self-determination on the intrinsic value of individual rights to autonomy, on the right of individuals to freely enter associations and on the foundational importance of consent as a principle for legitimizing any political order. From these basic premises follows the right of a collection of citizens to determine their political future, including the state to which they belong. This theory is thus blind to the cultural characteristics of the group participating in a democratic process or the rightfulness of their claims to the territory on which a new state is to be established. What matters is that an outcome is chosen through a democratic procedure, i.e. free and fair participation and majority rule. This is a highly permissive theory of secession in which the expressed democratic will of a collection of individuals in favour of a separate state is sufficient for its establishment.

The familiar problem that arises out of this purely democratic perspective is that if the democratic exercise is separate from considerations of national identity, how are we to decide who participates in the process? Which individuals, inhabiting which territories are to be included as participants in the democratic exercise? As Ivor Jennings (1956) famously put it, the self-determination of peoples is not possible until someone decides 'who are the people'. International law and the remedial theory together offered an answer, albeit one that is unsatisfactory to stateless nations. The purely democratic perspective does not. So, it needs to be anchored into a primary rights theory in which the democratic exercise is to be initiated by certain 'encompassing groups'. Identifying such groups and grappling with the consequences of their democratic right to self-determination however opens another set of difficulties.

5. The Difficulties of Accommodating Multiple Identities

If we accept that, when justified on the basis of the democratic will of specific 'encompassing groups', claims to self-determination possess a degree of legitimacy that cannot be summarily dismissed, we then open the door to an attendant set of more practical difficulties related to the implementation of national of self-determination on the ground. We have identified as the third source of deadlocks several types of difficulties that are typical in multinational democracies characterized by a multiplicity of groups and identities.

Identifying groups

Anyone persuaded in principle of the appeal of the 'primary rights' theory will be prompted to ask what are the 'encompassing groups' or national communities to which it applies? How does one answer Jennings's question about 'who are the people' entitled to self-determination?

The difficulty of answering this question arises because of the temptation to establish a list of objective sociological criteria- like the presence of a distinct ethnic trait, a distinct language or historical claim to a territory- which a group should meet in order to qualify as an 'encompassing group'. The difficulty of establishing a list of something as contested as the essential attributes of nationhood would only be mirrored in conflicts about the type of professions and individuals that should be responsible for drawing-up that list. For instance, if we compare self-determination aspirations of the Quebeckers, Scots, Catalans and Flemish, we find that the Scots stand out for the absence of a distinct language, despite the recent re-appearance of Gaelic in Scottish media. In contrast, the Scots have a solid claim to their territory, one is closely congruent with the boundaries of a previously independent Scottish kingdom (843-1603). But, speakers of the Catalan language are present in areas beyond the borders of the present-day Catalan Autonomous Community, that encompass the Balearics and Valencia, while the Catalan principality was in a dynastic union with Aragon (1137-1714). Similarly, there are Flemish and French-speakers beyond the present-day borders of the Flemish Region and Quebec province, the boundaries of which go beyond those of their historical predecessors: the County of Flanders (869-1795) was based around the cities of Western Flanders like Bruges and Ghent and New France (1534-1764) around the cities of Quebec and Montreal. So, Buchanan's (1991a) scepticism towards the UN Charter's claims about 'peoples' right to self-determination was justified insofar as identifying the 'self' to which it applies is an insoluble problem: it is impossible to establish a list of objective territorial, political and cultural characteristics that coincide consistently over time which can serve to identify the groups that can legitimately claim a right to self-determination.

It is instead more practical to adopt an approach in which subjective criteria are employed, where people's sense of belonging to a national community and their expressed desire for self-determination are the basis for adjudicating 'who are the people'. This does not mean to say that objective criteria that are markers of nationhood are utterly immaterial- folk culture, historical events, and collective memories of past glories and disasters, are all important, but only insofar as they provide the glue of the psychological bond which ties people together with a sense of belonging. Without this, it is difficult to imagine a crowd of unrelated individuals enthralled in passions and summoning the courage required to lead them through the struggle for recognition and political status. As Alfred Cobban put it (1970: 107): " the best we can say is that any

territorial community, the members of which are conscious of themselves as members of a community, and wish to maintain their identity, is a nation’.

This view of nationhood thus invites us to discard objective tests and to address demands for self-determination only where and when they arise. Beyond its practical appeal, using subjective criteria also accords with the individualistic ontology of liberal political philosophy as the decision to claim arises in two-steps form of reasoning (Abulof 2015). An individual first decides which national group to belong to and to which extent to identify as a member of that national group, then a group of individuals belonging to a nation decide how and with kind of political status it should best govern itself. Once both those steps are completed, a national group to which the ‘self’ applies has been subjectively identified.

Recursive secession

Those with a conservative penchant will however quickly point to the potentially devastating effects that a primary rights theory grounded in subjective criteria would have on the stability of the international system. It is feared that national groups everywhere, even those with a tenuous claim to nationhood, would claim a right to self-determination giving rise to ‘recursive’ secession. This situation arises if there is another distinct nation residing within the territory of the nation that has embarked on a journey to obtain a new political status.

This was dramatically evident in the case of Bosnia-Herzegovina, one of the independent Republics of former Yugoslavia which was composed of three main minority ethnic groups (Bosnians, Croats and Serbs), each possessed with a distinct sense of allegiance to the new Bosnian republic. The Serb enclave especially wished to establish a separate micro-republic which might eventually be re-attached to Serbia, an ambition that occasioned so much of the bloodshed during the Yugoslav war, given the complex inter-mingling of Bosnia’s ethnic groups (Bennett 1995). A similar tendency was also evident during Quebec’s bid for independence in the mid-1990s, when the sovereignty referendum was held in a territory that also included native communities belonging to the First Nations (Inuit, Cree) which did not identify as part of the Quebec nation, and which may have eventually demanded a status separate from Quebec, if the latter had seceded (Moore 1997). This tendency was taken to a satirical extreme with calls for the creation of an independent Republic of ‘Tabarnia’- a fictional region comprising most of Barcelona and its environs- issued during the Catalan independence referendum. The point was to parody any self-declared nation’s claim to self-determination (Grañó Ferrer and Kühn 2019). But the point nevertheless highlighted the potentially unlimited scope for even a small number of individuals to establish an *ad hoc* bond of allegiance and express their will to govern themselves in a political entity, the scale of which could range from a region, to a city, down to a borough. Where does it end if the identification of an ‘encompassing’ group relies solely on the identity-based and democratic criteria?

One way of halting the cycle of self-determination claims, presented at an ever-decreasing territorial scale, is to consider a minimum threshold of *size* in determining the viability of any new political entity. Any national group proclaiming self-determination should, in theory, inhabit a territory large enough- in terms of land, people and resources- that its political institutions can perform certain basic functions associated with the provision of public goods: supplying utilities, building roads, and maintaining public order (Philpott 1995a). The question is then: how small is too small?

A single nuclear family, a clan or a neighbourhood would certainly not be able to do this. What about communities at the scale just above, such as cities?

The question of how small an independent state could potentially be was a difficult issue during the decolonization period, when islands in the Caribbean and South Pacific, with populations ranging between one and a few hundred thousand, claimed independence. It was feared that they may not have the resources to ensure the well-being of their citizens and take-on responsibilities as full members of the UN. But size did not transpire to be a deterrent to independent statehood or a barrier to membership of the UN, as the international community could not muster the consensus required to draw and enforce a line at the threshold of minimum size (Emerson 1971). As a result of this accidental benevolence, a plethora of micro-states have emerged, extending from island nations like Iceland and Malta, to proud sultanates and duchies like Brunei and Luxembourg, to thriving city-states like Singapore and Monaco, to sleepy Pacific atolls such as Nauru and Tuvalu. Thus, the threshold of minimal size can put an end to a potentially unending process of recursive secessions, but it cannot do so at a scale that would help solve the thornier nationality problems of the cases cited above.

Rival claims to territory

To find another way of confronting this problem, it is useful to recall that the right to self-determination exercised by ‘encompassing groups’ is exerted over a specific *territory*. The borders of this territory will set the boundaries of the democratic process (elections, referendums) underpinning the exercise of self-determination and of the jurisdiction of whatever political entity is established as a result of this process. For instance, the land contained within the present-day Catalan Autonomous Community, Scottish Government or province of Québec is where referendums are held and upon which a political entity rules. So, it is important for national groups to lay a legitimate claim to this territory (Brilmayer 1991), one sufficiently persuasive that it would be difficult for other groups at a lower-scale to contest.

Clearly, territorial claims based on historical grievances- for example those of the Baltic states annexed by the Soviet Union, are the easiest to accept. But other kinds of arguments for laying claim to territory are more vexed (Moore 1998). Original claims to territory, often put forth by indigenous groups, run-up against historical counter claims by other groups. The veracity of claims becomes difficult to prove or disprove unequivocally with available historical evidence, and only serves to reveal the presence of deeply contested historiography, that makes it impossible to adjudicate which groups has the most rightful claim. This is evident in Northern Ireland, where the discourse of the Catholic community casts Gaelic-speaking Irish as indigenous to Ireland, while the Protestant communities are settler populations of foreign Scottish extraction. But this discourse overlooks that there was constant movement of people and that, from another perspective, Scottish settlers were in fact returning to Ireland.

Even if original claims to territory can be ascertained, human migration that unfolds over centuries makes it difficult to justify the absolute priority of such original claims over the will of contemporary democratic majorities. This is the case, for instance, with Serbia’s and Greece’s original claims to the land contained in present-day Kosovo and Macedonia, now inhabited by majority of Albanians and Macedonians. The presence of majorities from such distinct national groups was the basis for asserting their democratic right to self-determination with respect to the Serbia and Yugoslav federation, while the original historical claim to these territories became the basis for

Serbia's opposition to Kosovo's independence and Greece's rejection of Macedonia's naming as an independent state.

More examples of these types of rival claims to territory created by migration can be found elsewhere: the French and Anglo-Protestant waves of settlers in Quebec, or the migration of French-speaking Belgians in and around Brussels, a historically a Flemish city. This raises several questions: does human migration constitute a deliberate historical grievance to be corrected? If it does, how far back should this migration have taken place to justify a correction? The problem is that if we allow everything to be up for grabs, Brilmayer (1991: 199) writes, "hardly a territorial boundary anywhere in the world would survive an effort to correct all historical misdeeds". So then, is there an expiry date after which the grievance committed becomes too distant an affair to warrant contemporary correction? In other words, how far should the status quo be altered to rectify past wrongs?

Brilmayer concedes that there is no rule that can definitively answer these questions in all circumstances, but she does offer a few rules of thumb based on the nature of events, the time-lapse since they took place and the scale of migration. A recent military annexation of territory involving a small displacement of people is an 'adverse possession' that should be rectified. But, if an event was the result of a more benign gradual and undirected migration, if it occurred a long time ago- beyond the life of the oldest existing generation- and if it involved an important scale of migration, then it is very difficult to reverse the status quo in favour of the population that have a stronger original claim. If events occurred in the fog of the distant past and in murky circumstances, and current population settlements are too important to shift, it may be better to let things rest. This does not mean that the Serbs of Kosovo, the First Nations of Quebec and the Flemish of Brussels relinquish their original territorial claim; it simply means that these claims must co-exist with the equally legitimate claims of contemporary democratic majorities.

The majority group in parent state

The presence of rival claims to a territory will also arise if the parent state (e.g. Spain, Canada and the UK) and the majority group that is represented therein (Castilian-speaking Spaniards, English-speaking Canadians, the English) asserts a rival claim over the territory inhabited by the national group wishing to exercise its right to self-determination.

This kind of conflict first appeared during Ireland's struggle for independence from the UK, when it was asked whether a referendum should be held only in Ireland or across the whole UK. Irish nationalists defended the right of Irish citizens to determine the fate of Ireland; Unionists argued that the dismantlement of the United Kingdom would affect all its citizens and thus needed to be consented to by the entire political body. The debate highlighted how Ireland's fate would be sealed by the choice of jurisdiction for the plebiscite (Barry 1991).

A cautious outlook on this question would lead to the contention that the existing parent state does have a legitimate historical claim to the specific territory containing a distinct national group. This is especially the case if it is an age-old state forged out of voluntary dynastic or political unions, as was the case with Spain in the 15th c. and Great Britain in the 18th c., rather than one put together recently by force and imposition. This long-run historic experience of rule reinforces the intimate relationship between territory, citizenship and statehood: Spain comprises the territory of Catalonia just as Catalonia is a constitutive part of Spain; people that live in Catalonia and speak

Catalan are Spanish citizens, as are other people living in Spain that do not- they are part of the same body politic. This enduring relationship furnishes legitimacy to the parent state's claim over the specific territory and underpins the political endorsement of this claim by the majority community associated with the parent state.

This outlook would thus find favour with the Unionist argument that the dismantlement of the United Kingdom would need to be consented to by all British citizens. The logic goes that the secession of a part of the state that results from a self-determination exercise by a distinct national group would deprive other citizens living in other territories within the state of access to the seceding part. This would curtail their own individual and group autonomy to live, travel and work in parts of the country of their choice and to make decisions over geographic areas that were once within their domain of influence, the fate of which was inextricably linked to their own (Philpott 1995a: 362). The conclusion is that the autonomy of the distinct national group to exercise self-determination would be realized at the cost of reducing the autonomy of other citizens in other parts of the state, thereby violating the equal liberty principle, one of the central tenets of liberalism about the legitimate scope of autonomy (Moore 1998). Thus, other citizens of the state, directly or indirectly affected by a national group's exercise of self-determination, would need to give their consent to any change of boundaries.

A more benevolent perspective would, in contrast, defend the fundamental principles of identity and democracy espoused by the primary rights theory. It would therefore accept the assertion of the Irish nationalists that the appropriate jurisdiction for exercising self-determination is the territorial boundary of the distinct group. Denying this would be a tantamount to admitting that the group did not really inhabit that territory, or, that it was not really a distinct group, or, that even if it was, it did not enjoy a right to self-determination. This denial becomes particularly egregious if it becomes a way for a demographically dominant majority, say the Turks of Turkey, to deny the existence of the distinctive national identity of, say, the Kurdish minority. But this outright denial is hardly defensible, as "the right to decide whether another self can enjoy self-determination would make a mockery of the concept" (Philpott 1995a: 363). For the right to self-determination to be meaningful therefore requires the distinct national group to be recognized by the parent state and the associated majority community as a distinct nation inhabiting a territory over which it exercises sovereignty.

We are thus faced with seemingly unreconcilable claims in which both the national group and the majority community of the parent state believe they have a rightful claim over the territory and therefore that their respective consent needs to be explicitly voiced during a self-determination exercise. Catalans believe that they are the 'self' exercising self-determination in deciding the future of Catalonia. Spaniards believe that, since Catalonia is a part of a Spain, they are the 'self' exercising self-determination. This conflict is compounded by the fact that many individuals in Catalonia profess to both Catalonia and Spain.

The multiplicity of 'selves'

The conflicting claims to territory is reflected in rival claims made by national groups and parent states over the identity of individuals belonging to the national group. Both the remedial theory of secession and the primary rights theory employ the distinctiveness of a national group's identity as the basis for justifying either the secession of a territory or the self-determination of the group. But national identity is conceived in an *exclusive* fashion: individuals do not belong simultaneously to several

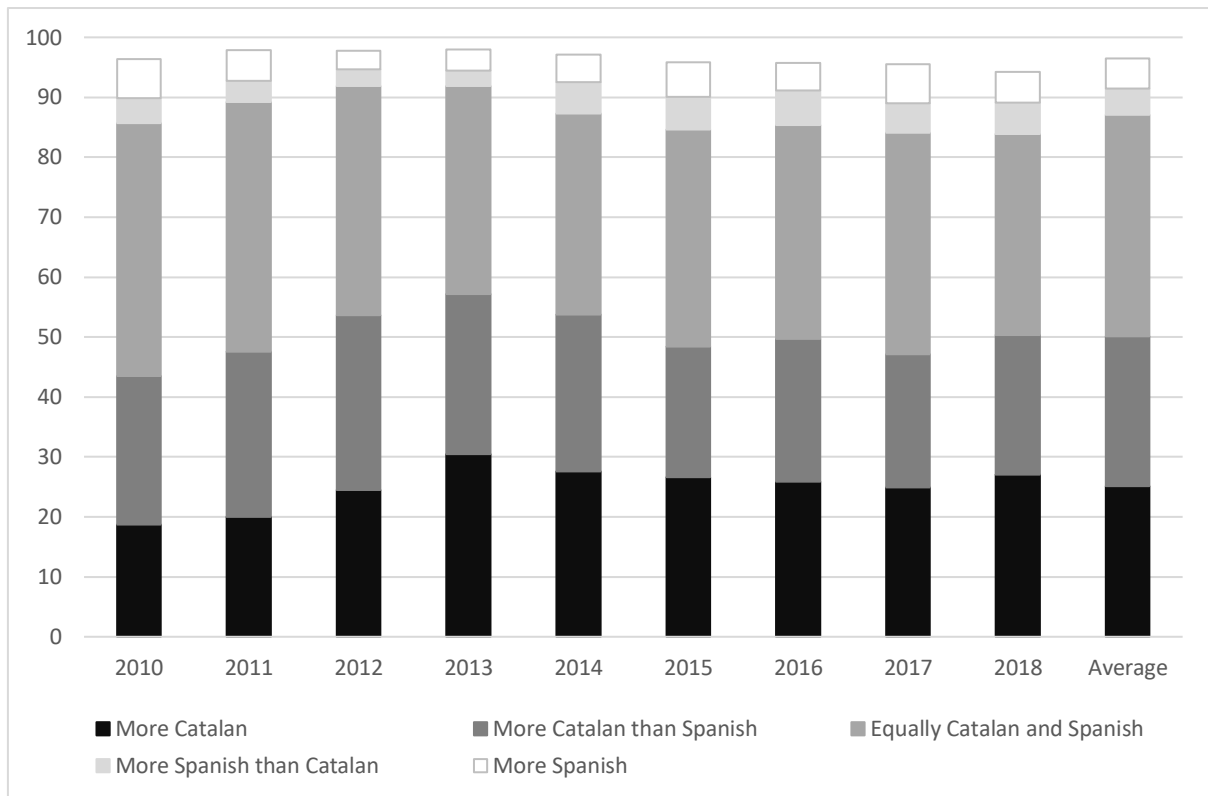
nations. It is this exclusive conception that makes it relatively straightforward for each theory to condone the separation of groups into separate states. This conception however runs up against the reality that individuals belong to different groups, espouse feelings of belonging to these groups and thus express multiple overlapping identities- what Michael Walzer (1992) referred to as the ‘multiple selves’, which results in the existence of ‘plurinational’ democracies (Keating 2001)

This multiplicity is highly evident in the case of Catalonia, as it is among other stateless nations such as Flanders, Quebec and Scotland. The data presented in Figure 1 reveals answers to the so-called ‘Linz-Moreno’ question about subjective national identities.

It shows that Catalans have *dual* identities- they feel both Catalan and Spanish. In the period 2010-18, between 80 and 90 percent felt a feeling of belonging to Catalonia in some way (all respondents except those that felt ‘more Spanish’), while between 70 and 80 percent felt Spanish in some way (all respondents except those that felt ‘more Catalan’). So, the percentage of individuals that have an *exclusive* identity is a small minority in both cases. But the minority that feel ‘more Catalan’ is larger (around 30 percent) than the minority that feels ‘more Spanish’ (around 10 percent). This predilection for espousing a Catalan identity is also found if we compare feelings of belonging to one nation rather than to another: the average combined share of those that feel ‘more Catalan’ and ‘more Catalan than Spanish’ is 50 percent; in contrast, those that feel ‘more Spanish’ and ‘more Spanish than Catalan’ is around 10 percent. However, the single largest category is of those that feel ‘equally Catalan and Spanish’ (35 percent). And the size of this category has remained remarkably stable over time. And, if we consider all groups with some form of *dual* identity (all except those with exclusive identities), we arrive at 70 percent. In other words, a sense of Catalan identity is certainly strong, but it co-exists with a feeling of Spanish identity too.⁷

Figure 1. Feelings of belonging in Catalonia

⁷ This trend mirrors what is found in other Autonomous Communities. Since the 1980s, respondents across regions of Spain have shown a declining exclusive identification with Spain and a growing identification with their region and especially a dual identification with both national and regional communities. (Martínez-Herrera 2002)



Source: Centre d'Estudis d'Opinió (CE), Barometre (2010-18)

Sociological analyses (Moreno et al. 1998; Burg 2015) have shown that place of birth, language, education and ideology are the main determinants of feelings of national belonging. Individuals born in Catalonia that speak Catalan tend to feel Catalan, whereas those born outside Catalonia- a group consisting of economic migrants that moved to Catalonia from other parts of Spain in the 1960s- largely feel Spanish. A similar pattern holds for those expressing a dual identity: it is stronger among those born in Catalonia than those outside. But the effect of being born outside Catalonia diminishes with time and as a function of education: older migrants and migrants with higher levels of education are more likely to speak Catalan and thus identify less with Spain and more with Catalonia. Education matters too for those born in Catalonia: those with higher educational level and higher incomes are more likely to have a strong Catalan identity than a dual or Spanish identity. Finally, an individual's ideological orientation matters: being left-wing or liberal, rather than conservative is also associated with feeling more Catalan than with having a dual or Spanish identity, as conservatism in Catalonia is associated with Spanish identity and the centralized Francoist dictatorship (Dinas 2012).

What emerges from this evidence is the existence of three archetypes of individuals in Catalonia. First, there is the one that identifies strongly with Catalonia: a Catalan-speaker of Catalan descent, a highly educated member of the intelligentsia with a high income and socially liberal views. On the opposite side is the one that identifies strongly with Spain: a recently arrived Castilian-speaker born somewhere else in the rest of Spain, poorly educated and working in a manual profession for a lower income, that possibly espouse socially conservative views. In the middle is the individual that identifies with both communities: for instance, a second-generation migrant that was socialized in post-Franco Catalonia, has attained a tertiary-level education and speaks Catalan at home.

The picture of national identification in Catalonia is thus a highly complex one that makes it difficult to accept exclusive claims to a territory put forward by groups or states or the depictions emanating from normative theories of distinct national groups as homogeneous entities the members of which display similar levels of national attachment. Such exclusivity and homogeneity cannot be reconciled with the reality of multiple and overlapping forms of national identification and its variability across different segments of a population.

There are several significant implications that follow from accepting this reality. The first is to recognize that asking citizens with ‘multiple selves’ whether they are exclusive members of a single nation or whether they want to be part of only one state imposes an artificial distinction on them. Forcing individuals to choose between their identities is likely to tear them internally just as much as it is likely to tear asunder the societies in which they live, resulting in the kind of brute polarization which can be witnessed in many of the countries experiencing self-determination processes, including Catalonia.

The second is to recognize the dangers of applying majoritarian principles of democracy when treating such delicate questions as the right to national self-determination. If it may appear unfair for the majority community associated with a parent state to use its demographic weight to deny a national group’s ‘right to decide’, then it follows that it would be equally unfair for a majority in the national group with intense feelings of belonging to use their own demographic weight for the purpose of attaining their own final objective. The perils of majoritarianism are especially pronounced if executives are formed on the basis of a plurality of votes (Mueller 2019). The risk this poses is especially dangerous if self-determination results in the kind of autonomy of action that would allow rulers to activate illiberal policies that would deprive their own minorities of their basic rights, for instance civil rights surrounding language use. For a number of political theorists (Nielsen 1993; Margalit and Raz 1990) the existence of a liberal regime in place in the territory exercising self-determination is a condition for exercising the right in the first place. That risk may be less obvious among nations with liberal values existing within states with liberal constitutions, as is the case with Catalonia.

But it is precisely because of a trust in the prevalence of these liberal norms that it would be expected of any national group exercising self-determination that its leaders give due respect to the variable intensity of multiple identities among the individuals inhabiting its jurisdiction. Such recognition would also entail acceptance of the legitimacy of identifying with the parent state and, consequently, a partial recognition of the historic claim of the parent state over the territory of the national group. In exercising its right to self-determination and managing what this process eventually engenders, the national group is therefore expected to maintain a sense of obligation towards all its members and towards the parent state of which it is part.

6. National Self-Determination is Equated with Secession

This obligation would be especially pressing if, as a result of exercising its right to national self-determination, the national group were to secede, that is, the territory it inhabited would separate from the parent state to become an independent sovereign state.

As we shall see in section 7 below it is only by respecting its obligation toward its parent state that independence would likely be recognized by the society of states which the national group aspires to join as fully-fledged state entity. Whatever its relative merits, what is certain about the independence option is that, by forcing

individuals to belong to a single group which has successfully asserted its exclusive territorial claim, it would do grave injustice both to the multiplicity of 'selves' that constitute the individuals of stateless nations and to the simultaneous presence of legitimate territorial claims made by the national group and the parent state. This is one reason why it has proved such a contentious matter.

But the potential injustices that would follow from a process of secession are too often passed on to the right to self-determination *per se*, making the latter far more contentious than what the principle really entails. It is this conflation between secession and self-determination that we identify as the sixth source of deadlock.

Self-determination as secession vs...

This conflation is as much present in the doctrine of self-determination expounded in international law as it is among some of the normative political theories that have sought to qualify the circumstances under which the right to national self-determination can be exercised.

Under international law, the right to self-determination of all peoples was initially conceived in vague terms, as the right of a people(s) inhabiting a territory to make choice, to "determine their political status and freely pursue their development". But because the right to self-determination gradually became so intricately associated with the independence of colonies and "non-self-governing" territories in the immediate post-war period, self-determination and independent sovereign statehood became *de facto* associated. It is for that reason that so much effort was invested in limiting the implementation of the right and in ensuring that it did not cover cultural groups and cases of minority separatism, by erecting countervailing principles of national unity and territorial integrity.⁸ Beyond decolonization, the right to self-determination was associated with disruption, instability and fragmentation.

It was for these same reasons that, even under the more permissive Wilsonian understanding, in which self-determination was applied to minority groups, the principle received limited application beyond the dismembering of the defeated European empires. Although Wilson himself equated self-determination more with democratic forms of government and the cultural and linguistic protection of minorities than is widely recognized, the principle nevertheless became associated with the drawing of new nation-state boundaries. But the fuelling of nationalist aspirations for statehood unsettled European diplomats and it quickly became accepted, that making "culturally homogeneous states the only basis of legitimate political organizations was untenable in practice" (Cobban 1970). From the start of the inter-war period then, nationalist component embedded in self-determination was assumed to result in secession and the creation of independent states.

This hasty association is equally remarkable in normative theories. In his corpus of work, Buchanan (1993; 2003) does distinguish between self-determination and secession, insofar as wishes to reject the general right to self-determination and instead to justify secession as a remedial right. The general right to self-determination is dismissed for being unworkable in practice because of the reasons mentioned in section 3 above (e.g. identifying groups, rival claims to territory) (Buchanan 1991b: 329). It is for this reason that he condemns the UN for apparently sanctioning virtually unlimited

⁸ Documents from San Fran conference- those who drafted UN charter which declares right of all peoples to self-determination did not support self-determination by secession. Understanding that right to SD conformed to purpose of the Charter only insofar as it implied right of self-government of peoples and not right of secession. (Emerson in Neuberger, p.405).

secession by making a blanket endorsement of the principle of self-determination.⁹ However, in dismissing the right to self-determination for these reasons, Buchanan conflates it with secession. In his view, secession is the only outcome that deserves deep normative theorizing and it is justified as a remedy of last resort, without appeal to the principle of self-determination. Meanwhile, territorial autonomy is treated as a form of *internal* self-determination and pursued as an alternative institutional arrangement superior to secession in those cases that do not meet the remedial criteria. But it remains unclear on which normative grounds territorial autonomy could be justified, given Buchanan's unwillingness to subject the principle of self-determination to a normative evaluation. Thus, despite acknowledging the difference between the right to self-determination and secession as a potential outcome of the exercise of that right, he dismisses the former for automatically yielding the latter, without recognizing that they deserve separate consideration.

The moral justification for self-determination is better elaborated among primary rights theorists but the automatic association with the outcome of secession persists. For instance, when they isolate the "core content of the claim to be examined (viz. national self-determination), Margalit and Raz (1990: 440) talk about "a right to determine whether a certain territory shall become or remain a separate state". Matters are further confused when they parenthesize "and possibly also whether it should enjoy autonomy within a state" and derive the justification of self-determination from the value of "self-government" or "sovereignty" over political affairs. By focusing wholly on justifying the right to national self-determination by reference to groups rights to self-government, the authors abstain from reflecting on the differences between the types of outcomes that this right may generate (independent statehood or territorial autonomy) and the implications these bear for the terms of the institutional adjustment. This means that they can countenance self-determination being equated with secession without a great deal of moral compunction. The same insouciance is felt among theorists that espouse a purely associational perspective on the question (Gauthier 1994): the right to association translates seamlessly into a right of entering and exiting political unions.

... *Self-determination as democracy*

To understand why this conflation has been sustained so consistently across the domain of law and ethics, it is useful to recall the contingent historical circumstances in which the current of ideas that underlie the principle of self-determination was put into practice.

When Rousseau refashioned Locke's notion of individual consent into a collective form of popular consent, he fashioned self-determination as a democratic ideal- as the right of a body of citizens to rule themselves. It was this ideal that ignited the American Revolution; it only became a war of independence when the demand for responsive government was not met. Similarly, the French Revolution was motivated by the expectation of more responsive rule. But it was the replacement of the absolutist and then constitutional monarchy by a republican government at the helm of an already existing state that sealed the relationship between the rights of citizens to self-determination and democratic government, conceived as the sovereignty of the French nation, and the public decisions of the French state. Thus, although self-determination

⁹ He does this despite admitting that fewer groups have made bids to secede that could potentially be the case and that the UN has made concerted efforts to ensure that the right did not include a broad right to secession.

originated as a purely democratic ideal, as a result of its implementation during two tumultuous historical events, it became associated with independent statehood.

The convergence in understanding between self-determination and sovereign statehood represents a significant cognitive shift because it conflates ends and means: the mean of self-determination became associated with the goal of independence. Yet, self-determination is essentially about a *process* not a specific *outcome*. Self-determination was originally conceived, and remains today, about a democratic collective procedure for selecting between different types of constitutional options that will afford to national groups a form of “self-government”. Self-determination is fundamentally about the ability of a national group (and/or a constituent unit of a federation) to refashion its relationship with the central government of the parent state, with other territorial units in the state, as well as with supranational organizations of which it is part. This may but does not necessarily have to lead to the creation of an independent state; other types of constitutional outcomes are possible.

This distinction between *process* and *outcome* is acknowledged by some contemporary ‘primary rights’ political philosophers. They will agree on the point that national self-determination is not reducible to a simple right to democratic participation and representation in the government of a country, for which case a liberal regime of individual rights (to e.g. free speech, assembly and voting) would be enough (REF). Rather, national self-determination is about creating a set of institutional arrangements that will allow national groups to express their identity in the public sphere- thereby furnishing them with recognition and status- and allow them to manage their communal life in accordance with their preferences and customs. What theorists do disagree about however is about what specific kind of institutional arrangements will permit this, which opens the door to a variety of potential outcomes.

The purely cultural approach adopted by Tamir (1991) in which national self-determination is conceived as the ability of individuals to freely engage with their culture and to perform its pageantry and various traditional celebrations does not lead to the prescription of any particular institutional solution. The basic requirement is access to the public sphere. At a minimum, this can be satisfied by a combination of active civil society groups that enjoy the freedom to mobilize individuals in sustaining a national group’s culture and of a neglectful state that refrains from taking actions that may jeopardize that freedom. Beyond that, institutional arrangements will vary depending “both on the members’ preferences and on the particular circumstances in which national demands arise”. Any arrangement should nevertheless reflect the “history, the culture, the language and, at times, the religion of the national group, thereby enabling its members to regard it as their own. In other words, political units and institutions established on the basis of the right to national self-determination should reflect the unique character of the national group.” (Tamir 1991: 588). Meeting this aspiration does not, in her view, require the establishment of a separate nation-state.

Perhaps not, concedes Philpott (1995a), but reflecting the unique character of the group does nevertheless require an element of separate government which requires drawing-up new political boundaries around the national group. Why? Because for a national group to exercise national self-determination- collective autonomy over its fate and development- the individual members that share its identity need to be circumscribed geographically, ruled by leaders they understand and that understands them, and that will fight the causes, pursue the ideas and implement the set of policies that are defined by their distinct culture, without external interference or influence (Philpott 1995a: 359-62). A separate territorial jurisdiction is necessary for such activities can take place. It is also necessary if a national groups’ culture is to be

preserved and is to flourish- such a thing requires the deliberate actions of a political entity with territorial control, that is intent of fostering the expressions of culture.

It is for these reasons, that national self-determination is not simply a cultural claim but a political claim (De-Shalit 1996). By pointing to the inadequacies of an institutional status quo that may not offer a separate territorial jurisdiction to a national group (or may offer an insufficient level of autonomy), the claim to self-determination is addressed to a central state which is requested to take a positive political action, rather than expected merely to tolerate the cultural particularism of national group and to take a *laissez-faire* approach to its development. National self-determination is thus an obligation-generating claim for the state to undertake concrete political measures, like legislating the establishment of autonomous political institutions, drawing-up new politico-administrative boundaries, changing the taxation and revenue distribution systems, and so on. Territorial autonomy within a federal state is an acceptable institutional outcome to the exercise of national self-determination. But it is not a stable solution; the central state retains the obligation to be responsive to enduring claims.

The conditions under which such claims result in the creation of an independent state is naturally a matter of dispute among theorists, given the potent symbolism and momentous material repercussions such a choice would entail. The more permissive line of reasoning (Nielsen 1993) suggests that if a national group constitutes a majority on a territory which it has occupied for a long time (e.g. Québec) and it is committed to respecting the rights and civil liberties of newly formed cultural minorities within its fold (e.g. Anglophone Quebecers), and it expresses a collective wish through a plebiscite to become independent, then these conditions alone justify a right to secede. But such a permissive approach however fails to recognize that national self-determination is an obligation-generating claim of recognition and autonomy, which the central state is required to grant and, therefore, to which it must also consent. A central government may, moreover, take positive actions towards fulfilling their obligation, such as establishing meaningful constitutional arrangements like a multinational federation that confers territory autonomy and symbolic recognition to national group(s). As a result, certain scholars (Patten 2002) have more recently adduced an additional criterion of 'recognition-failure' to justify secession. It is only in the cases where the central government has not undertaken its obligation of recognition towards the claim of national self-determination and introduced meaningful constitutional arrangements that a democratic mandate in favour of independent sovereign statehood may justifiably result in that outcome. Otherwise, secession leads to the dismantlement of the institutions that provide equal recognition to the different identities and 'multiplicity of selves' present in a multinational state.¹⁰

The fact that political theorists have disputed the type of institutional outcome that best serves and most legitimately answers a national groups' right to self-determination underpins our contention that self-determination should not be associated with any single specific institutional outcome. Rather it is best understood as a democratic *process* regulating the selection of an institutional *outcome*. Self-determination is thus not to be confounded with secession. But nor is it to be reduced to individuals' engagement with their culture and language. Instead, it should be viewed

¹⁰ Whether and to what extent the obligation of recognition has been met is not however discussed in this proposition, so that a claim of 'recognition-failure' advanced by a national group may be contested by a central government, providing the basis of an enduring conflict, even within a multinational federation, and for attempts at secession, unilateral if necessary.

as a political claim put by a national group before the central government of a state for orchestrating institutional changes that provide a national group with meaningful territorial self-government and symbolic recognition. It is a profoundly democratic process: political claims are advanced following democratic elections and new constitutional arrangements are ratified by parliaments or by plebiscites. Self-determination is thus a process regulating a change in the constitutional relationship between a group, a territory or sub-state entity and the central state, with a variety of potential outcomes possible. As we shall see in the two sections below, this distinction between process and outcome is something that has been a matter of common practice in the international politics and is well understood both by Catalan and Spanish voters. But given the nature of the rights and obligations of different parties included in this constitutional relationship, all of them should be involved in the process and consent to the outcome. As we shall see in section 5 below, any unilateral move by any party is hardly ever justified or accepted.

The free determination of political status

The distinction between *process* and *outcome* was better understood in the UN charter and in the subsequent UN resolutions and covenants that gave expression to the principle of self-determination than the interpretation of those same texts would later belie.

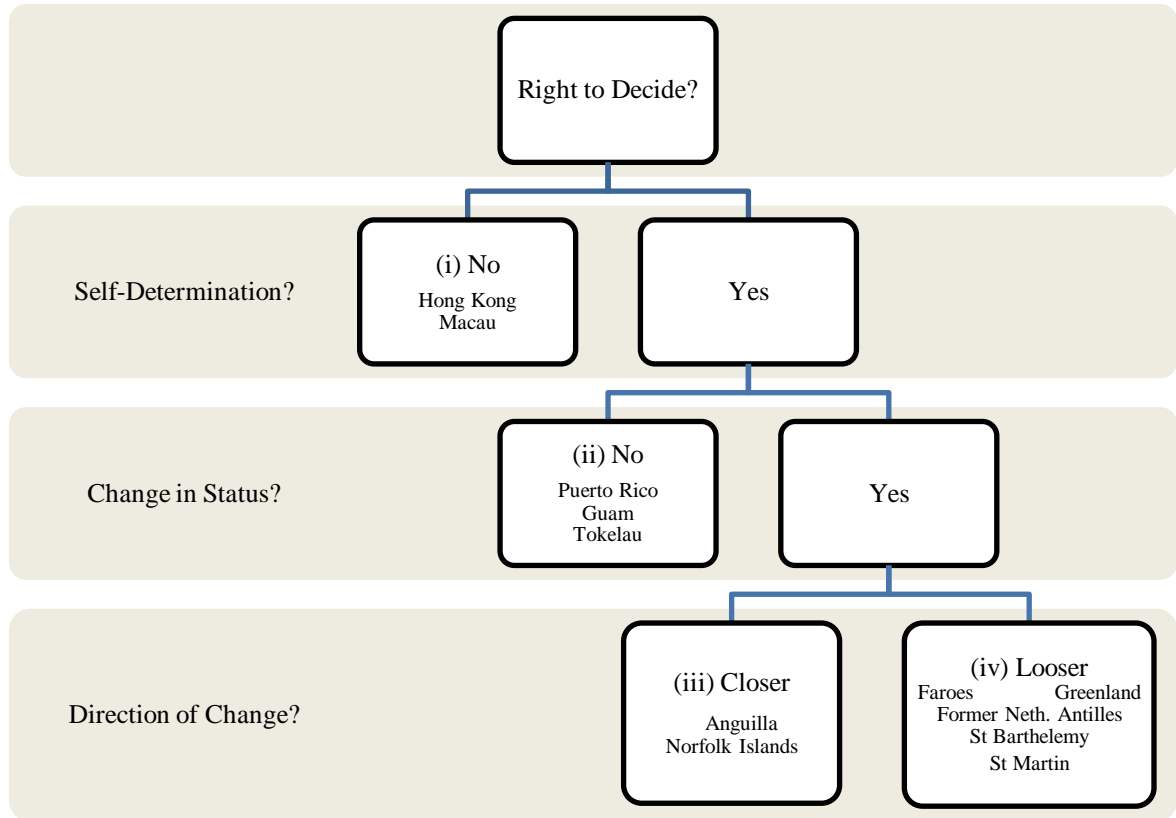
Even when the right to self-determination was applied during decolonization- a context in which its implementation was irrefutable- it was treated mainly as a procedural democratic right. The Declaration on Colonial Independence (GA Res. 1514) stated that by virtue of the right to self-determination, all peoples would “*freely determine their political status* and freely pursue their economic, social and cultural development”. Projecting the insight of the Special Committee on the Granting of Independence to Colonial Countries and People, the UN Secretary General recognized that self-determination did not have necessarily to involve full independence (UN 1967). Both the General Assembly Resolutions 1541 (1960) and the Declaration on Friendly Relations (1970), which resolved to guide colonial powers to grant a full measure of self-government to colonial territories, stated that self-determination comprised: the establishment of a sovereign independent state, “free association” with an existing independent state or integration into another state. The essence of self-determination was thus a collective *determination* of some type a political *status*.

The bulk of colonial territories opted to become sovereign states, which further cemented the cognitive association between self-determination and independent statehood. Interestingly, however, other colonial territories chose other options short of statehood, such as associated statehood, or chose to remain as dependent territories. What is striking about these cases is that they are entities with all the trappings of potential statehood- especially territorial control- that have nevertheless voluntarily excluded themselves from the society of states and have become labelled as quasi-states or non-state actors (Ronen 2013)

What these set of cases illustrate is that self-determination is fundamentally about a collective choice of status, rather than about the status itself. This pertains both to associated states, which are already nominally sovereign political entities as well as to dependencies, which are not. What we find is that the case analysed above fall into four different categories that follow the tree depicted below: (i) those with no right to change status; (ii) those with a right to change status, which have experienced no

change in status; those with a right to change status, which have experienced a change in status towards looser integration (iii) or closer integration (iv).

Figure 1. Self-determination and its outcomes among associated states and dependencies



(i) No Right to Decide

The two most prominent cases of dependencies that do not enjoy the right to decide are **Hong Kong** and **Macau**. Neither of these islands were considered colonies during their transfer into Chinese hands: the land was controlled and governed by the British and Portuguese colonial authorities, but under a leasing agreement that was foisted upon the Chinese imperial government of the time. So, these islands did not enjoy the right to self-determination when these lease agreements came to an end, one hundred years after their original signing. They were always considered an integral part of China by the Chinese government which made this view clear in the prelude to the bilateral negotiations that paved the way for the Sino-British and Sino-Portuguese Declarations. These made it explicit that China retained sovereignty over the territories. The Basic Laws of Hong Kong and Macau make no mention about the right of these SARs to decide their political status. The Basic Law remains a reserved matter of the Supreme Council NPC. So, even if the MSAR and HKSAR can propose amendments to the Basic Laws, via two-thirds of the local and national representatives, the final word about approval rests with the Committees in the NPC (Art 144 Macau Basic Law, Art.159 Hong Kong Basic Law). This rule also holds the other way around, however. If the

SCNPC proposes an amendment, it must receive the approval of the Chief Executive, and two-thirds of the local and national representatives.

(ii) No Change in Status

The other main category includes all those territories which have been given the right to decide their political status. In certain cases, this right has resulted in no change in status, either because there has not been any demand for change or because attempts at change have resulted in failure and the preservation of the status quo. In the latter category, we find certain obscure cases such as **Tokelau** an island listed by the UN as a 'non-self-governing territory' and governed as an unorganized dependent territory of New Zealand. Its local parliament and government exercise autonomy but not sovereignty. In an effort to turn Tokelau from a NSGT to a self-governing state in free association with New Zealand, two referendums were held in 2006 and 2007 under the supervision of the UN, which asked inhabitants of the island if they were in favour of a looser relationship of 'free association' and full external sovereignty- similar to that exercised by the Cook Islands and Niue. Although a majority of voted in favour of association, on both occasions the vote failed to produce the required two-thirds majority required for the measure to pass.

The most prominent case in this category is that of **Puerto Rico**.

Puerto Rico (either)
Guam (
Tokelau (towards looser integration)

(iii) Closer Integration

Anguilla
Norfolk Islands

(iv) Looser Integration

Former Netherlands Antilles
Faroes
Greenland
St Barthelemy (from Guadeloupe)
St Martin (from Guadeloupe)

In the case of the Faroe islands, this local home-rule was passed by the Danish parliament in 1948 in response to a referendum held on the islands in 1946 which resulted in a majority vote in favour of independence and a subsequent unilateral declaration of independence. The Danish king declared the vote and UDI illegal and dissolved the local parliament, and the Danish parliament subsequently introduce a home rule bill which abolished the islands' status as administrative units of Denmark and gave them a wide scope of autonomy.

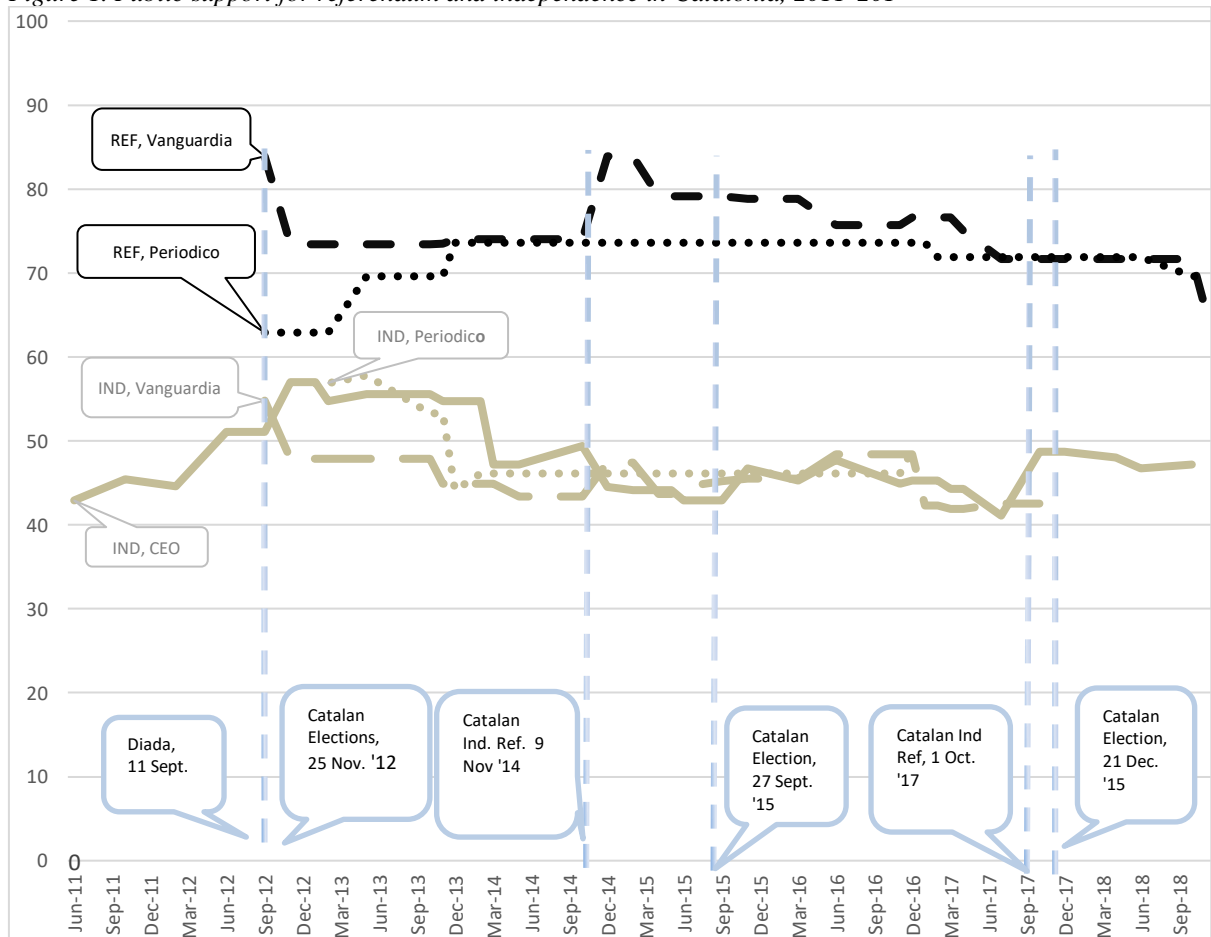
Greenland: autonomy referendum, right to self-determination in Greenland Act, recognition of treaty between equal partners, provisions for arriving at independence.

The preamble to this Act states explicitly that it is based upon a Treaty between the Government of the Faroes and the Government of Denmark as equivalent parties (emphasis added).

The 'right to decide' in Catalonia

In the context of Catalonia, there are two separate but related issues that underlie the current debate surrounding Catalan peoples' 'right to decide': (i) whether the Catalan government should organize a referendum on independence; (ii) and whether Catalonia should become an independent state. The state of public opinion differs according to the issue.

Figure 1. Public support for referendum and independence in Catalonia, 2011-201



On the first issue, the Figure 1 shows that a clear majority of Catalans are in favour of the Catalan government organizing a referendum.¹¹ The average level of support in

¹¹ Public opinion data collected from polls conducted for two dailies (La Vanguardia and El Periódico) were selected because they offered the highest number of data points over the period in answer to a

the period 2011-18 hovers around 75 percent. If we look at the La Vanguardia polls, we see that there was an increase to around 80 percent following the Diada and Catalan elections of 2012 and the consultation of November 2014. However, there is a decrease to just below 70 percent over the course of 2018, suggesting that the 1-O referendum and the events that followed, including changes in central and regional government, may have dampened support for a referendum.

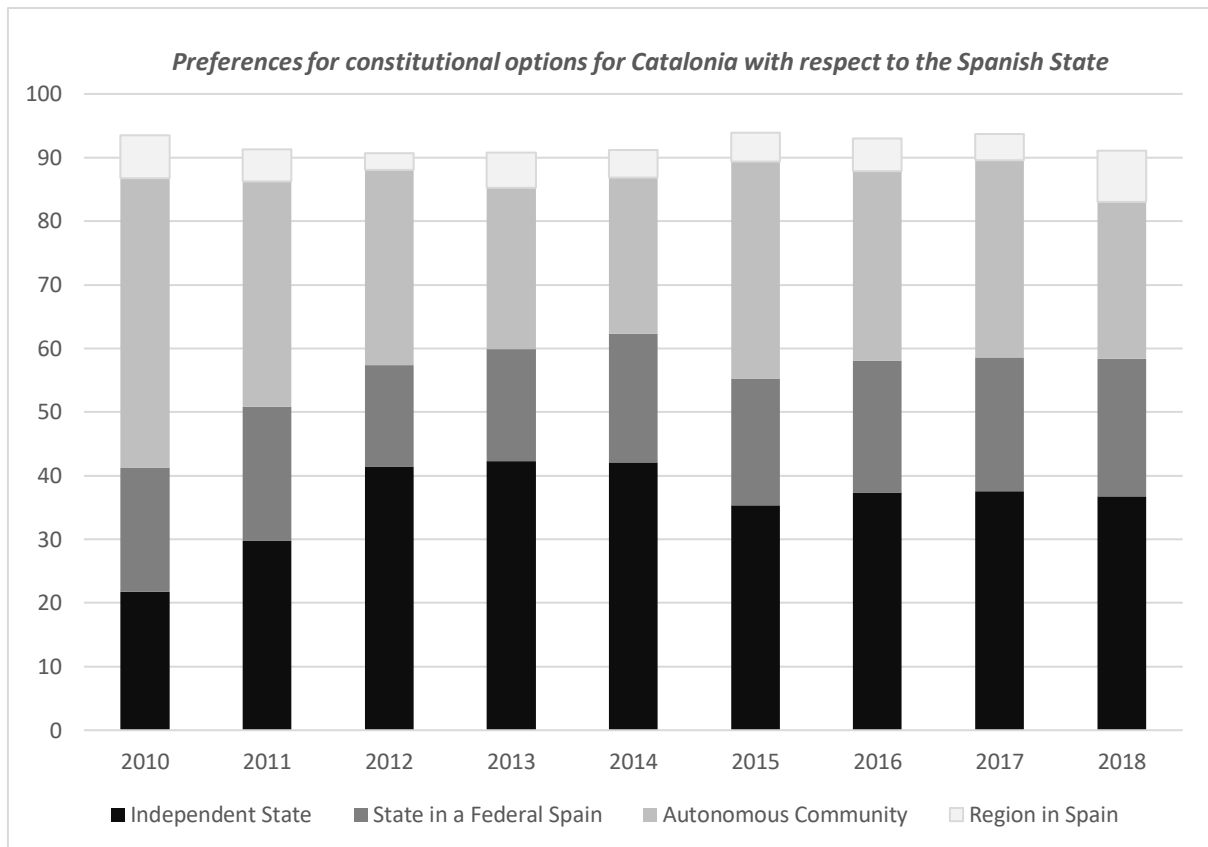
On the second issue, Figure 1 shows that support for independence for Catalonia hovers just below the 50 percent mark for the 2011-18 period.¹² According to the opinion polls conducted for the CEO, there was a marked increase in support to around 57 percent in the period leading to and just after the Diada and Catalan elections of 2012, which is corroborated by other sources. However, from about 2014 onwards, the level falls to around 43-48 percent. There is a marked decrease in support to around 41-43 percent in La Vanguardia and the CEO polls over the first half of 2017, when it became clear that the Catalan government would be organising a referendum without the assent of the Spanish government.¹³

These polls reveal a fundamental characteristic of the debate surrounding the ‘right to decide’ in Catalonia: the share of people that believe that the Catalan government should be able to call for a referendum on independence is significantly higher than the share of people who want independence. In fact, it appears that, on average, around 30 percent of people who believe in Catalonia’s right to organize a referendum would reject independence. Catalonia seems more united in claiming its ‘right to decide’ than in wanting to become independent. On the latter issue, the country is clearly divided.

similar question: “do you agree that in Catalonia it should be possible to call for a referendum on independence?”.

¹² See fn.1 for the selection of sources. The question asked for the CEO poll was: “if tomorrow a referendum on the independence of Catalonia was held, what would you do?”. For the Vanguardia, the question was: “if a referendum on independence of Catalonia was held, how would you vote?”. For El Periódico, the question was: “would you agree on Catalonia separating itself from Spain and becoming a new state within the EU?”

¹³ The results appear to be sensitive to a reformulation of the question to: “if a *legal* referendum on the independence of Catalonia was held, how do you think your vote would be?”



7. Domestic Consent as the Condition for International Recognition

- need to make clear that there has been reluctance to enforce right to SD both in Wilsonian inter-war period. Aaland, mosul, minority rights regimes- difficult to enforce
- Much of our current thinking about the legitimacy of claims to self-determination put forward by national minorities and stateless nations, such as the Catalans, is informed by the principles of international law that have been developed since the end of the Second World War. International law broadly recognizes two types of rights: (i) rights between sovereign states- enforced for instance during the settlement of international disputes; (ii) rights conferred to ‘peoples’ and individuals, such as those contained in the Universal Declaration of Human Rights. The right to self-determination falls in the second category.
- **Talks to issue of statehood,**
- **Recognition by other states as threshold.**
- But no recognition forthcoming if no mutual consent
- **Linked to issue of statehood. Discuss Kosovo here.**

The Normative Backdrop: Quebec Secession Reference (1998)

- Does Quebec have right to secede under Canadian and International Law?
- Answer: NO right to unilateral secession.
- “In other circumstances, peoples are expected achieve SD within the framework of existing state, whose govnt represents the whole of people resident within territory on basis of equality and without discrimination and respect of principle of SD within internal arrangements is entitled to respect principle of territorial integrity under int. law and to have that integrity recognized by other states”
- Canadian Supreme Court: In case of vote in support of SD- content and process will be for the political actors to negotiate, the reconciliation of conflict legitimate claims belong in political rather than judicial realm, precisely because can only be resolved through give and take of negotiations. Courts would have no supervisory role
- Right to SD has to be implemented by political process
- *A clear vote* in favour of independence in answer to *a clear question* would confer democratic legitimacy which all participants in confederation would have to recognize.
- Even though there is no right to referendum
- But, Quebec could not despite clear referendum result invoke right to SD to dictate terms of proposed secession to other parties of federations.
- Legitimate right cannot be unilaterally implemented even if.
- “But continued existence and operation Canadian constitutional order could not be indifferent to clear result if majority of Quebecers wished to leave Canada. Other provinces and Canadian FG would have no basis for denying right to Quebec to pursue secession”
- Negotiation that would follow would focus on terms of secession, how
- “there would be no conclusions determined by law on any issue”
- No right to deny SD by CG or other provinces.
- Otherwise: negotiation. Canadian SC Opinion. Two-sided obligations of good faith negotiation. Can we agree on terms? Not soon in case of ES.

Cases:

Domestic consent-recognized

The State Practice of Recognition

		Domestic Consent	
		Granted	Not-Granted
Recognition by International	Recognition	Bangladesh (1971) East Timor (1999) South Sudan (2005)	Kosovo (2008)

Community	Non-Recognition		Abkhazia, South Ossetia, Tans-Nistria, Palestine, Taiwain
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8. The Constitutional Identity of EU Member-States

- **Something about the influence of the EU on this issue.**
- **Either as a subsection of 7 or as separate section**

- The EU has no legal role in mediating this potential scenario, as there are no Europe-wide principles for when and how this is to be practiced.
- The European Union has displayed a comparably ambiguous attitude towards self-determination demands.

- In our earlier document, we noted that the European Union has played a paradoxical role indeed. On the one hand, as an economic project of market creation, the EU has reduced the economic costs of independence

Regional Blindness

Respect for Constitutional Identity

- On the one hand, the respect for the national identities and constitutional structures of states is a foundational pillar of the European Union (EU), which has made it 'blind' to the place of regions in domestic constitutions. (since 1968)/ Accordingly, the institutions and member-states of the EU have staunchly defended the integrity of states, much to the detriment of the nationalist government of Catalonia when it failed to obtain any meaningful support from EU institutions or its member-states.

- In line with this, EU Commission Presidents Prodi and Barroso repeatedly underlined the condition that newly created states would have to re-apply for membership, casting severe doubt on the economic viability of bids for independence. The EU refused to become embroiled in the conflict between the Catalan and Spanish governments and, when pushed, sided with the latter in defending the respect for domestic law. Indeed, the lack of support and recognition for Catalonia was the undoing of its government's bid for forcing independence.

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