Internal Self-Determination in Public International Law

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I, Kumaravadivel Guruparan confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

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ABSTRACT

The thesis focuses on the internal dimension of the right to self-determination in public international law. The objective of the thesis is to explore the possibilities of deepening the normative foundations of the internal dimension of the right to self-determination in order to strengthen its claim as a viable alternative to external self-determination. The thesis does this through three different means: a) critically identifying the current status of the right to self-determination and its internal variant; b) offering a theory of internal self-determination and how it may relate to external self-determination; c) exploring how sub state actors have attempted to engage with their host states in a variety of contexts both in the Global North and South, and drawing from those experiences to restate / clarify how internal self-determination can play the role of a credible alternative to external self-determination. The thesis argues that the meaning of self-determination in this context can only be understood through examining the circumstances in which the law is being sought to be applied. The thesis identifies that the site of the circumstances in which internal self-determination is invoked is the constitutional law of states. The argument developed claims that through studying how constitutional law grapples with these issues we may normatively fine tune our understanding of internal self-determination. The thesis demonstrates how this may be done by engaging with a few case studies from the Global North and the South and provides tentative conclusions for bettering our normative understanding of internal self-determination.

IMPACT STATEMENT

The attempt to specify the core meaning of the principle of self-determination in the post-colonial context as self-government and locate its internal variant within such conceptualisation is an original contribution to the field. Academic commentary on internal self-determination has been engaged with and an alternative conceptualisation that draws from a diversity of sources - political theory, comparative constitutional law of deeply divided states and the praxis of sub-state nations/stateless nations - has been proposed.

The thesis impacts on how different group rights claims are understood – particularly self-determination and minority rights. It has discouraged a static and time-frozen understanding of the claims that groups make. The thesis has shown that the claims may evolve over time – what I have called in the thesis as temporal plurality – and that our responses must be commensurate to this reality.

The thesis impacts our understanding of the relationship between the right of self-determination in its internal and external (secession) and breaks down the artificiality that existed between the variants.

The thesis provides international actors engaged in peace building conceptual tools in relation to the practice of internal self-determination in areas such as the recognitional aspects of a political settlement, the form of government that may provide for a satisfactory level of self-government and the desire for third party guarantees for the durability of an internal self-determination arrangement.

The thesis overall has the potential of impacting on international law and policy on peace building. A deeper appreciation of internal self-determination, similar to the one outlined in this thesis it is hoped would contribute to a better appreciation of internal self-determination as a viable path to the goal of self-government thus discouraging secessionist tendencies and encouraging the exploration and building of plurinational societies.

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And finally, I dedicate this project to all those who laid down their lives for Tamil self-determination and all those including Aravamuthan who may continue to dream and struggle for a better future.

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PROLOGUE

Why Internal Self-Determination?

In December 2002 the Sri Lankan Government and the Liberation Tigers of Tamil Eelam as part of a peace process announced during their third round of talks as follows in what became to be known as the 'Oslo *Communique'*:

> Responding to a proposal by the leadership of the LTTE, the parties have agreed to explore a political solution founded on the principle of internal self-determination in areas of historical habitation of the Tamil-speaking peoples, based on a federal structure within a united Sri Lanka.[1]

As a 17-year-old high school student from the war-ravaged town of Jaffna interested in the study of politics and law, the words internal self-determination and federalism drew my attention. In 2002 by that time 60,000 Tamil civilians had died in the civil war in Sri Lanka. Internal self-determination and federalism were being proposed as alternatives to a separate state.

Earlier, in November 2002, Mr. Velupillai Prabaharan, Leader of the LTTE had in his annual 'heroes day' address declared as follows:

> Tamils constitute themselves as a people, or rather as a national formation since they possess a distinct language, culture and history with a clearly defined homeland and a consciousness of their ethnic identity. As a distinct people they are entitled to the right to self-determination. The right to self-determination has two aspects: internal and external. The internal self-determination entitles a people to regional self-rule.
>
> The Tamil people want to live in freedom and dignity in their own lands, in their historically constituted traditional lands without the

[1] Tamilnet, 'LTTE, GoSL reach exploratory agreement' (05 December 2012) <https://www.tamilnet.com/art.html?catid=13&artid=7937> accessed on 15 December 2018

> domination of external forces. They want to protect their national identity pursuing the development of their language, culture and economy. They want to live in their homeland under a system of self-rule. This is the political aspiration of our people. This constitutes the essential meaning of internal self-determination. We are prepared to consider favourably a political framework that offers substantial regional autonomy and self-government in our homeland on the basis of our right to internal self-determination. But if our people's right to self-determination is denied and our demand for regional self-rule is rejected we have no alternative other than to secede and form an independent state.

The use of internal self-determination in the Oslo Communique was not easy for the LTTE, as I knew from conversations within the Tamil community. There were internal rifts on whether articulating the right to self-determination in its internal variant was the wise thing to do given the perception that the Sri Lankan Government would never concede anything that could satisfy the minimum yearnings for self-government. The *North Eastern Herald* opined in its editorial that 'in giving up the goal of Eelam, the Tigers have been put on the dock in the court of Tamil opinion. They have to show the Tamil people that in settling for federalism, they will get a deal worth the lives of 17000 fighters and more than 60000 civilians in the North-East.'[2]

On the other hand, internal self-determination among the majority Sinhala community was seen, with concern, as a stepping stone for external self-determination. HL de Silva, a senior lawyer, one time representative of the Government of Sri Lanka at peace talks argued as follows:

> While the expression 'internal self-determination' prima facie precludes secession or a separate legal existence for the envisaged entity to be created, through the exercise of the right of self-determination, it could nevertheless encompass a constitutional arrangement which creates, de facto, a degree of separateness and a capacity for autonomous

[2] Editorial, 'Federalism: LTTE has to deliver the goods' (*North Eastern Herald,* 03 January 2003) 6

decision over all subjects of government which for all practical purposes gives such constituent entity the character of an independent entity. In other words, this formulation of words does not necessarily exclude a confederal arrangement for the territorial units bearing the nominal title 'Sri Lanka' since the words 'self-determination' suggest that it is the 'self' that effectively decides on its own political destiny and since the word 'internal' which is used as a prefix may signify anything, which, while it has an external aspect may be argued to have an 'internal impact', as well.

This means that the non-use of the words 'external' may not, in such circumstances have a great deal of significance. This would for all practical purposes leave each entity pretty much free to do what it wants even in relation to external matters which have a bearing as internal affairs. And with such concepts as 'asymmetrical devolution' and 'quasi-sovereignty' being in vogue, in effect, this will mean that 'state sovereignty', by reason of the conferment of wide-ranging powers on any constituent entity, would be emasculated and eroded to such an extent and degree that it would be no more than an empty shell bereft of any practical significance. If in consequence of the negotiations, the final result is a confederal arrangement between the two entities, a 'loose federation', the appellation 'Sri Lanka' encompassing both entities would then only have a nominal or formal significance. In other words, 'State Sovereignty' as far as the State of Sri Lanka is concerned, will then be drained of all vitality concerning the territory that is eventually controlled by the LTTE, and this area will for all practical purposes, in the first instance, be the *de facto* State of Eelam till the time is ripe for such entity unilaterally to declare itself as the independent State of Eelam.'[3]

In the course of time the Sri Lankan Government would renounce the Oslo *Communique*. The LTTE would 'clarify' their undertaking in the statement.

[3] H.L de Silva, *Sri Lanka: A Nation in Conflict: Threats to Sovereignty, Territorial Integrity, Democratic Governance and Peace* (Visidunu Publications 2009) 327

Anton Balasingham, the Chief Negotiator a few years later would argue that the Forum of Federations, a think tank led by a Canadian liberal party leader (Bob Rae) which was invited by the Norwegians during the peace process to assist in the constitutional negotiations had insisted that he identify in institutional terms what their principled position for self-determination meant (ie that it was not merely enough to speak only of 'principles' but that such principles had to be put forward in the form of institutional proposals) and that this in turn led to him expressing willingness to 'explore' a federal solution[4].

An official report of the Norwegian Government that audited Norway's involvement as a facilitator/mediator in the peace process found that rather than providing to be a spring board for further dialogue, the communique turned out to be a step back[5].

The breakdown of the peace process led to the return of a Sinhala Buddhist hard-line Government which waged a brutal war, that finally was brought to an end, but at a very huge cost. To-date the Tamil National Question remains unresolved and increasingly difficult to unpack. Federalism has become such a dirty word in Sri Lankan politics that even the party representing a majority of Tamils chooses to use it sparingly outside of Tamil majority areas.

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I had the opportunity to visit Aceh in 2010 as part of a Summer School on International Human Rights Law and International Humanitarian Law organised by the East West Centre and the University of California, Berkley. The place seemed 'peaceful' but the much-celebrated agreement between GAM and the Government of Indonesia, it was clear, did not lead to any respectable self-government for the Acehnese people. GAM, eagerly jumped on to the language of 'self-government' in place for self-determination, but within the rigid unitary character of the Indonesian state 'self-government' or internal self-determination did not work out. The driver of our van, an ex-

[4] Anton Balasingham, *War and Peace: Armed Struggle and Peace Efforts of the Liberation Tigers of Tamil Eelam,* (Fairmax 2004) 403

[5] Goodhand, J., B. Klem and G. Sørbø, *Pawns of Peace: Evaluation of Norwegian Peace Efforts in Sri Lanka, 1997-2009*, Report 5/2011 (NORAD Evaluation Department 2011) 88

combatant was struggling to make ends meet, whereas some of the GAM commanders were top-level corporate leaders.

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Six years later as I was writing my PhD, I was in Scotland on 18 September 2014 to witness the Scottish people exercise their right to self-determination, wherein there was a celebration of the right to decide their own political future be it within or outside the UK. *The Independent* edition on 18 September 2014 carried a cover page with a hand holding both the Scottish and Union Jack flags and underneath had lines that read, 'whatever the result, we ought to celebrate a carnival of democracy from which the rest of the world can learn'. Outside the Scottish Parliament I saw a Catalan activist hold up a placard that read 'We Catalans also wish to vote, but Spain won't let us'.

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I have throughout my life, born and bred in Jaffna, Sri Lanka, realised that the principle and right of self-determination in International Law is not some dry legal principle that international lawyers practicing in foreign ministries across the world have to deal with occasionally. The principle animates discussions around many places in the world in terms of how one must organise a State. And in that, it would in no way be an overstatement to say that the understanding of the principle/right has a direct impact on the lives of people across the world.

INTRODUCTION

This thesis seeks to explore the potential and promise of internal self-determination and suggest ways in which the normative content of the right to self-determination in international law can be further deepened.

1.1. Approach of the project

The thesis conducts research into the *de lege ferenda* of the law of self-determination, in particular, as concerns its internal variant.

Professor James Crawford, in *The Creation of States in International Law*, recognised the *de lege ferenda* character of internal self-determination as follows:

> *There is a further issue of internal self-determination in the sense of the recognition of cultural identity and internal self-government for different groups or peoples within the State. Traditionally international law treated such issues as matters of domestic jurisdiction, as reflected in the very reserved formulation in the minority rights clause, Article 27, of the International Covenant on Civil and Political Rights. Developments in respect of the right of internal self-determination and self-government are, however, occurring, and they are accompanied by an extension of minority rights, including the rights of national minorities, and an increased recognition of the rights of indigenous peoples. Consistently with these developments, the term 'peoples' is coming to be seen as more inclusive, and is not limited to the people of the State as a whole. But these developments are still tentative (de lege ferenda), and they do not affect the established rules and practices with respect to self-determination and the territorial integrity of States*[6]

The objective of this thesis is to explore the possibilities of deepening the normative foundations of the internal dimension of the right to self-

[6] James R. Crawford, *Creation of States in International Law* (2nd edn OUP 2006)120-121

determination in order to strengthen its claim as a viable alternative to the right to external self-determination. The thesis does this through three different means: a) critically identifying the current status of the right to self-determination and its internal variant; b) offering a theory of internal self-determination and how it may relate to external self-determination; c) exploring how sub state actors have attempted to engage with their host states in a variety of contexts both in the Global North and South, and drawing from those experiences to restate / clarify how internal self-determination can play the role of a credible alternative to external self-determination.

The argument developed in this thesis in relation to internal self-determination does not argue that a separate right will have to be stated or that the right of self-determination will have to be restated in light of a new right to internal self-determination. The normative argument for internal self-determination that is being developed herein in this thesis is in consonance with the core of the right to self-determination. Drawing from H.L.A Hart it argues that self-determination has a core and a penumbra, and that the penumbra can only be understood with an appreciation of the circumstances in which the law is being sought to be applied[7]. I argue that the site of the circumstances in which internal self-determination is invoked is the constitutional law of States. I argue that by studying how constitutional law grapples with internal self-determination, we may normatively fine tune our understanding of internal self-determination. In the conclusion I try to draw some tentative lessons learnt in this regard.

1.2. The structure of the thesis:

Chapter 1 seeks to assess and identify the legal pedigree of the internal dimension of the right to self-determination in international law. The chapter traces the idea of self-government short of independence during the decolonization era. It looks at the circumstances under which independent statehood became invariably attached as a right to colonial territories under the principle of self-determination. The chapter then moves on to critically analyse the rise in what I describe as a state - centric approach to self-

[7] See Introduction to Part II for a detailed exposition of this argument

determination aided inadvertently by the over-powering of the self-determination discourse by the human rights agenda in the post-colonial context. I then turn to the decision of the Canadian Supreme Court in *Reference re Secession of Quebec*[8] to show how the constitutional law of some deeply divided societies has moved beyond the limits of liberal constitutionalism and the idea of a rigid nation-state in their handling of self-determination, but that international law by failing to reflect on these developments, lags behind. The third section argues that the ideas associated with internal self-determination as developed by comparative constitutional law can help develop the international law of self-determination.

In ***Chapter 2***, I attempt to suggest a framework for internal self-determination by clarifying the content of the right to self-determination in the post-colonial context. In this chapter I argue that self-government is a necessary condition of self-determination and consequentially that self-government is also a necessary condition of internal self-determination. The thesis that self-determination is about self-government rejects accounts that suggest that self-determination in its internal dimension refers to minority rights and to participatory rights. It seeks to define self-determination as a claim to an institutional right – the right to self-government, as opposed to claims to poly-ethnic rights or special representation rights. The chapter argues that the claim to self-determination in plurinational[9] States in the post-colonial context is a challenge to the monistic ordering of the nation-state. The application of self-determination internally, it is suggested, should result in the institutional recognition of the plurality of the state. The chapter also offers a holistic way of understanding the internal and external aspects of self-determination.

Chapter 3 focuses on the reasons that explain the trajectory from internal to external self-determination in the process that led to deciding Kosovo's status and what lessons it might have for developing a better understanding of the post-colonial right to self-determination in Public International Law. The

[8] [1998] 2 SCR 217

[9] Defined as the coexistence within a political order of more than one national identity. Michael Keating, *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era* (OUP 2001) 27

chapter considers the challenging question of whether this exercise is worthy of its stated objective given the argument that the 'Kosovo case' is presented as *sui generis*. Having considered the political environment that shifted the debate on Kosovo's future from internal to external self-determination, it studies in detail the justificatory reasons used by States arguing in support of or against this slide from internal to external self-determination in Kosovo's case through a study of their submissions before the International Court of Justice in *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*[10]. It also considers whether International Law should remain neutral / silent on self-determination and proposes a way of balancing the rule of self-determination with the rule of territorial integrity that is not zero-sum.

Chapter III is followed by an **Introduction to Part II** which explains why I think it is possible that International Law can learn from Constitutional Law and the methodological approach to the selection of case studies. This note on methodology applies as much to chapter 3 as it does to chapters 4 and 5.

Chapters 4 and 5 draw on experiences of constitution-making in multinational contexts in their handling of the right to self-determination. The case studies seek to reflect on the arguments advanced in Chapters 1 and 2.

Chapter four focuses on the practice of internal self-determination in protracted social conflicts. The case studies selected are Aceh in Indonesia, Bougainville in Papua New Guinea, and the Tamils in Sri Lanka. These case studies have been chosen because in addition to being examples of protracted violent conflicts, they have had a substantive international involvement in efforts at resolving the conflict. The chapter considers whether sub-state national actors are in fact willing to explore arrangements for internal self-determination within the larger state, whether such arrangements for internal self-determination within a unitary state is possible and as to why sub-state national actors seek guarantees from international actors for the durability of the internal self-determination arrangement arrived at.

[10] 2010 I.C.J Reports. 403

Chapter five deals with two case studies from the Global North wherein there have been recent and ongoing attempts of sub-state entities that are trying to redefine their relationship with the parent state constitutionally but also extra-constitutionally by way of seeking to democratically secede from the parent state. The case studies selected are Catalonia and Scotland. The chapter seeks to shed light on how important recognitional issues are for sub-state actors and as to whether acknowledgment on the part of the parent state of the uniqueness / self-determining character of the sub-state entity contributes to an environment that provides the opportunity for internal self-determination to work. Secondly it seeks to engage with the question of whether the character of the State with regard to being unitary or federal or otherwise contributes to the workability of internal self-determination. And finally, it tries to shed light on how the demand for referendums as an expression of the 'will of the people' has emerged as a useful tool available to sub-state entities to further legitimise the democratic nature of their demands and more importantly to apply pressure on the parent state to concede more in terms of self-government.

The concluding chapter draws lessons that may be learnt from the case studies for a broader and more refined approach to internal self-determination in international law.

PART I

Chapter 1

The Current Status of the Internal Dimension of the Principle of Self-Determination in Public International Law

Introduction

This chapter seeks to assess the legal pedigree of the internal dimension of the principle[1] of self-determination in international law. The first section (Section 1.1) looks at the manifestation of the principle of self-determination as it developed prior to decolonisation. It traces the modern roots of the idea and the institutional forms in which they were articulated. The second section (section 1.2) looks at the evolution of the principle during the period of decolonisation and looks closely at how anti-colonial movements resisted the idea of self-determination being constrained to self-government at the discretion of colonial powers and helped crystalise independent statehood as a right of colonial peoples. The third section (section 1.3) critically analyses the rise in a state-centric approach to self-determination in the post-colonial context and how parallel developments in international human rights law shaped the current formulation of the principle. The fourth section (section 1.4) chalks out the current status of the principle of self-determination in its internal dimension. The fifth section (Section 1.5) draws from the decision of the Canadian Supreme Court in *Reference re Secession of Quebec*[2] [*Secession Reference Case*] to illustrate how constitutional law interacts with international law on self-determination, the advances made by some deeply divided societies in moving beyond the traditional confines of the nation-state liberal

[1] Please see discussion later in this chapter particularly pages 32-33 on the use of 'principle' as opposed to 'right' to describe self-determination's status as a rule in International Law.
[2] [1998] 2 SCR 217

constitutionalist paradigm towards accommodating claims made by sub-state national societies and how international law is unsupportive of these advances. This final section argues that the ideas associated with internal self-determination as developed by comparative constitutional law can help develop international law. This chapter is not a general study on the evolution of the principle of self-determination. Its interest is limited to the institutional forms of self-determination as developed by Public International Law and a narrower frame of reference is adopted to suit this purpose.[3]

1.1 Self-Government, Statehood and Self-Determination in the colonial context

The idea of self-determination was borne out of the result of the combined influence of liberal and socialist political thought, nationalism and international law.[4] The rise of the nation-state as the foundational idea for organizing the state, the gaining popularity of the idea of self-governance and the rise of international law together contributed to the development of the idea of self-determination. Self-determination in particular has strong deep-rooted antecedents to the idea of a nation-state.[5] The idea of nationality being the organizing principle of nation-states started getting attraction in the early 19th century as a challenge to rule by dynasty and to large empires. Following the first world-war it was being increasingly articulated as the basis for territorial rearrangements and found its most high-profile endorsement in President Woodrow Wilson, who understood the concept as one relating to self-

[3] For extensive treatment of the same see for example: Antonio Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (CUP 1995); James Summers, *Peoples and International Law* (2nd Revised Edition, Martinus Nijhoff 2014); David Raic, *Statehood and the Law of Self-Determination* (Kluwer Law International 2002).
[4] For an account of how liberalism, nationalism and international law interact, see: Summers (n 3) 29-36.
[5] Alfred Cobban, *National Self-Determination* (OUP 1944).

government i.e government with the consent of those being governed.[6] But Wilson despite articulating self-government in universalist terms had doubts about its application outside of the European context. Wilson thought that 'you cannot set weak peoples up in independence and then leave them to be preyed upon'.[7] Parallel to the debate within political liberalism on self-government and self-determination was the debate within Socialism on self-determination. Lenin articulated a more detailed vision of self-determination from the socialist perspective four years before Wilson's Fourteen Points speech, in his lengthy response to Rosa Luxemburg on the socialist commitment to self-determination.[8] Lenin defined self-determination as the political separation of these nations from alien national bodies, and the formation of an independent national state. Lenin was also quite categorical in that it would be wrong to interpret the right to self-determination as meaning-anything but the right to existence as a separate state.[9] However the acceptance of the principle of self-determination as a right to secede is not an endorsement of separatism Lenin argued:

> To accuse those who support freedom of self-determination, i.e., freedom to secede, of encouraging separatism, is as foolish and hypocritical as accusing those who advocate freedom of divorce of encouraging the destruction of family ties. Just as in bourgeois society

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[6] Woodrow Wilson, 'President Woodrow Wilson's Fourteen Points' (Joint Session of Congress, 08 January, 1918) available at <https://wwi.lib.byu.edu/index.php/President_Wilson's_Fourteen_Points> accessed 15 December 2018; Woodrow Wilson, 'Second Inaugural Address' (05 March 1917), <http://avalon.law.yale.edu/20th_century/wilson2.asp> accessed 15 December 2018.
The fifth point provided as follows: 'A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined'.

[7] Foley Hamilton, *Woodrow Wilson's Case for the League of Nations* (Princeton University Press 1923) 130.

[8] Julius Katzer (ed), *Lenin's Collected Works,* Volume 20 (Progress Publishers 1972) 393-454.

[9] Lenin is here responding to Rosa Luxemburg's argument that self-determination does not provide practical answers to nationality questions. Luxemburg had argued that the right of nations to self-determination is essentially not a political and problematic guideline in the nationality question, but only a means of *avoiding that question. Rosa Luxemberg, The National Question - Selected Writings* (Monthly Review Press 1976) Ch.1.

> the defenders of privilege and corruption, on which bourgeois marriage rests, oppose freedom of divorce, so, in the capitalist state, repudiation of the right to self-determination, i.e., the right of nations to secede, means nothing more than defence of the privileges of the dominant nation and police methods of administration, to the detriment of democratic methods.[10]

Lenin argued that people generally know the 'value of geographical and economic ties and the advantages of a big market and a big state'.[11] They will resort to secession, he argued 'only when national oppression and national friction make joint life absolutely intolerable and hinder any and all economic intercourse'.[12]

Lenin saw the creation of national states as necessary to move away from feudalism to capitalism and the creation of national states based on the principle of self-determination as an essential step for the later dismantling of capitalism. Lenin was in support of the nationality principle based on common language.[13] He argued that a common language was essential for commodities-based markets and hence the creation of national societies and states based on language was worthy of support in the long march to socialism[14]. Lenin understood that the anti-colonial struggle in Asian and African states was led by the elite (bourgeoisie) of the national movements and considered their progress to the formation of independent national states as being essential in their path to socialism.

It appears that both Wilson and Lenin agreed that territories could be drawn based on nationalities. Wilson in his fourteen points argued for an 'independent Polish state which should include the territories inhabited by indisputably

[10] Katzer (n 8) 422-423
[11] Katzer (n 8) 423
[12] ibid
[13] Katzer (n 8) 397
[14] '[T]he right of self-determination in Soviet doctrine exists only for cases where it serves the cause of class conflict and so-called socialist justice: it is only a tactical means to serve the aims of world communism and not an end in itself', in D Thurer, 'Self-Determination', in R Bernhardt (ed), *Encyclopedia of Public International Law,* Vol IV (North-Holland 2000) 364.

Polish populations', for 'relations of the several Balkan states to one another determined by friendly counsel along historically established lines of allegiance and nationality' and for a 'readjustment of the frontiers of Italy … along clearly recognizable lines of nationality'.[15] Hence for both Lenin and Wilson nationality was at the centre of their articulation of self-determination. Wilson however popularized the notion of the 'will of the people' whereas Lenin spoke of National Self-Determination. At least up to this point it does appear that Wilson did regard peoples as synonymous with nationalities. In both Wilson and Lenin's articulation of the idea territorial integrity did not hold centre stage.

The difference between the two was that Lenin's articulation was truly universal in that it included the application of the principle to colonial territories as well. But Wilson's approach to self-determination was Euro-centric in nature. He believed that the colonised territories of the Third World needed to be tutored in the art and science of governance before they were ready for self-determination. Wilson who had called for the setting up of the League of Nations had failed in his efforts to include self-determination in the organisation's covenant. In Article 22 the Covenant of the League of Nations[16] provided for a mandate-system over colonial territories, formerly held by Germany, to be overseen by 'advanced nations', 'who by reason of their resources, their experiences or their geographical position' a duty of 'sacred trust towards colonized people under whom the 'tutelage of such peoples'. The stated end goal of the mandate system was self-government, a term, as Antony Anghie puts it, was 'capacious enough to suggest progress toward full sovereign statehood, while not explicitly making this the ultimate and inevitable goal'.[17] The League of Nations thus saw the role of international law via the mandate system as a civilising mission, destined to develop non-European territories into European style sovereign states prior to full self-government. While this represented international law transforming the exploitative rationale for colonialism into a project of civilizing the colonial world, as some scholars have pointed out this was also a sophisticated justification for colonialism and

[15] Cobban (n 5).
[16] League of Nations, *Covenant of the League of Nations*, 28 April 1919 13 AJIL Supp 128 (1919).
[17] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005)121.

the denial of self-government for colonized territories or as a liberal pursuit for the universalization of Western form of statehood.[18] The mandate system according to these scholars sought not to challenge the world order but to stabilise it.[19]

The realization of the impossibility of drawing new state boundaries on the basis of nationality resulted in the League of Nations developing a unique minority treaties system that remains unparalleled in the history of international law. The minority treaties system was mandated to oversee a series of agreements and declarations that were entered into following the redrawing of European borders at the end of the first world war. The system has been hailed to be a unique achievement in that 'it endowed an international institution with a supervisory role for a human rights issue', and for marking a new state of development of international law by attributing new powers to an international organization previously held only by sovereign states.[20] As Hannah Arendt put it the real significance of the minority treaties was that 'now millions of people were legally recognized by international law to live outside normal legal protection and [in need of] an additional guarantee of their elementary rights from an outside body'.[21] The minorities system however was introduced not to enunciate general principles of treatment of minorities but to deal with the consequences of the imperfect implementation of the principle of self-determination in post- World War I Europe and hence had minimal reach. As Preece puts it was a 'consolation prize' for those who were not offered self-determination.[22] It failed because it was seen to be selectively applicable – applicable to the newly emergent states in Central and Eastern Europe. The new states saw them as standards imposed unfairly on them designed to limit their newly won over self-determination.[23]

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[18] Martti Koskenniemi, *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870-1960* (CUP 2001).
[19] Susan Pedersen, *The Guardians: The League of Nations and the Crisis of the Empire* (OUP 2015) 404.
[20] ibid 93.
[21] Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich Publishers 1973) 274.
[22] Jennifer Jackson Preece, *National Minorities and the European Nation-States System* (OUP 1998) 94.
[23] Ibid.

The most interesting contribution of the League of Nations era to self-determination came in its handling of the Aaland Island Question.[24] The Commission of Jurists appointed to hear the Aaland Islands case noted, at the very outset of its opinion,[25] that the League of Nations did not consider the principle to be legal but that it had only political persuasive value. The commission also held that 'under normal conditions' International Law leaves such matters entirely to the domestic jurisdiction of one of the States concerned.[26] It was categorical in noting that 'any other solution would amount to an infringement of sovereign rights of a State and would involve the risk of creating difficulties and a lack of stability which would not only be contrary to the very idea embodied in the term "State," but would also endanger the interests of the international community'.[27] The stability of the state, the commission's opinion confirms, has been a long standing priority for the international community in dealing with self-determination questions.[28] However the commission hinted in a negative statement that a manifest and continued abuse of sovereign power, to the detriment of a section of the population of a State, may give rise to an international dispute.[29]

What is most interesting is the Commission's comments on the relevancy of self-determination in what it described as abnormal times: the Commission opined that the 'formation, transformation and dismemberment of States as a result of revolutions and wars create situations of fact which, to a large extent, cannot be met by the application of the normal rules of positive law'.[30] This transitionary state of affairs means that the territorial integrity question will not arise because it has not been firmly established:

> This amounts to a statement that if the essential basis of these rules, that is to say, territorial sovereignty, is lacking, either because the State

[24] See generally James Barros, *The Aland Islands Question: Its Settlement by the League of Nations* (Yale University Press 1968).
[25] 'Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question', adopted in Paris on September 5th, 1920, *Official Journal of the League of Nations*, Special Supplement No 3, Oct 1920.
[26] Ibid 5.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Ibid 5, 6.

> is not yet fully formed or because it is undergoing transformation or dissolution, the situation is obscure and uncertain from a legal point of view, and will not become clear until the period of development is completed and a definite new situation, which is normal in respect to territorial sovereignty, has been established.[31]

In such situations of transition, the Commission argued the principle of self-determination becomes relevant:

> Under such circumstances, the principle of self-determination of peoples may be called into play. New aspirations of certain sections of a nation, which are sometimes based on old traditions or on a common language and civilisation, may come to the surface and produce effects which must be taken into account in the interests of the internal and external peace of nations.[32]

Finland later in the International Court of Justice in relation to in *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* would argue that the rationale of the Aaland Islands question had continuing relevance.[33] It argued that the First World War and its consequences, colonialism and the prolonged war after the collapse of USSR in Yugoslavia all amounted to situations of abnormalcy where the sanctity of borders should be abandoned in favour of the principle of self-determination.

During the Second World War, the Atlantic Charter signed by the US and UK Governments intending to lay out their vision for post-world war II, confirmed the superiority of the self-determination principle over that of territorial integrity by explicitly providing that the will of the people should be the basis of territorial changes in Europe.[34] It also recognised the right of all peoples to choose the form of government under which they will live; and for the restoration of sovereign rights and self-government to those who have been forcibly deprived

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[31] Ibid 6.
[32] Ibid 6.
[33] 2010 I.C.J Reports. 403 Finland, Written Statement, See further discussion in Chapter 3. Section 3.4.1.
[34] Atlantic Charter, Aug. 14, 1941, annexed to Declaration by United National, Jan. 1, 1942, 55 Stat. 1603, E.A.S. No. 236, 204 L.N.T.S. 382. Point 2 of the Charter.

of them. The Charter chose to use the term self-government and avoided the term self-determination. Self-government was again employed in contradistinction to independent statehood but as referring to a gradual process towards self-government especially for the colonial peoples under the tutelage of the 'advanced nations' reflecting a continuation of the mind-set that existed during the setting up of the League of Nations. British Prime Minister Churchill as co-author of the document insisted in an address to Parliament that the notion of self-government only applied to European states and not to Asia and Africa.[35]

1.2 Self-Government and statehood in the context of decolonisation

The UN Charter[36] in Article 1 (2) refers to self-determination as one of the purposes of the UN. Early commentary on the UN Charter sought to understand this inclusion as another expression of the sovereign equality of states and non-interference in the domestic affairs of the state.[37] This understanding represents one of the first instances where self-determination was employed in defence of sovereignty rather than as a challenge to sovereignty. Article 73 of the UN charter which is the specific article on decolonisation does not refer to self-determination explicitly but uses the term 'peoples' when referring to the population of these territories as being entitled to a 'full measure of self-government'. The *travaux preparatoires* of the UN Charter on Article 1(2) indicates that an early draft of the said article intended self-determination to mean only self-government and not secession,[38] but this view was not conclusively entertained. Article 73 (e) states that member states who administer such territories have the duty 'to develop self-government, to

[35] Churchill said: 'The Progressive evolution of self-governing institutions in the regions and peoples who owe allegiance to the British crown had nothing to do with the emancipation of Europe from Nazism', as cited in RJ Moore *Churchill, Crips and India* (OUP 1979) 42.
[36] *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI
[37] Hans Kelsen*, Law of the United Nations* (Frederick A Praeger, 1950) 199-201; N Bentwich and A Martin, *A Commentary on the Charter of the United Nations* (Macmillan Company 1950) 7.
[38] United Nations Organization, *Documents of the UN Conference on International Organization San Francisco 1945* (Vol VI, United Nations Information Organizations 1945) [Documents of the UN Conference] 296.

take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement'. The reference to a duty to develop self-government according to the particular circumstances of each territory could be on the one hand read as the UN Charter providing space for diverse models of self-government to develop but on the other hand from the perspective of colonized peoples it was yet another representation of the self-assumed burden on the part of colonial powers to civilize colonial territories, undermining their aspirations to full self-government *qua* independence. In this sense there was very little change in the attitude of the colonial powers towards self-determination. But the gains that the anti-colonial movement was making were evident in the fact that a 'full measure of self-government' was codified as the end goal of the decolonization process. When an amendment was moved to Article 73 in an attempt to include 'independence' it was successfully resisted by members pointing out that self-government included independence. During the debate on Article 73 Belgium's suggestion for the extension of the notion of non-self-governing territories to all instances of domination, irrespective of the place of their occurrence and of the identity of the subjugating power, was not accepted.[39] Article 73 and decolonization was restricted to colonies coming under European colonial powers

Article 76[40] on the other hand, which relates to the Trusteeship system (which in itself was a remnant of the colonial attitude towards colonised peoples) provided for self-government or independence of peoples who are part of territories who come under the administration of the Trusteeship system. Herein self-government and independence are provided distinctively with self-government by implication meaning a form less than independence. If as previously referred to, in Article 73 self-government included independence

[39] UN Doc A/C4/SR 253, paras 14-30, 259 and 419, para 25.

[40] Article 76 (b) provides that the one of the objectives of the Trusteeship system shall be to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement.

the question arises as to why they are used alternatively in Article 76. It appears that there was insufficient debate on these nuances. Though Articles 73 and 75 do not make explicit references to self-determination the reference to peoples and their aspirations clearly imply self-determination.

It was also pointed out that peoples could refer to national groups that did not identify with the population of the state[41] and to remedy this it was proposed that it was conjunctively mentioned alongside the principle of equality of states. This view was not accepted.[42] More explicitly it was also stated during the drafting process that the Charter's objective was to ensure equality between states, nations and peoples. There was at a particular stage of drafting a desire among some states to clarify the use of the terms nations, peoples and states and the Secretariat was asked to come up with a memorandum on the matter.[43] The memorandum defined peoples as 'groups of human beings who may or may not comprise states or nations'.[44] Nations it was argued was used in a non-political sense to include colonies, mandates, protectorates, quasi states and states.[45] But what was clear in the way in which peoples was defined that peoples could refer to a section of a population of a state or a state-in-formation (as a result of decolonisation). However, the memorandum was not debated and no decision on the exact use of these terms was agreed upon. In fact, it appeared that there was a desire to keep these terms deliberately ambiguous so that the politics of the evolving times could decide their content.[46] The question was also raised as to whether self-determination referred to the right of secession or the right to have its own democratic institutions.[47] A future date was set aside to debate and resolve the issue but there is no such record of the discussion taking place. This debate has not

[41] Documents of the UN Conference (n 38) 300.
[42] Ibid 704.
[43] UN, *Documents of the UN Conference on International Organisation San Francisco 1945* (Vol XII, United Nations Information Organisations 1945) 142.
[44] UN, *Documents of the UN Conference on International Organisation San Francisco 1945* (Vol XVIII, United Nations Information Organisations 1945) 658.
[45] Ibid 657.
[46] UN, *Documents of the UN Conference on International Organisation San Francisco 1945* (Vol VI, United Nations Information Organisations 1945) 700.
[47] UN, *Documents of the UN Conference on International Organisation San Francisco 1945* (Vol XVII, United Nations Information Organisations 1945) 143.

taken place in the many decades that have followed and the need for clarifying these issues, as this thesis points out, is now overdue.

The UN Charter confirmed that self-determination was available to colonial peoples but it was left to the discretion of the governing powers to decide when these peoples would be ready for full self-government.[48] However, the General Assembly in a series of resolutions significantly clarified the meaning of the charter by taking away the discretion of the administering powers.[49]

The UN General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples[50] (UNGA 1514) is considered to be the most important UN instrument on ending colonialism.[51] The global political consensus in support of the anti-colonial movement pivoted in a document that represented the ethos and values of the movement. It marked an instance where members of the Third World could turn, as Samuel Moyn puts it, a hypocritical rhetoric into a global reality.[52] It showed how International Law could be 'fulfilled from below.[53]' The Resolution in contrast to the UN Charter categorically stated that non self-governing territories and territories under trusteeship have to unconditionally move towards freedom and independence and that economic, social and educational preparedness should not serve as a pretext for delaying independence.

This was the height of the self-determination movement where self-determination was explicitly identified with independent statehood, and lesser forms of self-government in tutelage towards separate statehood were rejected as a continuation of colonialism. But this declaration that was understood to be about colonial peoples did not explicitly restrain references to 'peoples' to

[48] Stefan Oeter, 'Self-Determination' in Bruno Simma et al (eds) *The Charter of the United Nations: A Commentary* (OUP 2012) 319.
[49] Vaughan Lowe has noted that though UN General Assembly resolutions are non-binding, GA resolutions like Resolution 1514 may be considered to be an agreement on how to interpret the UN charter which must be taken into account as per Article 31 (3) of the VCLT on interpretation of treaties, Vaughan Lowe, *International Law* (Clarendon 2007) 91.
[50] GA Res 1514 (XV), UN GAOR, 15th sess, 947th plen mtg, UN Doc A/RES/1514 (XV) (14 December 1960)
[51] *Western Sahara, Advisory Opinion*, IC.J. Reports 1975. p. 12, at para. 56
[52] Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010) 86.
[53] Ibid.

colonial situations. Despite the fact that the declaration was unequivocal in its recommendation of independence as the form of self-government for non-self-governing territories, a subsequent resolution that was passed with the intention of clarifying the practical details of UNGA 1514 and Article 73 of the Charter, provided that independence could take the form of, 'free association with an independent state', 'integration with an independent state' and that these would amount to a 'full measure of self-government', which it will be remembered found mention in Article 73 of the Charter.[54] The choice to settle for something less than an independent state should be made, the resolution provided:

> as a result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes. It should be one which respects the individuality and the cultural characteristics of the territory and its peoples, and retains for the peoples of the territory which is associated with an independent State the freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes[55].

As the US representative opined during the deliberations of UNGA 1514 that:

> The vital test for the administering authority of every dependent area is the test of free consultation with the people through free elections or through some equally valid means of self-determination. This means more than a ceremony in which the people are permitted to ratify a single predetermined decision. It means an actual choice among alternatives. That is the essence of the principle of self-determination of peoples which is included among the Purposes of the United Nations.[56]

[54] UN General Assembly, *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter*, 15 December 1960, A/RES/1541, Principle VI.
[55] Ibid Principle VII.
[56] U.N. General Assembly, 15th Session, 937th Plenary Meeting, Agenda Item 87: Declaration on the granting of independence to colonial countries and peoples, U.N. Doc. A/PV.937 (6 Dec. 1960), 1158.

The logic herein is that the option of independent statehood should be clearly available but that it is for the peoples concerned to make their choice if they so wish to settle for something short of complete statehood.

This point is demonstrated in the ICJ Advisory Opinion in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970) (Advisory Opinion) [*Namibia* case].[57] South Africa argued in the case that self-determination need not necessarily follow a particular pattern, namely universal adult suffrage within a single territorial unit.[58] It implied that arrangements short of separate statehood could satisfy the right to self-determination of the Namibian people and insisted that the will of the people of Namibia be tested through a plebiscite.

President Judge Zafarulla Khan in his separate declaration rejected this argument:

> The representative of South Africa, while admitting the right of the people of South West Africa to self-determination, urged in his oral statement that the exercise of that right must take into full account the limitations imposed, according to him, on such exercise by the tribal and cultural divisions in the Territory. He concluded that in the case of South West Africa self-determination 'may well find itself practically restricted to some kind of autonomy and local self-government within a larger arrangement of Co-operation' (hearing of 17 March 1971). This in effect means a denial of self-determination as envisaged in the Charter of the United Nations.[59]

Judge Khan thus dismissed South Africa's claim that the colonial power could choose internal self-determination as a valid exercise of the right to self-determination on behalf of the Namibian people. However Judge Khan went on to suggest that if indeed Namibia wished to be part of South Africa a free

[57] [1971] ICJ Rep 16.

[58] *Namibia* Case South Africa's Written Submissions, p. 729 available at <http://www.icj-cij.org/docket/files/53/9365.pdf> (last accessed 26 December 2018).
[59] *Namibia* Case Judge Khan Separate Opinion p. 63

and fair referendum should be held under the auspices of the UN, but that South Africa had to first legally end the mandate before the referendum was to be held.[60] Judge Khan opined that if the Namibian people chose as a result of participating in a free and fair referendum to remain with South Africa then such a choice would be an exercise of the right to self-determination. Ultimately then an internal exercise of the right of self-determination would not have been inconsistent with the exercise of the right as long the people had a free and fair opportunity to make that choice in an environment where the colonial mandate had been brought to an end.

UNGA 1514, despite its unequivocal reference to independence, also contained an article that reaffirmed that the disruption of the territorial integrity of a country would be contrary the purposes of the UN Charter.[61] The use of the term 'country' and not 'state', it was suggested, implied the territorial integrity of the colonial territories which had not yet become independent states. But others interpreted it as referring to nations in that the current territorial map of states could be re-drawn to accommodate for example Indonesia's claim over West Papua and Ireland's over Northern Ireland. The term country hence did not decisively provide for any legal clarity.

The issue is whether Resolution 1514 converted the principle of self-determination into a right to self-determination is a subject that currently animates the proceedings of the International Court of Justice in the case of *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965 (Request for Advisory Opinion)* [*Chagos Archipelago* case].[62] The position taken by the UK in the case is that as of 1968 (the material year of dispute in the case) self-determination was only a principle of international law and not a right. It claims that it became a right with the adoption of the

[60] Ibid p 65-66.
[61] Principle VI, UNGA Resolution 1514.
[62] UNGA Resolution 71/92 adopted on 22 June 2017

Friendly Relations Declaration.[63] Mauritius takes up the position that self-determination became a right with UNGA 1514.[64]

The question of whether self-determination is a right or principle assumes significance in the sense that if it were deemed to be a right it will signal the need for a colonial power to proceed to independent statehood immediately without regard to the question of whether the territory in question was ready to be independent. As has been discussed above, there is enough to argue that that the principle did evolve into a right to independent statehood in the colonial context following UNGA 1514. That is to say, one of the achievements of UNGA 1514 was to undoubtedly assure that the principle of self-determination included a right to independent statehood. But the articulation of the principle as a right to statehood did not, as was demonstrated in this section preclude the ability to explore other alternatives as long as the other alternatives were not seen to be a cynical attempt to deny independent statehood. Independent statehood had to be on the table. Hence in summary the question of whether self-determination is a 'principle' or 'right' under international law then is limited to whether there is an institutional form that the principle lends itself in the form of a right. The answer is a resounding yes in the colonial context. Whether there was enough in terms of customary international law to claim that UNGA 1514 established this right is beyond the scope and purpose of this thesis.

The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations[65] ['Friendly Relations Declaration'] is considered to be the most significant legal document in the international legal development of self-determination as a right of peoples. The Friendly Relations Declaration recognized a right to self-determination as belonging to all peoples. The decision to vest the right in peoples was a decision arrived at after a conscious

[63] Written Statement by UK before the ICJ in the *Chagos Archipelago* case. Available here <https://www.icj-cij.org/files/case-related/169/169-20180215-WRI-01-00-EN.pdf> accessed on 15 December 2018, p. 144, para 8.75, 8.81

[64] Written Statement by Mauritius in the *Chagos Archipelago* case. Available here <https://www.icj-cij.org/files/case-related/169/169-20180515-WRI-04-00-EN.pdf> accessed on 15 December 2018

[65] GA Res 2625 (XXV), UN GAOR, 6th Comm, 25th sess, 1883rd plen mtg, Agenda Item 85, UN Doc A/RES/2625 (XXV), annex (24 October 1970)

debate on whether the right should be one vested in states or peoples. This was important as the resolution was adopted when colonial empires had mostly been broken down. As Gaetano Arangio-Ruiz put it in his 1972 Hague Academy Lectures, the vesting of the right to self-determination in peoples (in what was the early stages of the post-colonial context) was 'a daring statement'.[66] Arangio-Ruiz points out the non-reference to GA Resolution 1514 in the 2625 Resolution as evidence for the fact that the drafters of the 2625 did not want to confine self-determination merely to the colonial question. Arangio-Ruiz considers that the absence of pressure for inclusion from Third World countries of UNGA 1514 was indicative of the fact that they perceived that 'self-determination is not just another word for decolonisation in a narrow sense' and that 'they understood that colonial self-determination is but an aspect of a larger problem'.[67]

In paragraph 5 (2) the declaration provides that there should be 'a speedy end to colonialism, having due regard to the freely-expressed will of the people'. The choice of the 'will of the people' terminology meant that self-determination was not tied to a particular institutional design. Within the colonial context, the phrase was supposed to reflect the understanding that certain colonial territories may not desire to become separate states.[68] Hence paragraph 5 (4) explicitly recognized that 'free association or integration with an independent State or the emergence into any other political status freely determined by a people' would also constitute a valid expression of the right to self-determination. It will be noted that compared to UNGA Resolution 1514, the terms 'any other political status freely determined by a people' have been now added. Once the 'civilisational mindset' of international law was set aside it appears that Third World states were more comfortable with self-determination language that did not point to separate statehood. The significance of this formulation for peoples outside the colonial situation and for consideration of the application of the right within a state needs to be underlined. As noted

[66] Gaetano Arangio-Ruiz, 'The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations' in *Collected Courses of The Hague Academy of International Law* (Sijthoff 1974) 547 at 565.
[67] Ibid 566.
[68] Ibid 567.

above non-colonial situations were indeed being considered by the drafters of the resolution in drafting paragraph 5(4).

Paragraph 5(7) is the part that has caused the most excitement about the Declaration given that it seeks to address the right to self-determination in its interaction with the principle of territorial integrity:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

The first half of the paragraph in its positive formulation gives priority to territorial integrity over self-determination while in its saving clause conditioning it on respect for the principle of equal rights and self-determination and a government representing the whole people belonging to the territory without distinction as to race, creed or colour. According to Rosenstock, who was part of the US State Department's legal team at that time, the savings clause reaffirms the continuing applicability of self-determination within states that have become independent from colonialism. He argues that 'a *contrario* reading of the paragraph (through the savings clause) should not be misunderstood to limit the sweep and liberality of the paragraph'.[69]

But Rosenstock may be overstating the liberality and sweep of the savings clause. The terms 'a government representing the whole people belonging to the territory without distinction as to race, creed or colour' are far from clear.[70] Both the US and UK draft of the paragraph sought to more clearly require a democratic representative Government as fulfilling the requirement of Self-

[69] Robert Rosenstock, 'The Declaration of Principles of International Law Concerning Friendly Relations: A Survey', *65 AJIL* 713, 732

[70] Michael Pomerance, *Self-determination in Law and Practice: The New Doctrine in the United Nations* (Martinus Nijhoff 1982) 38-39 citing the remarks of the Burmese Representative, 1967 Session of the Special Committee on Friendly Relations, UN Doc. A/AC.125/SR.68

Determination. The UK draft in particular sought to locate the right of self-determination as also being available to 'those people who were geographically distinct and ethnically or culturally diverse from the remainder of the territory administering it if the Central Government was not representative of the people located in that territory'.[71] A number of countries from the Global South such as India and Kenya objected to this proposal. Kenya argued that enunciating the right as being available to each group 'would be carrying the principle to an absurd extreme'.[72] The UK amended the draft to refer to a more simple representative form of government as satisfying the right to self-determination. But even this met with resistance. The United States representative went to the extent of arguing that by linking self-determination to representative government it would be easy to reject claims to ethnic self-determination[73]. Even this did not satisfy the detractors. The Lebanese text referring to non-distinction on the basis of race, creed and colour was finally adopted replacing the description of a representative Government. The final text is indicative of the refusal to equate self-determination to just merely democratic government. The wording of the final draft is far from clear. The reference to 'whole people' in paragraph 7 also seems to further the notion that the population of a state constitutes a singular people. It is also not clear as to what 'distinction as to race, creed or colour' means and how these categories of 'race, creed and colour' relate to the notion of the 'people'. Later on, in the Vienna Declaration of 1993 and the UN Fiftieth Anniversary declaration the formula was repeated with the terms 'race, creed and colour' being replaced by 'without distinction of any kind'.[74]

The Friendly Relations Declaration then standing at the margins of history - from colonial to post-colonial – averred that self-determination continued to be of importance to regulation of world affairs. But the indeterminacies of its content would lay the foundations for both hope and despair for many 'peoples' across the world who saw emancipatory potential in the principle.

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[71] UN Doc A/AC125/SR69, Cassese (n 3) 115.
[72] UN Doc A/AC125/SR107, 88, 4 September 1969.
[73] US, A/AC125/SR92 (1968), 133.
[74] UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, para 2. UN General Assembly, *Declaration on the Occasion of the 50th Anniversary of the United Nations:* 9 November 1995, A/RES/50/6, para 1

The International Court of Justice for its part continued to invoke self-determination in universalist terms though such statements were made in the contexts of cases that had more to do with the process of decolonization. In the *Namibia* case, previously referred to, the Court referred to the principle of self-determination as giving the peoples of non-self-governing territories the right to choose their political status.[75] In the *Western Sahara* Advisory Opinion Case, the Court referred to the right of a people of a territory to determine their future political status by their own freely expressed will as the right of that population to self-determination[76]. Two decades later in the *East Timor* case the Court stated that self-determination was 'one of the essential principles of contemporary international law' and had an '*erga omnes* character' that was 'irreproachable'.[77] The Court stated similarly in the *Palestinian Wall Advisory Opinion* Case.[78]

Despite the fact that colonization in the usual sense of the word (the dismantling of European colonial rule over most of Asia and Africa) is considered to be over, the issue remains on the UN agenda. The UN Special Committee on Decolonisation currently lists 17 territories as being non-self-governing. 10 of these are administered by the UK, 3 by the US, 2 by France and 1 by New Zealand. Western Sahara is not claimed by any state as being administered by it. The critical issue with most of these cases is as to whether the issue should be framed as a self-determination issue or a territorial sovereignty issue. For example, in Gibraltar and the Falklands, Spain and Argentina respectively maintain that it is a sovereignty issue and that self-determination should not apply where there is a dispute regarding the former. A General Assembly resolution seeking to assert that self-determination for these territories arises only where there is no sovereignty dispute was rejected by a majority vote. Most of the administering states claim that the permanent

[75] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ Reports 16, para. 52.
[76] *Western Sahara, Advisory Opinion*, I.C.J. Reports 1975, p. 12, at p. 36, para. 70.
[77] *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90, at p.102, para. 29
[78] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p. 136, at paras. 87-88, 118, 122, 149, 155-6

population in the territory have chosen by democratic will to be associated with the administering state in either of the forms stipulated in UNGA Resolution 1514.[79]

To conclude, the principle of self-determination with much difficulty transformed itself into a legal principle governing the de-colonisation process and post-UNGA 1514 into a concrete right to statehood for colonies. Up until the UN Charter was enacted and the end of the Second World War, States that had colonies in Asia and Africa tried to appropriate the self-determination process by converting it into a gradual process of self-government overseen by the colonial powers and sanctioned by international law, whereby colonial peoples would be trained in the art and science of self-government. This led to the anti-colonial movement seeking to move the principle of self-determination closer to the notion of statehood in the colonial context. The emphasis on independent statehood during the colonial context for the right reasons however led to self-determination being closely associated with a particular institutional form. But as has been shown in this section, once there was enough traction for the idea that colonial territories were entitled to independent statehood if they so wished, there was greater space given for other forms of institutional arrangements short of independent statehood. Alternatively, the reluctance of international law to prescribe full independence as the solution to colonialism may be read as being persuaded by the view that the model of self-determination including independence could not be externally imposed, without contradicting the notion of self-determination, and hence that even the choice of independence over other forms of self-government had to be self-determined.

[79] Speaking before the Special Committee on Colonisation in 2015 the Argentinian Foreign Minister argued that 'The British attempt to apply that principle to the population implanted in the Malvinas Islands was diametrically opposed to the goals established by the international community with a view to recognizing the right to self-determination. That attempt would mean that the right to self-determination of a people, conceived as a tool to end colonialism, would apply as a tool to perpetuate it'. General Assembly, Special Committee on Decolonisation, 2015 Session, 6th and 7th meetings, GA/COL/3283, 25 June 2015 available at <http://www.un.org/press/en/2015/gacol3283.doc.htm> last accessed on 15 December 2018

1.3 Self-Government and Statehood in the Post-Colonial Context

Following the setting up of the UN, as colonial self-determination in terms of independent statehood was getting recognized widely in practice the question of the future of self-determination as a principle ran into difficulty. As described in the previous section, despite the overt preference for independent statehood as the best means of ending colonial regimes, self-determination was being enunciated universally as about the will of all peoples. We also saw that there was resistance to the idea of self-determination as prescribing a particular form of Government. But for Third World states a growing concern was also about how self-determination could turn to challenge the newly formed state structures.

I previously referred to the fact that the early discourse (during the inter-war period) on self-determination gave self-determination pride of place over territorial integrity. This was in line with the view taken by the Commission of Jurists in the Aaland Island case that during periods of transition where territorial integrity was unclear and in a state of flux the principle of self-determination gained prominence and was even instructive in the manner in which the territorial question was settled. This was a period where self-determination was promoted as an instrument for world peace during which territorial adjustments based on the nationality principle were considered legitimate. Following the end of World War II and the gradual end of colonialism, concerns started being aired particularly by the Global South that self-determination could be used to de-stabilise the peace and security of the newly independent states. The major concern was that in the geo-political climate that existed in the bi-polar world at that time (with US and USSR being the major power blocs), self-determination could be used to alter territories and change regimes by powerful states. This tension was reflected in the drafting of GA Resolution 2625 where states from the Global South sided with the USSR in making sure that self-determination was not tied to democracy. Relatedly there was also concern about linking self-determination with human rights. Jawaharlal Nehru, the then Prime Minister of India, addressed this

question at the Bandung Conference in 1955. In response to linking human rights with self-determination Nehru argued:

> If we look at this question in its entirety, as the honourable delegates from Iran and Iraq said, and impartially, and if we examine the state of freedom, the state of individual or national freedom, the state of democratic liberty or democracy itself in the countries represented here, well, I feel many of us are lacking, terribly lacking. . . . If we sit down and discuss these matters in all integrity in its entirety, then we shall have to go very far and discuss how far countries represented here fulfil that noble standard which we laid down yesterday in the human rights or even the ordinary tenets of democracy and freedom.[80]

Nehru argued that the Third World should not link self-determination with human rights as it would boomerang on them, be used by self-determination movements on their contested territories and be used as an excuse by the West to interfere in the domestic affairs of their newly formed states. Nehru felt that it was best that the idea of self-determination be limited to the colonial situation. But warnings like that of Nehru's did not deter the Global South for preferring a human rights approach to self-determination. The Bandung conference positioned self-determination as a fundamental human right. But the tension between three approaches continued to be at the centre of the debates at the UN throughout the 1950s. The Global South was caught in the middle between the US and USSR which wanted to use self-determination as a propaganda tool against each other. The US emphasised democracy with the view to criticizing the USSR's system of governance, and the USSR sought to lay emphasis on national sovereignty in an attempt to criticize European colonialism. The Afro-Asian bloc at the UN presented a draft that was finally accepted as UNGA Resolution 1514 that stood by a democratic approach to self-determination and was also unequivocally condemnatory of the progressive approach to self-determination in colonial situations, thus distancing themselves from both the US and USSR bloc. The UN rights

[80] Jawaharlal Nehru, "Problems of Dependent Peoples," (Address in closed session, Political Committee, 22 April 1955, File No SI/162/9/64-MEA), as reproduced in S. Gopal, *Selected Works of Jawaharlal Nehru* (OUP 1984) 103.

covenants – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in their Common Articles 1 also witnessed similar divisions with Western states opposing its inclusion given its 'political character', and the USSR and the Afro-Asian bloc insisting on its inclusion. The latter succeeded given their numerical majority in the UN unlike in the early period of the UN when the resistance to its inclusion in the Universal Declaration of Human Rights was successful. But as previous discussion on GA resolution 2625 shows, while there was support to enmesh self-determination in the human rights movement there was resistance to the idea of linking it to democratic government. But even the support for a human rights approach to self-determination lost momentum soon after. The practice on self-determination particularly from the Global South took the form of a state-sovereigntist approach to self-determination. As Roland Burke in in his comprehensive analysis of the competing approaches to self-determination during the early period of the post-colonial context notes,

> The dominance of the Third World majority had ensured the inclusion of self-determination in the catalogue of rights, but it had done nothing to ensure its promise was fulfilled. By the mid-1960s, the right to self-determination had become little more than the one-sided anticolonial weapon that the self-interested European critics had charged it to be. The claims of the colonial powers had been unjust in the 1950s, but when the two human rights covenants were passed in 1966, the rhetoric of independence as the gateway to democracy had begun to look less and less plausible. Postcolonial regimes had proven to be anything but democratic, from "Nkrumahism" in Ghana, to "Guided Democracy" in Indonesia, to "Basic Democracy" in Pakistan. The self-determination of "sovereignty" had consumed its "democratic" sibling.[81]

In the previous section I referred to Gaetano's assessment that Third World States were enthusiastic in their embrace of self-determination to non-colonial situations. In light of the above Gaetano's view expressed in the 1970s seems to be very premature. Crawford Young was probably more accurate in his

[81] Roland Burke, *Decolonisation and the Evolution of International Human Rights* (University of Pennsylvania Press 2010) 58.

assessment that human rights was merely an 'instrumental norm for the anticolonial movement, a means to the transcendent end of immediate independence'.[82]

The state-sovereigntist vision of self-determination however had more content to it than a push back on human rights and democracy simpliciter. The now new sovereign nations turned out to be zealous protectors of the notions of territorial integrity in the name of internal stability and order against the claims made to self-determination by peoples part of their own state. The principle of *uti possidetis* rose to prominence in the same period. The ICJ confirmed the superiority of the *uti possidetis* principle in *Burkina Faso v Mali* [*Burkina Faso* case]:

> At first sight this principle [*uti possidetis*] conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.
>
> Thus, the principle of *uti possidetis* has kept its place among the most important legal principles, despite the apparent contradiction which explained its coexistence alongside the new norms implied. Indeed, it was by deliberate choice that African States selected, among all the classic principles, that of uti possidetis.[83]

Ad hoc Judge Francois Luchaire in his separate opinion pointed out however that this dichotomisation and hierarchical views of *uti possidetis* over self-

[82] Crawford Young, 'African States and the Search for Freedom', in Robert H Taylor (ed) *The Idea of Freedom in Asia and Africa* (Stanford University Press 2002) 9-32 at 32.
[83] *Frontier Dispute (Burkina Faso v Mali)* (Merits) [1986] ICJ Rep 554, [25] and [26].

determination may not adequately explain the process of decolonization in Africa. He pointed out that 'the frontiers of an independent State emerging from colonization may differ from the frontiers of the colony which it replaces, and this may actually result from the exercise of the right of self-determination' and provided examples of how different units of former colonies became part of one or the other state or an independent state[84]. (Examples include Togo's accession to Ghana, Northern Cameroon with Nigeria, and British and Italian Somaliland becoming one state of Somaliland). This conclusion is also true for Asia as was seen in the redrawing of boundaries and creation of two new states in India and Pakistan.

Ad hoc Judge Lucaire also claimed that this experience should lead to the conclusion that 'the colonial process must be regarded as finally over once the inhabitants of a colony have been able to exercise this right of self-determination'.[85] The question then is as to whether a component of a colony may claim that the colonial process has not been complete because its right to self-determination has not been honoured. Typically, most self-determination claims made by peoples in the formerly colonized Global South are rooted in claims that the colonization processes did not take account of their right to self-determination.

Stability, peace and order, which had been previously used by colonial powers to delay the claim to self-determination by colonial peoples, were used by states in the Global South that had multinational populations to brutally suppress self-determination claims within their own borders. This is true, for example, of India in their treatment of Kashmir and the North East, Sri Lanka in terms of the Tamils, China in its treatment of the Tibet question, Indonesia in its treatment of the Aceh question, and Nigeria's handling of the Biafra question. As Hannah Arendt put it 'the newly established states' who had championed the 'liberating idea of self-determination' now 'found themselves in the role of the oppressor'.[86]

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[84] Ibid, 653
[85] Ibid
[86] Hannah Arendt, Origins of Totalitarianism 271 as cited in Christian Volk, 'The Decline of Order: Hannah Arendt and the Paradoxes of the Nation-State' in Seyla Benhabib (ed), *Politics in Dark Times: Encounters with Hannah Arendt* (CUP 2010) 172-197, 176

The legal reflection of this attitude is seen in India's reservation to Common Article 1 of both the International Covenants.

> `the right of self-determination' appearing in [this article] apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation--which is the essence of national integrity.[87]

France, Germany and Netherlands objected to this reservation as did Pakistan as violating the very spirit and content of Article 1.[88] Indonesia similarly entered an interpretation that 'the right of self-determination' appearing in this article do not apply to a section of people within a sovereign independent state'. Most states that were former colonies also took up statist notions of self-determinations in their submissions before the International Court of Justice in the *Kosovo Advisory Opinion Case*, as will be seen later.

1.4 Internal Self-Determination in the post-colonial international legal discourse.

The argument for self-determination as an exercise by the people of a state, understood as a single *demos*, choosing their government started to gain attraction in the post-colonial context. Increasingly it started being considered as the internal dimension of the right to self-determination.

The distinction between internal and external was first mentioned during the drafting of the International covenants on Human Rights when Syria mentioned the 'domestic' component of the right as the right of peoples to choose a form of self-government, adopt representative institutions and freely choose a form of Government.[89] The external aspect in Syria's submission was independent statehood. Syria did not clarify as to whether it was equating peoples with the whole people of a state but in general had stated that the right of self-

[87] Cited in Hurst Hannum, Autonomy, Sovereignty, and Self-Determination: The Accomodation of Conflicting Rights (University of Pennsylvania Press 1996), 41-42.
[88] Ibid
[89] Syria, 6 GAOR (1951) 3rd Cmttee., 397th mtg., (A/C.3/SR.397) para 5

determination was a right available to all nationalities. Netherlands also during the drafting process similarly fashioned internal self-determination as a right of people to determine the form of Government.[90]

The practice before the Human Rights Committee, entrusted with oversight of the International Covenant on Civil and Political Rights, indicates diverse interpretations of the notion of internal self-determination. States in their reports identified internal self-determination as either relating the form of government, or the distribution of power between the central government and the periphery[91] and as with regard to the relation between different ethnic groups in the state.[92] Members of the Committee have also entertained different views of what constitutes internal self-determination in their deliberations which exhibit no coherence or anything meaningful.[93]

The HRC in its concluding observations on state reports has steered clear from commenting on self-determination claims that do not relate to colonial situations or indigenous peoples. When dealing with States that clearly have a self-determination problem it has chosen to raise individual human rights issues that affect those communities that demand greater self-determination within the state or treat those problems as relating to Article 27 (on minority rights) and thus have deliberately side-stepped the self-determination issue. For example in its concluding observations on Cyprus, the committee raised issues faced by Turkish Cypriots in gaining employment and identity cards but says nothing under article 1.[94] In its concluding observations on Turkey, the HRC spoke of the problems of Kurds under Article 27 of the ICCPR as relating to the Kurds' right to practice their culture and use their own language.[95] By contrast the HRC has been willing to make recommendations under Article 1 as it related to indigenous populations, as in the cases of Norway, Mexico, Finland, Denmark, Canada and Australia. The Human Rights Committee in its

[90] Netherlands, 7 GAOR (1952) 3rd Cmttee., 447th mtg., (A/C.3/SR.447) para 4
[91] See for example 4th Periodic Report of Cyprus, CCPR/C/CY/4, paras 7 - 11
[92] Summers (n 3) 343.
[93] Ibid, Footnote 357.
[94] See for example UN Human Rights Committee (UNHRC), *UN Human Rights Committee: Concluding Observations: Cyprus*, 6 April 1998, CCPR/C/79/add.88, para 18.
[95] UNHRC, *UN Human Rights Committee: Concluding Observations: Turkey,* 13 November 2012, CCPR/C/TUR/CO/1, para 9.

individual complaints procedure has refused to entertain complaints under Article 1 citing its collective character.[96]

The most straightforward reference to the classification on the right to self-determination into its internal and external varieties from within the UN Human rights treaty bodies comes from the Committee on the Elimination of All Forms of Racial Discrimination.[97]

> In respect of the self-determination of peoples two aspects have to be distinguished. The right to self-determination of peoples has an internal aspect, i.e. the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level as referred to in article 5 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination. In consequence, governments are to represent the whole population without distinction as to race, colour, decent, national, or ethnic origins. The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination, and exploitation.

The committee's equation of the internal aspect of the right to self-determination with the right of every citizen to take part in the conduct of public

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[96] *Mikmaq v Canada*, HRC, Communication No. 78/1980, views adopted on 29 July 1984; *Lubicon Lake Band v Canada*, HRC, Communication No. 167/1984, Views adopted on 26 March 1990; *Kitok v Sweden*, HRC, Communication No. 197/1985, Views adopted on 27 July 1988; *Vid. Marshall et al v Canada*, HRC, Communication No. 205/1986, Views adopted on 4 November 2006; *EP et al v Colombia*, HRC, Communication No. 318/1988, Views adopted on 25 July 1990; *AB et al v Italy*, HRC, Communication No. 413/1990, Views adopted on 5 November 1991; *RL et al v Canada*, HRC, Communication No. 358/1989, Views adopted on 2 November 1991; *Apirana Mahuika et al v New Zealand*, HRC, Communication No. 547/1993, Views adopted on 20 October 2000; *JGA Diergaardt et al v Namibia*, HRC, Communication No. 760/1996, Views adopted on 25 July 2000; *Gillot et al v France*, HRC, Communication No. 932/2000, Views adopted on 15 July 2002.

[97] UN Committee on the Elimination of Racial Discrimination, 'General Recommendation 21, The right to self-determination' in 'Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' UN Doc HRI/GEN/1/Rev.6 at 209 (2003), para 4.

affairs was not very well explained. The 'right to determine political status' aspect of the right to external self-determination was allocated merely to the external dimension of the right, thus appearing to confirm the age-old, outdated wisdom that political status was only realizable through independent statehood. But the committee did not take cognizance of the fact that the ICCPR had made a distinction between the right to self-determination and minority rights.[98] It also was keen to note that it supported the Declaration of Friendly Relations conclusion that none of this is to be understood as supporting the dismemberment of existing states where they conduct themselves in accordance with the 'principle of equal rights and self-determination of peoples and possessing a government representing the whole people belonging to the territory without distinction as to race, creed or colour'.[99] The committee also noted that 'international law has not recognized a general right of peoples to unilaterally declare secession'[100]. Secession was possible, the committee suggested, only by mutual consent between all parties. It stated that it 'follows the views expressed in the Agenda for Peace, namely that a fragmentation of States may be detrimental to the protection of human rights as well as to the preservation of peace and security'.[101]

The Helsinki Final Act adopted by the Organisation for Security and Cooperation in Europe in 1975 and signed by 35 states is a non-binding declaration which nevertheless has been widely cited by international and domestic courts.[102] The Helsinki Final Act in Principle VIII (2) articulated that all peoples always have the right in full freedom to determine when and as they wish their internal and external political status without interference and to pursue as they wish their political, economic, social and cultural development. In Principle VIII (1) it was stated that the right shall be respected 'at all times' in accordance with the charter and territorial integrity of states. The reference to internal self-determination herein was understood by many states to mean the right of a people of the whole state to determine its own political economic

[98] Ibid para 1.
[99] Ibid para 6.
[100] Ibid.
[101] Ibid.
[102] Summers (n 3) 276

and cultural systems[103]. It was not understood to refer to the right of a particular set of people distinct from the whole population to internal self-determination. The primary objective of the Western States in mooting the principle of internal self-determination was to score propaganda points against the USSR and to provide encouragement to Eastern Europe to embrace liberal democracy and align with their geo-political interests.[104]

African states which took a hard-line position on the non-applicability of self-determination in the post-colonial context,[105] however, advocated the right of self-determination in a more universal manner in the African Charter on Human and People's rights. The charter in Article 20 speaks of the unquestionable right to self-determination of all peoples including colonial and oppressed peoples. The African Commission on Human and People's rights in 1995 in a matter relating to the Katangese Peoples' right to self-determination from Zaire interpreted Article 20 of the Charter as follows:

> The Commission believes that self-determination may be exercised in any of the following ways independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people but fully cognisant of other recognised principles such as sovereignty and territorial integrity.
>
> In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in Government as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that Katanga is

[103] Summers (n 3) 279, 280.
[104] Harold S Russel, 'The Helsinki Declaration: Brobdingnag or Lilliput?' (1976) 70 AJIL 242, 255-257. Mr Russel was the Chief Negotiator for the US at the Helsinki Conference.
[105] S Kwaw Nyameke Blay, 'Changing African Perspectives on the Right of Self-Determination in the Wake of the Banjul Charter on Human and Peoples′ Rights' (1985) 29 (2) Journal of African Law 147-159, 149-152.

> obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire. [106]

The Commission is quite progressive in identifying self-determination in its diverse forms but, in identifying independence as one such form and then imposing the condition that they have to still meet the principle of territorial integrity, lacks coherence. In the second paragraph quoted above the commission is suggesting the formula that egregious violations of human rights and the lack of a right to internal self-determination may justify external self-determination. However, the restriction of internal self-determination to Article 13(1) of the Charter which deals with the right to take part in elections[107] is a low bar for the right to internal self-determination that in practice is not adequate to deal with the claims of self-determination. Here again we see the pitfalls of associating the right to internal self-determination along the lines of liberal participatory/electoral democracy.

In the ICJ case of *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, (Advisory opinion)[108] [Kosovo Advisory Opinion Case] internal self-determination was widely used by states in their submissions.[109] It is noteworthy that both states which argued for the Declaration of Independence's legality (for example Germany, Denmark, Ireland) and against (for example Cyprus, Serbia) referred widely to the notion of internal self-determination. Helen Quane is of the opinion that the written statements made by States 'represent the first substantial body of practice to explicitly recognize such a right outside the indigenous context.[110] But none of these statements provided a clear idea as to what internal self-determination actually meant. Germany spoke of internal self-determination being the enjoyment of a 'degree of autonomy within a larger entity', 'deciding

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[106] *Katangese Peoples' Congress v Zaire*, African Commission on Human and Peoples' Rights, Comm. No. 75/92 (1995), Communication No 75/92 (Application No) IHRL 174 (ACHPR 1995)

[107] For a detailed discussion see Dirdeiry M Ahamed, *Boundaries and Secession in Africa and International Law* (CUP 2015) 203.

[108] ICJ 423 (ICJ 2010), 22nd July 2010

[109] See chapter 3 for a detailed discussion of the Kosovo Advisory opinion and submissions by states before the Court.

[110] Helen Quane, 'Self Determination and Minority Protection After Kosovo' in J Summers (ed) *Kosovo a Precedent?* (Martinus Nijhoff 2011) 181-212.

issues of local relevance at a local level'.[111] Cyprus for example defined it as a the 'right belonging to the people of the population as a whole to choose a form of government and have access to constitutional rights'.[112] Most states, for example Albania,[113] Denmark,[114] Estonia,[115] Ireland[116] and the Netherlands.[117] chose not to provide an explanation or a definition at all.

The court explicitly refused to provide an opinion on the scope of the right of self-determination outside the colonial context.[118] Judge Yusuf in a separate opinion held that external self-determination would be unavailable outside the colonial, alien, foreign domination context even if it was the will of a particular ethnic group as a whole.[119] He however stated that international law would pay close attention to claims of external self-determination where there was a denial of internal self-determination and particularly where there were large scale atrocities committed.[120] Judge Cancado Trinidade averred that the label 'remedial' was immaterial and that the principle of self-determination applies in new situations of systematic oppression, subjugation and tyranny.[121] But for reasons I will provide in detail in Chapter 2 to link the right to self-determination *qua* an independent state to the notion of remedial secession is highly unsatisfactory. Furthermore, both Judges Yusuf and Trinidade also unfortunately also refer to internal self-determination only in passing without expounding on the subject in any detail.

The most definitive development of the notion of internal self-determination in the past decade has been in the area of self-determination of indigenous peoples. Article 3 of the Declaration of the Rights of the Indigenous Peoples[122] provides that indigenous peoples are 'peoples' and have the right to self-

[111] Kosovo Advisory Opinion Case, Germany, Written Statement [WS], p. 33
[112] Cyprus, Written Statement, para 135
[113] Albania WS, para 75
[114] Denmark WS, p. 12
[115] Estonia WS, p. 4
[116] Ireland WS, p. 30
[117] Netherlands WS para 3.6
[118] Kosovo Advisory Opinion (n 106) para 79
[119] Ibid, Separate Opinion of Judge Yusuf, para 10.
[120] Ibid.
[121] Ibid, Separate Opinion of Judge Trindade, para 184-185
[122] *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, 107th plenary meeting Issued in GAOR, 61st sess., Suppl. no. 49.

determination. Article 4 provides that this right means their right to autonomy or self-government in matters relating to their internal and local affairs. Article 5 and 20 provide that indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions. Article 46 adds the usual caveat in UN instruments that the recognition of indigenous peoples as holders of the right to self-determination shall not imply a right to dismember a state – in other words external self-determination. Karen Engle in an illuminating article shows how acceptance of this article was a significant compromise on the part of indigenous peoples.[123] It is through a discursive move from self-determination language to human rights and from surrendering political self-determination for cultural self-determination, Engle claims that the indigenous people were able to win over the Declaration.[124] The argument was made by a number of states that indigenous peoples was a distinct category of peoples and hence the kind of self-determination articulated in the Declaration had nothing in common with the rights of peoples to self-determination.[125] The ILO Convention No 169 of 1989[126] had a similar provision that distinguished indigenous peoples from other peoples. The representatives of Indigenous peoples wanted them to be identified with the general designation of peoples. The Declaration's wording reflects an attempt to locate indigenous peoples as part of the larger classification of 'peoples' but still distinct within it. Similar to the lack of definition of peoples in self-determination instruments, the term indigenous peoples was also left undefined. Representatives of Indigenous peoples insisted that no definition should be imposed and put forward a subjective approach to defining peopleshood[127]. The ILO Convention recognized this. Article 8 of the Declaration implicitly also recognized this by providing that indigenous peoples have a right to determine their own identity and membership. The lack of a definition meant that many countries in the Global

[123] Karen Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22(1) EJIL 141
[124] Ibid 150-160
[125] Summers (n 3) 258
[126] *Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169)*, 27 June 1989, 1650 UNTS 383 28 (Adopted 27 June 1989, entered into force 5 September 1991).

[127] Summers (n 3) 259

South like India, Indonesia and Pakistan chose to identify their whole population as being indigenous.[128] These states have sought to classify indigenous peoples as a New World settler states issue.

The self-determination of indigenous peoples, including acknowledgment of their right to self-determination internally, finds clearer articulation in international law when compared to that of the rights of numerically smaller nations demanding self-determination. Will Kymlicka has rightly pointed out that this firewall drawn between indigenous peoples and national minorities is morally indefensible.[129]

The post-colonial interpretation of internal self-determination has struggled to move beyond confining it to democracy and choice of form of Government. The reason is twin fold: Firstly, the complete overtake of the principle of self-determination by the human rights agenda. Secondly the perpetual fear that self-determination for a people within a state would eventually spiral to a demand for secession. Third world states also saw self-determination as a potent weapon in the hands of the western nations with which they could meddle in the internal affairs of their countries. A combination of these factors has led to internal self-determination being instrumentalised in the service of liberal peace which do not take account of the structural first order problems relating to state formation in deeply divided societies.[130] This tension between international law and the problems of deeply divided societies is evident in the Canadian Supreme Court's handling of the *Canada Secession Reference* case.

[128] India 61 GAOR 2006, plenary meetings, 108th mtg., (A/61/PV.108), p.2; Indonesia, ibid 4; Pakistan, ibid.
[129] Will Kymlicka, 'Beyond the Indigenous/Minority Dichotomy?', in S Allen and A Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011).
[130] Explored in detail in Chapter 2

1.5 Internal Self-Determination in Constitutional Law: *The Canada Secession Reference Case*

The Supreme Court of Canada's decision in *Reference re Secession of Quebec*[131] is the most cited judicial authority in the discussion on internal self-determination. The court was asked by the Federal Government of Canada to answer three questions in the form of an advisory opinion. The first question was as to whether Quebec's institutions could unilaterally secede from Canada under the Canadian constitution. The second question was on the question of whether Quebec had the right to unilaterally withdraw from Canada under international law and as to whether the right to self-determination provided for such a right. Finally, the third question asked which was to take precedence if the answers to questions one and two were to conflict. The court answered the first two questions in the negative thus rendering the third question void. The analysis of the judgment that follows will restrict itself to those issues that are of relevance to this thesis.

The court answered the first question by way of articulating four unwritten principles of the Canadian Constitution: Democracy, Federalism, Rule of Law and Protection of Minorities.[132] The court concluded that an application of these four principles would mean that Quebec had no unilateral right to secession as it would be in violation of the principles of federalism and democracy. At the same time the court also concluded that the democratic expression of a clear majority of the people of Quebec in response to a clear question would impose a duty to negotiate on the rest of Canada and that this was required by the principle of democracy.[133] The explanatory reasons provided by the court to arrive at this judgment, despite not using the international law language of self-determination, are instructive of how the values of self-determination are interpreted and applied in a domestic context.

The court was careful to suggest that they were asked to rule only on the legality of a unilateral secession and not on the legality of secession *per se: "*At issue is not the legality of the first step but the legality of the final act of

[131] [1998] 2 SCR 217
[132] Ibid [49]-[82]. (reference is to paragraphs)
[133] Ibid [90], [100], [103], [104].

purported unilateral secession".[134] The court held that a referendum on its own will not have a legal effect but that it will trigger a duty on the part of Canada to negotiate:

> The democratic principle identified above would demand that considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada, even though a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession. Our political institutions are premised on the democratic principle, and so an expression of the democratic will of the people of a province carries weight, in that it would confer legitimacy on the efforts of the government of Quebec to initiate the Constitution's amendment process in order to secede by constitutional means.[135]

While the articulation of a 'duty to negotiate' in consequence of a 'clear expression of will to secede' is rooted in constitutional law, the reference to the 'will of the people' it may be noted is also a constituent aspect of the right to self-determination in international law. There is a growing tendency for important constitutional law matters are being settled by way of a referendum.[136] Coupled with the increasing number of demands for referendums as a means of settling self-determination disputes, particularly in Europe, the question arises as to whether as an evolving principle, the procedural aspect of the right to self-determination requires that the State provides an opportunity for the people to express their will democratically *via* a referendum.

The identification of a constitutional route to secede in itself was an innovation by the Canadian Supreme Court (based on its articulation of the unwritten principles of the Canadian Constitution) as the Canadian Constitution has no explicit provisions for constitutional secession:

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[134] Ibid [89].
[135] Ibid [87].
[136] Stephen Tierney *Constitutional Referendums: Theory and Practice of Republican Deliberation* (OUP 2012).

> The *Constitution Act, 1982* gives expression to this principle [of democracy], by conferring a right to initiate constitutional change on each participant in Confederation. In our view, the existence of this right imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces. This duty is inherent in the democratic principle which is a fundamental predicate of our system of governance.[137]

The Supreme Court's holding that a clear expression of the democratic will of the people of Quebec would confer legitimacy on the efforts of the Government of Quebec to initiate a constitutional process to secede, it is submitted, is a novel attempt to link the democratic content of the right of self-determination along with that of an acknowledgement of the existence of a plural *demoi*. The court did not merely say that Quebec's right to express and initiate a process of secession was legitimate, it argued that this right had legal consequences within Canada – constitutional obligations on the rest of Canada:

> The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire.[138]

Hence from a Canadian constitutional perspective, the internal dimension of the right to self-determination in its most expansive interpretation would provide for the legal space within the existing state to initiate a constitutional dialogue for the exercise of external self-determination for a people.

The Supreme Court pointed to the existence of conflict between two democratic majorities here: the majority of the people of Quebec and the majority of the whole of Canada. The court pointed out that neither of these

[137] Secession Reference case [69].
[138] Ibid [88].

majorities was hierarchically superior and that both majorities had to act in accordance with the other principles that underlie the Canadian constitution:

> There can be no suggestion that either of these majorities "trumps" the other. A political majority that does not act in accordance with the underlying constitutional principles we have identified puts at risk the legitimacy of the exercise of its rights.[139]

The court's identification of the majority of Quebec as a valid source of constituent power that had the right to initiate constitutional change is critical to discussions on the scope of the internal dimension of the right to self-determination. The court's reading of democracy shows nuance and complexity borne out of the need to adjudicate constitutional disputes in fairness to the different legitimate interests in a state consisting of plural peoples:

> It is of course, true that democracy expresses the sovereign will of the people. Yet this expression, too, must be taken in the context of the other institutional values we have identified as pertinent to this Reference. The relationship between democracy and federalism means, for example, that in Canada there may be different and equally legitimate majorities in different provinces and territories and at the federal level. No one majority is more or less "legitimate" than the others as an expression of democratic opinion.[140]

The court took pains to suggest that neither party could insist on the other's obligations in negation of theirs in an absolute way. Quebec, the court argued, could not insist that secession necessarily be the end result of negotiation, and neither could the rest of Canada prolong the duty to negotiate in detriment of the expressed desire of the will of the people of Quebec. The court refused to go further into how this negotiation should be conducted, making the important observation that this is for the realm of politics and not for law and the courts. This conclusion by the court about the limitations on the law in exhaustively providing for a self-determination situation is, I submit, suggestive also of the

[139] Ibid [93].
[140] Ibid [66].

limits of the extent to which the law of self-determination in international law could be expanded.

The court's direct comments on internal self-determination in public international law are found in its answering of the second question put forward to the court:

> The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination -- a people's pursuit of its political, economic, social and cultural development within the framework of an existing state[141]

The court did not reference the 'recognised sources' of international law that it says establishes that the internal application of the right to self-determination is the 'normal' means of existing the right to self-determination. As previous sections have indicated, internal self-determination does not have an adequate grounding in the sources on the law of self-determination. However, the court's method of defining internal self-determination – "a people's pursuit of its political, economic, social and cultural development within the framework of an existing state" – provides the basic reference point for discussions around internal self-determination. The court, unlike some of the UN treaty bodies, does not limit internal self-determination to participation in the affairs of the State. The observation in the judgment that 'there is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a "people" to achieve a full measure of self-determination'[142] is a positive approach to a reading of two principles (territorial integrity and self-determination) which are regarded as potentially incompatible principles of international law, and for decoupling self-determination from secession.

The court's opinion on internal self-determination is further found in its discussion on the right of secession in international law. The court identified that that there were three circumstances under which a unilateral right to secession was legal under international law. The first two, the court argued,

[141] Ibid [126].
[142] Ibid [130].

related to colonial and other forms of occupation under an alien force. The third circumstance arises, the court argued, as follows:

> When a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession. The *Vienna Declaration* requirement that governments represent "the whole people belonging to the territory without distinction of any kind" adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession[143].

The court unfortunately seems to set a very high bar to demonstrating the existence of the third circumstance. It is unclear as to whether any circumstance could be definitively argued as encompassing a “complete blockage” of internal self-determination.

How does the court apply this analysis to the Canadian context? The court held that even if the third circumstance is sufficient to create a right to unilateral secession under international law, the current Quebec context cannot be said to approach such a threshold.

> The population of Quebec cannot plausibly be said to be denied access to government. Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world. The population of Quebec is equitably represented in legislative, executive and judicial institutions. In short, to reflect the phraseology of the international documents that address the right to self-determination of peoples, Canada is a sovereign and independent state conducting itself in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction.[144]

[143] Ibid [134].
[144] Ibid [136].

The Court in the context of the Quebec secession claim seemed to suggest that Quebec could never claim a unilateral right to secession even if the rest of Canada failed to negotiate a clear choice of secession on the part of Quebecers in favour of secession:

> The continuing failure to reach agreement on amendments to the Constitution, while a matter of concern, does not amount to a denial of self-determination. In the absence of amendments to the Canadian Constitution, we must look at the constitutional arrangements presently in effect, and we cannot conclude under current circumstances that those arrangements place Quebecers in a disadvantaged position within the scope of the international law rule.[145]

The above approach of the court makes it clear that the current state of the law of self-determination in international law has nothing to contribute to the situation in Quebec. A thin reading of the internal dimension of the right to self-determination and a very restrictive reading of the circumstances that justify an external right to self-determination provide no guidance for countries like Canada. The international law on self-determination, the court's answer shows, has no relevance to the resolution of the self-determination dispute. The court's conclusion that international law would not rule that an intransigent Canada was in violation of its commitments for internal self-determination are to be contrasted with its analysis of how an intransigent Canada in violations of constitutional duty to negotiate might be evaluated by the international community:

> To the extent that a breach of the constitutional duty to negotiate in accordance with the principles described above undermines the legitimacy of a party's actions, it may have important ramifications at the international level. Thus, a failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's claim to legitimacy which is generally a precondition for recognition by the international community. Conversely, violations of those principles by the federal or other provincial governments

[145] Ibid [137].

> responding to the request for secession may undermine their legitimacy. Thus, a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process. Both the legality of the acts of the parties to the negotiation process under Canadian law, and the perceived legitimacy of such action, would be important considerations in the recognition process. In this way, the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the international plane.[146]

The Canadian Court's rich analysis with regard to what flows from intransigence on the part of both parties must not be confused as a recognition of the principle of effectivity – as a basis of recognizing a new state in international law. The court in fact rejected the principle of effectiveness[147] (advocated by the *amicus curiae* to the Court assigned by the court to provide the perspective of Quebec in light of the Government of Quebec's decision not to appear in the case.[148]) both under Canadian constitutional law and international law as providing the basis for the right to secession. Hence the above discussion on 'recognition', it must be assumed, is not related to the principle of effectiveness – in that it is a not a discussion on whether international law will recognize Quebec as a state if it in fact succeeds in establishing a *de facto* state. In fact, the discussion of the court on the principle of effectiveness is to be found from paragraphs 106 to 108 organised under a specific sub-heading, whereas the above paragraph 103 is part of the court's answer to question 1. Hence when the court says that 'a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation

[146] Ibid [103].
[147] The argument of effectivity basically argues that when an entity has effectively established itself as a State then there must be a recognition of that entity in lieu of its effectivity as a state, as a state.
[148] Report by George Ab-Sab: 'The Effectivity

process' the question that arises is as to whether the court is suggesting indirectly that Quebec's efforts at exercising external self-determination will be viewed favourably under international law. The intention seems like the court would welcome such a conclusion. But International Law has nothing to offer for the Court to come to such a conclusion.

The court it seems is handicapped by the ambiguity in international law and hence the reference to standards of 'evaluation' in the 'international plane'. As it stands the Court has no choice but to conclude that international law is silent on the intransigence of a State that fails in its constitutional obligations towards a distinct people within its own territory. What remains then is a very unsatisfactory state of affairs. It would be to state the obvious that the constitutional framework of the host state itself will also not act on the intransigence of its majority if it continues to unreasonably decline to negotiate with the legitimate expression of will of one of its constituent peoples. Hence if the rest of Canada is unwilling to negotiate with Quebec following a clear expression of the will of the people of Quebec at a referendum on a clear question, no legal consequences follow, either under Canadian constitutional law or international law. *Contra* the Supreme Court's eloquent suggestion of there being no hierarchy between the majorities in Quebec and the majority in the rest of Canada, in the event that no reconciliation of these majorities is possible, the larger majority within the established host state does trump; self-determination will remain evasive.

The import of this conclusion is that how much ever a stateless nation is most willingly and genuinely involved in a process towards settling its self-determination claims within a larger state (internal self-determination) it will remain locked in the host state because international law disfavors secession. The alternative then is recognizing external self-determination where internal self-determination has failed because of the intransigence of the host state. One of the objections to this proposition may be in the form of difficulties associated with assessing what may be considered as a 'genuine' attempt at giving internal self-determination a chance, by the stateless nation. Such a judgment it may be argued, would be extremely contextual and political in nature that law will not be able to help make that judgment. But this objection

is problematic in that law does routinely leave such judgments to the political arena and that this is unavoidable. In international law this is often truer than in domestic law.

In conclusion, while the Canadian Supreme Court's innovative reading of the unwritten principles of the Canadian Constitution had led to it going beyond the liberal narrative of a singular conception of the *demos* and the formulation of the duty to negotiate, the court's analysis of international law does not help further the discourse for a fairer hearing of the claims of smaller nations within the larger state. In fact, the state-centric, liberal formulation of self-determination only further strengthens the hands of the state against those claiming self-determination.

The international community's involvement in constitution making processes, particularly in deeply divided societies coming out of wars, is not a new phenomenon – but since the end of the cold war there is heightened interest in these processes[149]. From peace-keeping the United Nations has moved towards peace-building efforts that aim at state-building. Peace Building has been defined in the UN 'as activities undertaken on the far side of conflict to reassemble the foundations of peace and provide the tools for building on those foundations something that is more than just the absence of war.[150] Peace agreements and attendant constitutional frameworks have become an

[149] Recent constitution making processes in Bosnia-Herzegovina, Macedonia, East Timor, Sudan, Afghanistan, Iraq and Kosovo. For a UN account, see: Michele Brandt, *Constitutional Assistance in Post-conflict Countries: The UN Experience, Cambodia, East Timor and Afghanistan* (UNDP 2005). Also see: A von Bogdandy, S Haubler, F Hanschmann and R Utz, 'State Building, Nation Building and Constitutional Politics in Post Conflict Societies: Conceptual Clarifications and an Appraisal of Different Approaches (2005) 9 Max Planck UNYB 579; S Chesterman, *You the People: The United Nations Transitional Administration and State Building* (OUP 2004).

[150] UN Report on UN Peace Operations, 2000 (Brahimi Report). In 2007, the UN Secretary-General's Policy Committee laid out the following conceptual definition of peacebuilding to inform UN practice: "Peacebuilding involves a range of measures targeted to reduce the risk of lapsing or relapsing into conflict by strengthening national capacities at all levels for conflict management, and to lay the foundations for sustainable peace and development. Peacebuilding strategies must be coherent and tailored to specific needs of the country concerned, based on national ownership, and should comprise a carefully prioritized, sequenced, and therefore relatively narrow set of activities aimed at achieving the above objectives."

international best practice for resolving violent conflicts.[151] The key challenge faced by these processes is in designing constitutional mechanisms for deeply divided societies that will help perpetuate peace. The basic assumptions of the liberal peace agenda of the UN is that the rule of law, processes and mechanisms of good governance, human rights and free markets will help resolve disputes in deeply divided societies.[152] However these have hardly proved to be a success. These constitution-making processes have required the international community to go beyond the usual terrain of liberal constitutionalism and have required policy makers to look at constitutional designs that are appropriate for deeply divided societies that create complex models of self-government models around competing claims to self-determination, as for example in Bosnia-Herzegovnia. Where these have not been taken into account liberal peace has failed, as for example in Sri Lanka.

The role of international law in guiding international involvement in such processes is an understudied subject. While human rights law, self-determination law and other branches of public international law have helped guide these processes, the reverse, in terms of how experiences of peace making in these contexts can and have developed international law, is given no attention. The comparative constitutional law experience of deeply divided societies has come up with novel ideas to provide solutions that seek to reconcile the principle of self-determination and territorial integrity[153]. In some situations, efforts at constitutionally designing plural societies have not worked, providing insights as to contexts and circumstances in which internal self-determination works and does not work. These lessons can help further international law's understanding of internal self-determination. One of the objectives of this thesis is to further contribute towards such an understanding.

[151] See further on the international law on peace agreements, Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (OUP 2008).
[152] For a clear articulation of the liberal peace agenda and how it related to international law, see Russel Buchan, *International Law and the Construction of Liberal Peace* (Hart 2015).
[153] Stephen Tierney, *Constitutional Law and National Pluralism* (OUP 2004); Stephen Tierney, *Accommodating National Identity: New Approaches in International and Domestic Law* (Kluwer Law International, 2000), Sujit Choudhry and John McGarry (eds) *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press 2008).

Conclusion:

Self-determination has never been about a particular institutional form even in the colonial period. However, the denial or postponing of the option of statehood as one of the forms that self-determination could take, has been on its own regarded as a denial of self-determination. The angry response of the Global South to the 'progressive evolution to statehood' approach ended up tying self-determination with statehood, though legal expressions of the principle of self-determination still maintained that self-determination could be manifested in different forms including within the larger existing state.

Following the decolonization period coupled with the attempt to read self-determination as a human right, the trend in the years that followed decolonization sought to emphasise on the internal aspect of self-determination with an emphasis on participatory rights in governance. The collectivist character of internal self-determination for indigenous peoples has been consciously kept away from peoples that form part of national groups. To date the international law on self-determination outside the colonial and indigenous context is caught up in a restrictive, narrow, individual-rights centric, democracy promoting view of international human rights law. This unfortunately has proved to be insufficient in dealing with the problems and claims of peoples demanding self-determination. Contrary to international law's reluctance to deal with the problem of national groups, constitutional law making in deeply divided societies has had to deal with the problem and provides an enormous reservoir of knowledge on how self-determination can be applied in various forms within a state. In Chapter 2, I provide a theoretical framework for self-determination that grounds the right in all its manifestations as based on the right to self-government. I distinguish the right to self-determination, in that chapter, from minority rights and participatory rights and seek to show how such an understanding may help bring clarity to the post-colonial content of the right to self-determination. The chapters that follow will norm-test and elaborate the theoretical framework presented in Chapter 2, by

critically comparing lessons learnt from comparative constitutional law in countries riddled by self-determination conflicts.

Chapter 2
Internal Self-Determination: A Normative Account

Introduction

Internal self-determination has been referred to as international law's long-term response to ethnic conflict,[1] is increasingly championed as an alternative to independent statehood and is also used increasingly in peace agreements.[2] However there has been very little normative work done on the meaning and scope of internal self-determination. This chapter seeks to suggest a framework for internal self-determination by clarifying the content of the right to self-determination in the post-colonial context.

In this chapter I argue that self-government is a necessary condition of self-determination and hence self-government is also a necessary condition of internal self-determination. This thesis that self-determination is about self-government rejects accounts that suggest that self-determination in its internal dimension it refers to minority rights and to participatory rights in a monistic democracy. The approach to internal self-determination spelt out herein instead emphasizes self-government, which acts as a challenge to the monistic thesis of the state[3] conceived as a singular nation-state. The

[1] Michael W. Doyle, 'UN Intervention and National Sovereignty' in Wolfgang F Danspeckgruber, *The Self-Determination of Peoples: Community, Nation and State in an Interdependent World* (Lynne Rienner Publisher 2002) 97Anne Marie Slaughter, 'Pushing the Limits of Liberal Peace: Ethnic Conflict and the "Ideal Polity"' in David Wippman (ed) *International Law and Ethnic Conflict* (Cornell University Press 1998) 128 .

[2] Kelly Stathopoulou, 'Self-determination, peace-making and peace-building: recent trends in African intrastate peace agreements' Duncan French (ed), Statehood *and Self-Determination: Reconciling Tradition and Modernity* (Cambridge University Press 2013). See also Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (OUP 2008).

[3] The monistic thesis of the state either takes for granted or actively demands a monistic conception of the nation as the embodiment of a unified demos. Stephen Tierney, ''We the

application of self-determination internally, it is suggested, should result in the institutional recognition of the plurality of the state.

The chapter is organized as follows: The first section traces the theoretical path in seeking to establish that self-government is a necessary ingredient of self-determination and that in the post-colonial context that it is a challenge to the idea and practice of the nation-state. The second section distinguishes this approach to internal self-determination from that of other scholarly works on this subject and the third section focuses on how this articulation of the notion of internal self-determination relates to external self-determination.

Section I

Self-Determination as Self-Government

The first half of this section draws from the liberal nationalist's interpretation of nationalism and infuses it with the work of Charles Taylor on the subject. The liberal nationalist tradition, it is argued, establishes an inherent value of the public expression of national culture. By infusing Charles Taylor's work with that of the liberal nationalists I argue that there is an inherent value in the political manifestation of this public expression. However, this approach does not provide for an adequate explanation of self-determination or self-governmental rights as self-determination. The second half of this section then draws from the plurinationalist theorists to argue that self-determination needs to be understood as a distinct political claim to self-government (as opposed to minority rights and other related claims) and that self-determination in the post-colonial era needs to be seen as a challenge to the idea of the nation-state. It then seeks to argue that the purpose of internal self-determination

Peoples': Constituent Power and Constitutionalism in Plurinational States' in Martin Loughlin and Neil Walker, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2008), 230

should be to shift the conception of the state from uni-nationalist to pluri-nationalist.

2.1 In Defense of Group Rights

Both in history and in the present the roots of self-determination lie in the amorphous philosophy and practice of nationalism.[4] An account of self-determination hence has to by necessity engage with the idea of nationalism. Nationalism is not inherently morally right or wrong, but rather it is the practice of nationalism that determines its moral worthiness. Further, I subscribe to the thesis that the collective is essential for the individual to meaningfully exist and prosper. Given that what can be morally wrong about nationalism is largely related to its emphasis on the collective at the expense of the individual, my defence of self-determination and nationalism is premised on the basis that championing collective self-determination can and should be pursued without offending the autonomy of the individual. This in fact is the essence of the work of liberal nationalists.

Will Kymlicka[5] and Joseph Raz[6] have provided us with the most compelling reasons why nationalism and liberalism might not be at odds and have argued to the contrary that cultural nationalism may in fact provide an important context for the exercise of the autonomy of the individual. In Kymlicka's articulation it is the community that provides the context of choice to the individual, and in the words of another prominent liberal nationalist scholar, Yael Tamir, all individuals are necessarily 'contextual individuals'[7] and hence

[4] See for example James J. Summers, 'The Right of Self-Determination and Nationalism in International Law' (2005) 12 International Journal on Minority and Group Rights 325.

[5] Representative works include: Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (OUP 2001); *Multicultural Citizenship: A Liberal Theory of Minority Rights* (OUP 1995); *Liberalism, Community, and Culture* (OUP 1989/1991).

[6] Avishai Margalit and Joseph Raz, 'National Self-Determination'(Sep., 1990) 87 (9) Journal of Philosophy 439.

[7] Yael Tamir, *Liberal Nationalism* (Princeton University Press, 1993)

abstract individualism has no place in the real world that we live in. This forms almost the basics of the entire gamut of scholarship on liberal nationalism.

The primarily value of enhancing autonomy, it is claimed by liberal nationalists, provides reasons why group association should be considered valuable. Joseph Raz provides the following 'freedom-enhancing'[8] defence for liberal nationalism: Individual freedom upholds the value of people being in charge of their life. Freedom presupposes the existence of options to choose from – and all options except the very elementary ones, have an inner logic, their inner reason. Freedom depends on options, which in turn depend on rules, which constitute these options, rules being an inescapable part of realising options. Options presuppose a culture.[9] They presuppose shared meanings and common practices. This is true because the density of our activities, their multiplicity of dimensions, make it impossible to consider and decide deliberatively on all of them. As Raz explains, we cannot be children all the time and ask all the time why we cannot invent our own game rather than play chess by its rules.[10] A lot then has to be done automatically. But to fit into a pattern, that automatic aspect of behavior has to be guided, directed and channelled into a coherent meaningful whole. This is provided by culture. These social practices, which provide the options, Raz argues, do not come one by one. Social practices are interlaced.[11] Conglomerations of inter locking practices, which constitute the range of life options open to one who is socialized in them, is what cultures are. Hence the argument that membership in cultural groups is important for individuals.

But this importance that is given to the role of culture, according to the liberal nationalists, is worthy of promotion, protection and recognition only as long as culture enhances the autonomy of the individual.[12] When culture impacts

[8] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (OUP 1994) 170.
[9] ibid 176.
[10] Ibid.
[11] ibid 177.
[12] See for example Kymlicka who argues that collective rights *qua* internal restrictions are not defensible under a liberal theory of collective rights whereas collective rights as protection from external threats are compatible with liberalism. Will Kymlicka, *Multicultural Citizenship:*

negatively on the autonomy of the individual, such illiberalisms are contested and addressed and the system (the law) should be designed in a way that the individual has mechanisms for redress within the context. Liberal nationalists have argued that there are no set categories of liberal and illiberal cultures and that the process of liberalization is an ongoing project in all cultures.[13] Other liberal theorists have suggested that this is not enough and that a right of exit should also be available.[14] Others have contested the availability of the right to exit (which itself might not be feasible) on the basis that it could legitimize internal restrictions which are unacceptable.[15] In any case, the possibilities for liberals to deal with what they consider to be illiberal in their culture is greater in an approach that publicly recognizes it as opposed to an approach that refuses to recognize the existence of groups in the public law domain and that which recognizes only individual rights.

2.2 In Defense of (National) Culture

However, it has been argued that the freedom-based argument does not adequately explain the reasons for individuals' interest in adhering to their own particular culture.[16] The criticism is that the freedom enhancing argument only explains their interest in adhering to some or any culture and not necessarily

A Liberal Theory of Minority Rights (OUP 1996), Chapter 3 'Individual Rights and Collective Rights'

[13] Kymlicka argues, 'The aim of liberals should not be to dissolve non-liberal nations, but rather to seek to liberalize them. This may not always be possible. But it is worth remembering that all existing liberal nations had illiberal pasts, and their liberalization required a prolonged process of institutional reform. To assume that any culture is inherently illiberal, and incapable of reform, is ethnocentric and ahistorical. Moreover, the liberality of a culture is a matter of degree. All cultures have illiberal strands, just as few cultures are entirely repressive of individual liberty. Indeed, it is quite misleading to talk of 'liberal' and 'illiberal' cultures, as if the world was divided into completely liberal societies on the one hand, and completely illiberal ones on the other. The task of liberal reform remains incomplete in every society, and it would be ludicrous to say that only purely liberal nations should be respected, while others should be assimilated'. Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (OUP 1996) 94.

[14] Chandran Kukathas 'Are There any Cultural Rights?' (1992) 20/1 Political Theory 105–39 at 133.

[15] Will Kymlicka, The Rights of Minority Cultures (1992) 20/1 Political Theory 140-146

[16] See for example Jeremy Waldron, 'Minority Cultures and the Cosmopolitan Alternative', (1991-1992) 25 University of Michigan Journal of Legal Reform 751.

the national culture to which the person belongs.

Liberal nationalists have hence sought to supplement the freedom-enhancing argument with that of the identity and interest-based arguments for cultural nationalism. According to this view there are certain fundamental human interests that all individuals have and one such interest is in protecting (certain components of) their identity. Chaim Gans explains:

> [D]esires involving objects in which people have fundamental interests must be given special weight in determining the contours of the political order. In this respect such desires are very different from desires involving objects in which people do not have fundamental interests (for example, the wish to spend a holiday on one particular island as opposed to another island) [17]

Neil McCormick has similarly argued that national cultures provide the dominant context through which a sense of identity, individuality, and belonging is acquired.[18]

But is it true that people have such a fundamental interest in their identity and that it is national cultures that provide the dominant context? There is both a normative and empirical answer to this. The normative answer is already found in my discussion of Raz's take on culture. As Raz and Margalit put it, 'familiarity with a culture determines the boundaries of the imaginable'. Without culture 'the options and opportunities open to its members will shrink, become less attractive, and their pursuit less likely to be successful'.[19] Charles Taylor in his celebrated work on the politics of recognition, has argued that identity itself is 'partly shaped by recognition or its absence'.[20] *Per* Taylor, the absence of recognition 'can inflict a grievous wound, saddling its victims with a crippling

[17] Chaim Gans, 'The Liberal Foundations of Cultural Nationalism' (2000) 30 (3) Canadian Journal of Philosophy 441,446; Chaim Gans, *The Limits of Nationalism* (Cambridge University Press 2003) 40; Margaret Moore also presents an identity-based argument for national rights in Moore, *The Ethics of Nationalism* (OUP 2001) Chapters 2 and 3.
[18] Neil McCormick, *Questioning Sovereignty* (OUP 1999) 18.
[19] Margalit and Raz, *National Self-Determination* (n 6) 449.
[20] Charles Taylor, 'The Politics of Recognition' in Amy Gutmann (ed), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press 1994) 25, 25.

self-hatred. Due recognition is not just a courtesy we owe people. It is a vital human need'.[21]

The interest in identity amongst people has also empirically proven to be true. *Contra* the expectations of liberalization and modernization people's interest in their identities have not diminished but have rather expanded. As Kymlicka argues citing experiences from Quebec and Belgium, 'far from displacing national identity, liberalization has in fact gone hand in hand with an increased sense of nationhood'.[22]

Arguing that national cultures provide the dominant context is not to say, as Gans has noted, that there aren't other contexts that define the identity of an individual, only that national culture is an important and the most dominant context that has an influence over identity. Given the reality of national cultures being pervasive features of our lives, there is a duty to respect such culture. As Neil McCormick puts it:

> If many humans, as humans are today, include in their subjective sense of individuality and identity the idea of belonging to a certain nation or national culture, then respect for persons as contextual individuals must include respect for that aspect of their individuality.[23]

Chaim Gans, however, considers the freedom and identity/interest theories to be insufficient to defend nationalism. Gans argues that the freedom-enhancing argument and the fundamental interest that people have in protecting their identity justify reasons for valuing individuals' adherence to their national culture, but that it does not explain why the continued existence of such national cultures is valuable.[24] Charles Taylor identifies this as the main gap in the liberal response to nationalism of the Kymlickan and Razian variety – that they don't account for the cultural survival need of the community. Gans

[21] ibid 26.
[22] Kymlicka, *Multicultural Citizenship* (n 5) 88.
[23] Neil McCormick (n 18) 18
[24] Gans, *Limits of Nationalism* (n 17) 49-58.

attempts to answer this through what he calls the historical thesis. According to the historical thesis the interest that individuals have in ensuring that their endeavors have meaning beyond their existence is an important interest worthy of protection. The argument is that if people cannot be assured that their endeavours will have meaning beyond their life time, they will be discouraged from taking part in meaningful endeavours during their life time:

> One of the conditions for self-respect is that what people do can be done with the hope that it has some reasonable prospect of permanence. Insecurity with regard to the continued existence of their culture undermines the possibility of such hopes. The present claim is not that people need to be assured that what they do will last forever. Rather, they need to be able to *hope* that what they do has some prospect of enduring.[25]

These endeavors are performed within a particular context and this context is predominantly national, as has already been argued, and hence the interest in ensuring that people have in ensuring that their endeavours have meaning requires that we value national cultures.[26] Gans' historical thesis finds support from McCormick who argued in *Legal Rights and Social Democracy*:

> Consciousness of belonging to a nation is one of the things which enables us as individuals in some way in this earthly existence to transcend the limitations of space, time, and mortality, and to participate in that which had meaning before us and will continue to have meaning beyond us'.[27]

This is an interesting response but quite clearly the cultural survival argument sits uncomfortably within the liberal tradition. The interest of individuals in the value and meaning of their endeavours beyond their life time does not answer the question why individuals in the next generation should value them. A

[25] Ibid, 55
[26] However Gans is quick to point out that the grounds for the historical thesis for which he is arguing are intended to give "only limited protection to the preservation of national cultures. These grounds are certainly not reason for turning national cultures into fortresses and protecting them at any cost" Gans, (n 17) 56
[27] Neil McCormick, *Legal Rights and Social Democracy* (OUP 1984) 252.

probable answer is that individuals in future generations have the right to ignore the endeavours of their forefathers or aspects of them and that indeed that this is how change within a culture takes place. Hence the historical thesis may be defended as being concerned with the interests of the current generation that their endeavours will be passed down to a future generation while acknowledging that these endeavours do not limit the future generation's endeavours.

The freedom-enhancing, identity nurturing and the interests of giving a semblance of permanence to the endeavours of people together provide the best defence for why interests in culture and their protection can indeed be compatible with the ideals of liberalism. But does this liberal defence of the value of national culture provide justification for a political, institutional expression of the national culture including self-determination?

2.3 In Defense of the Political/ Institutional Expression of National Culture

This defence of the role of culture in furthering individual autonomy, Raz argues, lends justification as to why the public expression of such cultural membership is intrinsical.[28] But Raz says this does not necessarily mean that this public expression lends support to the intrinsical value of self-government:

> To the extent that a person's well-being is bound up with his identity as a member of an encompassing group, it has an important public dimension. But that dimension is not necessarily political in the conventional, narrow sense of the term. Even where it is, its political expression does not require a political organization whose boundaries coincide with those of the group.[29]

Raz argues that the public expression of an individual's group identity through politics in normal times is only an option and not intrinsically valuable. He accepts that participating in the political life of their state and fighting in the

[28] Joseph Raz, *Multiculturalism: A Liberal Perspective* (n 4); Margalit and Raz, 'National Self-Determination' (n 6) ; Raz, *Ethics in the Public Domain* (n 8).
[29] Raz, *Ethics in the Public Domain*, (n 8) 136-7.

name of group interests in the political arena may be intrinsically important to the politically active members of the group but is only of instrumental value to the group. He puts it point blank: “There is no reason to think that everyone must take part in politics if his or her development is not to be stunted and personality or life is not to be deficient.”[30] But Raz does make the point that the availability of politics as an option is important, for its absence deprives people of valuable opportunities.

Raz says there is only an instrumental case for self-determination. The prosperity of the group in question may sometimes require that the group enjoy sovereignty.[31] Raz admits that it is conceivable that the prosperity of the group and its self-respect are aided by, and sometimes they may be impossible to secure without, the group’s enjoying political sovereignty over its own affairs. It is historical conditions, the contingency of the situation that will decide this matter. In Raz’s view it is for the members of a group to judge whether their group’s prosperity will be undermined if it does not enjoy political independence. Raz adds that the realization of self-determination should be entrusted to international bodies with the duty to help bring about its realization, and to see to it that the limits and preconditions of the right are observed.

McCormick on the other hand in *Questioning Sovereignty* makes a straightforward case for self-government for nations. McCormick argues that since cultures have value in terms of identity to their possessors[32] shared national consciousness should be deemed to be politically relevant and valuable. McCormick for this reason argues that ‘the members of a nation are as such in principle entitled to effective organs of political self-government within the world order of sovereign or post-sovereign states’. This right to self-government is universal, irrespective of ‘whether or not those who possess it would wish to exercise the right, or to exercise it in a determinate political

[30] ibid 137 .
[31] ibid 135; Raz does not define the term sovereignty here. I am going to assume that this is inter changeable with self-government here given that elsewhere in the text he does not associate the right to self-determination only with separate statehood.
[32] Neil McCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (OUP 1999) 171.

way'.[33] McCormick, in contra-distinction to Raz, seems to be arguing that nations (Raz preferring the term 'encompassing groups') are *entitled* to self-government. McCormick in fact made this argument two decades before Questioning Sovereignty. In *Legal Rights and Social Democracy,* he asserted that it is a matter of 'principle that there ought to be respect for national differences, and that there ought to be an adoption of forms of government appropriate to such differences'.[34]

Raz and McCormick seem to differ on whether self-government is an intrinsic value. For Raz public expression of identity is what is intrinsically valuable. Self-government in Raz's view, has only a second order instrumental value. (Firstly, politics as a mode of such expression has to be instrumentally explained and when such an instrumental case for politics has been made one must then go on to establish self-government as a second order instrumental value) But the difference need not be overstated. Raz is keen to emphasize that the option of politics does have an important value and he would not dispute McCormick's assertion that self-government should be one such option in politics for these groups. But the difference is that, for Raz, the option of politics only has instrumental value. Where it is instrumentally justified, the option of self-government as one among the options within politics, or in his words 'sovereignty' for the group, is dependent on the contingency of the situation. Also noteworthy is that Raz claims that politics is an option in 'normal times', implying that the 'option' of politics could be intrinsically valuable in abnormal times. Self-determination situations and conflicts are not the politics of normal, and hence McCormick's claims are not far from Raz's conclusion. Even if they are not, both their accounts place stress on the need for the option for self-government for national groups to be available, which is the key point of convergence here. The language of self-government as one among the options of political expression of cultural groups is important as we will see later.

[33] ibid, 182.
[34] Neil McCormick, *Legal Rights and Social Democracy: Essays in Legal and Political Philosophy* (Clarendon Press 1982) 262.

2.4 In defense of the option of politics' intrinsic value

Before I move on a response to Raz's identification of politics as optional, that it lacks intrinsic value and hence that self-government may only hold an instrumental value is considered. The objection is derived from Charles Taylor's criticism of the ontological priority given to the individual in liberal theory. Taylor argues that this drives liberal nationalist theorists to a reductivism (wherein everything is justified by its service to individual rights) which then if logically followed leads to the kind of Razian argument that politics has no intrinsic value but is only an option for groups. Taylor's view of society is one which refuses to see society as an amalgamation of individuals. He lays emphasis on the shared elements of social life which cannot be reduced to individual options and choices. Taylor makes the powerful argument that liberal thinking itself pertains to a culture and that the celebration of the primacy of such liberal ideas itself is drawn by the individual from the community.[35] And hence he argues the individual who wishes to celebrate and further his freedom and autonomy must then seek to defend the group *qua* group. This line of reasoning lends supports to the political expression of one's identity qua a group intrinsically valuable and necessary.[36]

Taylor is sometimes regarded as a communitarian for this line of argument where communitarians are understood to place the community in the place of the individual in their ontological priority. Taylor rejects the label and has noted his opposition to any kind of single principle dominance over the debate on ontological questions and signs up for a more complex approach to liberalism.[37] His emphasis on the fact that the social life of the community is that which moulds the options of the individual is something that Raz and Kymlicka would not disagree with, but it is their priority to methodological individualism which Taylor says leads to political participation in the community as being seen from an instrumental point of view as opposed to its intrinsic

[35] Charles Taylor, *Philosophical Papers II Philosophy and the Human Sciences* (CUP 1985) 205-6.
[36] Charles Taylor, *Philosophical Arguments* (HUP 1995) 285.
[37] Ruth Abbey and Charles Taylor, 'Communitarianism- Taylor Made: An interview with Charles Taylor' (Autumn 1996) 68 (1) Australian Quarterly 1, 9.

value. Taylor's reasoning would lead to an appreciation for both the autonomy and freedom of the individual and for the importance of political expression of one's group identity.[38] The approach that I would suggest is one that agrees with Taylor's rejection of the ontological priority of the individual, his argument that the political expression and recognition of the group is intrinsically valuable and inseparable from the well-being of the individual while at the same time agreeing with Raz and Kymlicka on the need for not sacrificing the individual at the altar of the community and allowing the individual the space for her to explore options within but importantly also outside her community. This pluralist approach is more in accordance with the lived experience of individuals and communities and I submit provides a useful way to understanding self-determination.

2.5 The political claim to self-government

The above discussion however still does not provide answers for as to why and when groups choose to make the case of self-government. Is that entirely based on the historicity or specificity of the context or is there a principle of some generality that can be discerned?

Kymlicka provides a useful starting point to answering this question. Kymlicka speaks of three different types of modes in which cultural groups can choose to publicly express their identity: self-government rights, poly ethnic rights and special representation rights.[39] The difference between special representation rights and self-government rights are that the former is seen as a temporary measure and as a corollary of the latter, whereas the latter is seen as permanent and inherent. The difference between poly ethnic rights and self-government is that, while both are seen as in some measure permanent, the former is seen as part of a process of integration into the larger state whereas the latter is seen as preserving the autonomy of the group. Hence self-government rights compared with special representation rights and poly ethnic rights lay emphasis on institutional rights and permanently preserving the

[38] Taylor defends this as a complex/ rich theory of liberalism.
[39] Kymlicka, *Multicultural Citizenship* (n 5) 31-33.

autonomy of the group (which the other two typologies of rights do not provide). Self-government in principle is the optimum level protection that a national group can enjoy.

Kymlicka's useful distinction however does not say enough in terms of what constitutes the right to self-government, something that is important for the purposes of this thesis. What follows is a discussion of what the right to self-government in essence constitutes.

The demand for self-government seeks the creation of institutions exercising State power within the framework of a larger State, by and for the benefit of the group claiming self-determination, primarily along the boundaries of its territorial presence within the larger state. Institutions of self-government may also be created that defy and transcend territorial boundaries like for example the community parliaments in Belgium. But the more typical form of self-governmental arrangement would require some territorial basis to it. The institutions and the powers that it exercises may vary from one self-governmental arrangement to another – a variety of forms of representational government could potentially satisfy the requirements of self-government, although these would typically include parliamentary, legislative and judicial institutions. There must be a legislature with defined competences over which the executive exercises powers of administration and a judiciary must be provided for that can settle disputes with regard to the application of the laws that govern the competences of the self-government. The details of these arrangements can vary significantly.

However, the key distinction then of self-governmental rights from poly ethnic rights and special representation rights is that the former seeks the creation of institutions of state power for the sub-state actor within the larger host-state as opposed to the seeking of rights enforceable through the institutions of the host state. For example, if a group's primary concern is the issue of language rights, that could be satisfied by providing for legislative or administrative arrangements which would facilitate the exercise of such language rights by that group *vis-a-vis* the institutions of the host state. It does not require the establishment of self-governmental institutions. But the demand for self-

determination or self-government is a demand to be bestowed with a state-like status where the sub-state actor through self-government institutions decides on such matters as its own education and health policies, identifies its economic priorities and policies, is in charge of law and order *et al*. The actual list of competences that these institutions of self-government may be vested with will have to depend on the particularity of the context, in that the historical context that gave rise to the self-determination/ self-government claim may consider a certain governmental power to be more important than another. For example, in one context control over natural resources may be an important power which the sub-state actor will demand for its self-governmental institutions and in another context control over the police force (law and order) may be more important for the sub-state actor to have for its self-governmental institutions. The key point is that if a claim for self-determination is understood to mean self-government, this is an institutional claim, not merely a claim for rights.

But the question of why and when a group is entitled to self-government as opposed to poly ethnic rights and/or special representation rights is not a subject that Kymlicka has devoted extensive treatment to in his otherwise extensive scholarship on liberal nationalism. Kymlicka seems to suggest that self-government is available for national groups that have a defined territory to which the group has a historical connection.[40] Raz also in seeking to define self-determination suggests that as a matter of practicality, self-government is best suited for groups that are sufficiently territorially concentrated in a particular geographic area. Hence according to Raz and Kymlicka geo-demographic factors as a matter of practicality (and not as a matter of principle) determine whether a group can claim self-government rights. Gans draws from his historical thesis, previously referred to, to argue that where a particular group has a homeland in which it enjoys self-government then members of the group may be rightfully denied self-government rights elsewhere.[41] This however seems arbitrary and again historically situated from the experience of the Jewish claim to their homeland in Israel. For example, if we assume Kurds

[40] Kymlicka uses the term homeland, *Multicultural Citizenship* (n 5) 31.
[41] Gans, Limits of Nationalism (n 17) 62-3.

in Iraq have a state of their own, it would seem inherently unjust to suggest that the Kurds in Syria cannot claim self-governmental rights just because Kurds in Iraq have self-governmental rights in their homeland.

Despite Kymicka's useful typology of the modes of political expression there still remains a significant gap in explaining the reasons for justifying why a group may choose self-government and not poly ethnic rights of special representation rights. It is also wanting in terms of how these rights correlate to the claim to self-determination. The following section examines this issue.

2.6 Self-Determination as a claim to self-government

To understand the link between self-determination, self-government and others forms of political expression of culture I will draw from the plurinationalist scholarly tradition who invite our attention to normatively assess the claims that groups making their claim for self-determination put forward. Michael Keating, one of the leading scholars of this tradition[42] draws our attention to two key claims that nations make *qua* their status as nations: The first of these is the claim that they are a historically constituted community (claims that can be buttressed by the interests that groups have in enhancing their freedom, identity and the permanency of their endeavors) in addition to a particular history of the community as being historically self-governing in the past, later lost or diminished within the larger state. Secondly the claim that places importance on the desire on the part of the group to determine their future as a collectivity – in other words, seeking self-determination. Self-determination in this thesis is presented as a constitutive part of the identification of a nation. As Michael Keating puts it more clearly, self-determination is part of the normative content of nationality itself. Keating points out the essentially political nature of the claim to nationhood thus:

[42] Representative works include: Michael Keating, *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era* (OUP 2001); Michael Keating, *Nations against the State: The New Politics of Nationalism in Quebec, Catalonia and Scotland*. (2nd edn, Palgrave Macmillan 2001).

> Linking nationality to the self-determination claim also frees nationalities from having to demonstrate that to exist, let alone self-determine, they must somehow be 'different', where normality is defined by reference to the encompassing state. Such arguments have been used to catch nationalities in a logical trap—they cannot claim self-determination without proving that they are 'different', yet if they are different they are condemned as ethnic particularists unworthy of self-determination rights.[43]

Keating makes the important point that the 'two arguments, about being a historically constituted community and having a consciousness of nationhood and self-determination, cannot be reduced to a single logic, and national movements have appealed to one or other according to circumstance'[44]. One may add that they may appeal to both arguments at the same time.

Keating cautions us not to make the category error of conflating ethnic groups with nations. Not all ethnic groups make the claim to being a nation. This I suggest is the better way of approaching the perennial question of trying to define peoples in the international law on self-determination. The argument here is that peoples are those who make the claim to self-government. Hence what makes a cultural group a nation, or in the international law sense of the term, 'a people', is the claim to self-government. Hence objective criterion alone (such as common language/religion/culture and inhabitancy of territory) cannot determine whether a group is considered to be a people but the aspiration to be self-governing. A possible criticism is that this subjective approach to defining peoples would weaken the law of self-determination giving support to spurious claims. But this assumes that claims to self-determination can be made effortlessly in a casual manner. As Keating convincingly argues, nations cannot be imagined in an instant and are formed through a very long process.

[43] Michael Keating, *Plurinational Democracy,* 3-4.
[44] Ibid

> Nations cannot merely be wished into existence, but are built, often painfully, over time. They require a minimum of credibility in order to mobilize support, sustain a campaign, and get attention and recognition within and beyond the state. [45]

Citing the work of Ernest Renan, he argues that the formation of a nation requires constant work of creation and renewal.[46] It is not something that can be done overnight, and it is definitely not a light decision to be taken. The right of self-determination entails a psychological cost and tolerance of uncertainty and ambiguity. Keating concludes: 'nation-building is not for the frivolous or those who prefer the quiet life'.[47]

The following two points are made drawing from the foregoing discussion on the importance of evaluating the claims made by political communities.

Firstly, it is this claim for self-determination that distinguishes stateless nations from minorities. This I suggest is the best way of distinguishing the typologies that Kymlicka offers us. The political claims that minorities put forward are markedly different in that they do not include self-government rights. Keating does not necessarily disagree with Kymlicka and Raz that lack of concentration in a particular identifiable territory and with Gans that connections with their kin in a different state where they enjoy self-governmental rights may explain the claim for self-governmental rights and not minority rights. But Keating offers more than this: The collective evaluation of the group of the cost and feasibility of putting forward a claim to self-government (which Keating makes reference to in making the point that a claim to nationhood is not made lightly) may also be a contributing factor that determines whether a group puts forward its claims of self-determination. The group may have historically enjoyed self-determination but owing to external or internal reasons may decide not to make claims to self-determination at present. This is an important point to take note of. The fact that a community does not make a claim to self-determination claim

[45] Ibid, 5
[46] Renan, Ernest (1992), *Qu'est-ce qu'une nation? et autres essais politiques* (Presses-Pocket) cited by Keating, *Plurinational Democracy*, 5
[47] Ibid, 5

at present does not mean that they will not make the claim in the future. Acknowledging that a group may in fact temporally (over time) change the nature of its claims – what I shall call temporal plurality[48] of the political claims that a national group makes - will help us understand why a group that made claims to minority rights in the past may make the claim to self-determination at some future point in time owing to political factors that contribute to such consciousness. It is the consciousness of the group itself that matters here, and which distinguishes the claims that national groups make to minority rights and self-determination. Hence to understand and differentiate the claim to minority rights and rights to self-government is key to devising policy responses to such claims.

The *second point,* drawing from the first observation about the plurality of the claims that a community makes over time, is that this plurality does not apply merely to the distinction between minority rights and self-government but also within the spectrum of self-government rights. This is a call for recognizing that self-determination/self-governmental claims may fall short of statehood. As Keating contends, 'there is nothing intellectually inconsistent in the idea that stateless nations may have rights to self-government which are limited by reciprocal obligations and the rights of other nations, and so fall short of statehood'. It is this category of options within self-determination, short of statehood, that I shall call 'internal self-determination'. Stateless nations may choose to exercise their self-determination internally not only because statehood claims are difficult to achieve in practice but also because stateless nations may actually wish to live within a larger state while preserving their rights to self-government. There is a strong current of thinking that relegates self-government rights as the second-best choice for stateless nations. But it need not be so. The social, political and economic benefits of staying within a larger state may lead stateless nations to opt for self-government rights short of independent statehood. The benefits of multiple memberships (in their own nation and in the larger plurinational state) may also be an incentive that drives stateless nations to explore self-government claims within the larger state. It is

[48] By which I mean the same group changing their political demands over time.

true that most (and definitely not all) stateless nations make claims for a separate state at some point in time, but to equate their self-determination claims to only independent statehood would be a category mistake. Independent statehood is only one of the institutional forms through which stateless nations may exercise their self-governmental rights.

One of the factors that discourages stateless nations from articulating their claims more concretely as self-governmental rights within an existing state is because of the packaging of internal self-determination in the form of devolution as a concession and as a means of assuaging nationalist discontent rather than acknowledging it as a right of stateless nation. The term devolution is thus unpopular because it presumes that power resides in the state (controlled by the dominant nation) and that the institutional powers enjoyed by the stateless nation have been assigned as such out of the goodwill of the state and not because the stateless nation has a right to such powers. This may seem like a terminological quibble but this recognition angle that the claim to self-determination represents is of critical importance to stateless nations.

The above discussion also points to another important conclusion - that self-determination as a claim needs to be seen as part of a process that is continuously evolving. The issue of self-determination does not exhaust itself once external self-determination or internal self-determination is ‘achieved’. As much as identity and the claims of a political community are continuously evolving so does the process of self-determination. Hence the grant of internal self-determination does not then mean an abandoning on the part of the community its interest in external self-determination. Neither does it necessarily mean that internal self-determination is only a strategic stepping-stone for external self-determination. The minimum point that is being made here is that these claims are of a continuously shifting nature and that self-determination is in a constant state of negotiation and re-negotiation. Recognizing this is important because ‘internal’ and ‘external’ self-determination are not water tight categories that contain watertight institutional prescriptions – but that they are part of a more holistic reading of the right to self-determination.

That the Nationalities Question is very much alive is empirically proven.[49] Cosmopolitanism has at least not yet eroded the attachment to nationalism. While statist nationalism seeks to find new ways to assert itself in the era of globalization, stateless/ state-seeking nationalisms across the world, be it Scotland, Quebec, Catalonia, Kurdistan, Kashmir or Tamil Eelam, also continue to thrive. The nationalism of these stateless nations is largely in response to the fact that the state has identified itself principally with a singular nation or *demos* denying in essence the multinational / plurinational character of the state. The confounding of the state with the nation surprisingly to date remains a popular idea in the study of political science, international relations and importantly for this thesis in international law. John Stuart Mill's well-known claim that 'free institutions are next to impossible in a country made up of different nationalities[50]' dominates scholarly work on democratic theory to this day. Nation-State nationalisms are deceptively branded as civic nationalisms hiding their majoritarian bias. They are contrasted against nationalisms that are critical of the state as 'ethnic' and 'primordial'.[51]

The ideology of the nation-state is most of the time accompanied by rigorous nation-building exercises, which seek to coerce the non-believers into assimilating with the larger nations and their culture. These assimilatory tendencies are not only a feature of illiberal states but also of liberal states. Liberal nationalists have for some time questioned the falsehood of liberal states being culturally neutral. As Requejo argues even liberal democracies

[49] For example Sambanis and Milanovic argue that Demands for policy autonomy by regionally concentrated ethnic groups claiming the right to self-determination account for more than a third of all civil wars since 1945. See Nicholas Sambanis and Branko Milanovic, 'Explaining Regional Autonomy Differences in Decentralized Countries' (2014) 47 Comparative Political Studies 1830.

[50] John Stuart Mill, *Utilitarianism, On Liberty, Considerations on Representative Government*, (J. M. Dent and Sons 1972) 392

[51] Rogers Brubaker has convincingly argued that there is an element of ethnic-cultural emphasis in (western) societies typically defined as civic nations and there are civic characteristics in categories defined as ethnic nations. Defining civic nationalism strictly would lead to there being very few or no civic nationalisms (even France or the US will not be able to fit into the category). Similarly defining ethnic nationalisms narrowly produces the same result. Defining these broadly would lead to conflation of the two and hence the distinctions will fail their purpose. Roger Brubakcer Myths and Misconceptions in the Study of Nationalism, in Margaret Moore (ed.), *National Self-Determination and Secession* (OUP 1998) 258 Also see: Bernard Yack, 'The Myth of the Civic Nation', (Spring 1996) 10/2 *Critical Review* 193–211.

have always acted as 'nationalising agencies for specific cultural particularisms'.[52]

From the foregoing it is discernible that non-state nationalism needs to be partly and importantly understood as a challenge to the nation-state in addition to its positive content of wanting to further the prosperity and well-being of its individual members. The nationalism of the stateless nations from this perspective is defined as a response to the nationalism of the dominant nation within the state (that is endorsed and pursued by the state) in addition to drawing from its own subjective collective sub-consciousness. Paradoxically in challenging an existing nation-state within which they find themselves stateless nations also tend to centre their claims around establishing their own nation-state. But this is far from universal as has been shown above. As has been argued stateless-nations do transcend the boundaries of the nation-state and are willing to explore their place in a multi-layered legal order both inside the state against which they posit their self-determination claim but also outside it within a supra-national legal order. This is particularly true in Europe where stateless nations desiring self-government have positioned themselves as willing participants in the European Union.

The nature of the nation-state is such that it wittingly or unwittingly converts the public sphere in favour of the dominant nation within the state. It assumes that there is only one people (demos) within the state who share the characteristics of this dominant nation. This is what the plurinationalist theorists call the 'monist thesis of the state'.[53] Public law and the power structure of the state is arranged without affecting the notion of 'democratic legitimacy' in a way that benefits the dominant nation. Herein the stateless nation feels alienated. In worse forms not alien to even Western liberal states, the state actively pursues a policy of assimilation of the 'others' so as to forcibly create this monist nation-state. This provides the breeding ground for stateless nationalism to grow which is more often than not accompanied by violence and in a number of cases civil war. Hence the claim to self-determination by these

[52] Ferran Requejo, 'Democratic Legitimacy and National Pluralism', in Ferran Requejo (ed), *Democracy and National Pluralism* (Routledge 2001), 157, 167-169.
[53] See text in footnote 3 above

stateless nations is a direct challenge to the notion of a nation-state. As Stephen Tierney neatly puts it,

> "central to the challenge presented by sub-state national societies to the host state is a call for the disaggregation of the terms 'state' and 'nation'; those who adhere to the traditional conceptualisation of the 'nation-state' as one politico-constitutional territory encapsulating a unitary national society are charged with the task of reconceiving the plurinational state in appreciation of its essential societal plurality."[54]

Given the approach to internal self-determination that we have laid out in this chapter - as a means of exercising self-governmental rights within an existing state - and in light of the above, internal self-determination needs to be understood as a normative challenge to the nation-state. Hence if internal self-determination is to satisfy the goals of stateless nations it must succeed in converting nation-states into pluri-national states.

The challenge that this thesis takes up is to explore whether self-determination as an international legal norm can be read in this light – that of re-envisaging the norm of self-determination in light of the challenges faced by stateless nations. There is growing acknowledgement of the impact of international law in constitution making and the role of international institutions and legal norms in resolving armed conflicts relating to the sharing of political power. One of the most important challenges to peace in the contemporary world in fact still emerges from civil wars relating to quests for self-determination. For International Law to remain relevant and responsive to these challenges it needs to continuously evolve. The question of how this is possible is the focus of this thesis. The next section considers the current scholarly work on internal self-determination, its pitfalls and why the approach spelt out in this section provides a better normative explanation of self-determination. The final section (Section III) will consider in some detail the link between internal and external self-determination.

[54] Stephen Tierney, *Constitutional Law and National Pluralism* (OUP 2005) 5.

Section II

Internal Self-Determination is not minority rights neither is it participatory rights

Scholarly writing on internal self-determination primarily centres on the notion of the right to participate and the right to democracy. The right to participation and democratic governance thinking also has influenced the attempt at linking the internal aspect of the right to self-determination within an expanded notion of minority rights. This section critiques these approaches as reductionist in nature in that they dilute or mischaracterize the primary value of the right to self-determination defended in the previous sections as a right to self-government. The first section considers the right to democratic governance and right to participation aspect of the explanation of internal self-determination, the second section considers the combined effect that these have on the right of internal self-determination as a sub-set of minority rights.

2.7 Right to Democratic Governance and Internal Self-Determination

Whether adherence to democracy is required by International Law, and what link it may have to self-determination, is not a new debate. The argument is historically rooted in the post-World War II clash between Western States and Soviet Russia. Countries like the US and UK claimed that without liberal democracy the right to self-determination would be useless, whereas the Soviets argued that the right to self-determination was merely an instrument in the path to establishing socialism.[55] Concerns were also expressed by some Third World states that the internal self-determination argument would be used as a pretext by Western States to impose their own choice of form of

[55] See Chapter 1 for more on this.

Government and that this would violate the norm of non-interference in internal affairs.

The more modern manifestation of the link between democratic governance and the right to self-determination is seen in the work of Thomas Franck. According to Franck the emerging right to democratic governance has three normative foundations: the right to self-determination, freedom of expression, and the entitlement to a participatory electoral process.

According to Franck, following the adoption of the International Covenant on Civil and Political Rights the right to self-determination entered its third phase of enunciation,[56] the first two phases of the right's enunciation assigning the right to defeated European powers and colonial territories. In that third enunciation the right became, according to Franck, a right for everyone.[57] It became a principle not of exclusion, i.e. secession, but one of inclusion in which all peoples have the right to free, fair and open participation in the democratic process of governance. Franck argues that where this right is denied to a group that is distinct ethnically or culturally and geographically separate, and in a position or status of subordination, then secession may re-emerge as an option. Franck, however, adds that this aspect of self-determination – the external self-determination aspect – is unclear compared to the entitlement to democratic participation in governance. Franck does not use the term internal self-determination but it is clear that in his point of view the right to free, fair and open participation in the democratic process of governance is the internal dimension of the right to self-determination. External self-determination may be available where this is denied. In *Fairness in International Law and Institutions* Franck argues that the right to democratic governance aspect of the right to self-determination is devoid of challenge and

[56] Thomas M Franck, 'The Emerging Right to Democratic Governance', (1992) 86 AJIL 46 at 58.
[57] ibid 59.

controversy[58] and that it is the question of whether secession is still part of the right to self-determination or in other words the external aspect of the right to self-determination which is a matter of debate.

In his own account of self-determination Antonio Cassese seems to mirror closely Franck's argument in that he argues that there may be an emerging rule in customary international law *in statu nascendi* (in the process of formation) that self-determination may now include a rule requiring pluralistic representative democracy.[59] If unattended by a general and specific system that can ensure compliance, Cassese notes that this could be a 'rule' with only ethical, political and psychological value.[60]

Patrick Thornberry in similar vein claims that internal self-determination is 'the relationship between a people and 'its own' State or government'. It is the 'right of the people (population) of an existing state to exert control over its 'own' constitution and government, in other words, its right to democracy'.[61] Continuing in similar vein, Alan Rosas conceives the right of internal self-determination as a right of a people to determine its constitution (*pouvoir constituant*) including an autonomous status within the confines of a bigger State and the right of a people to govern, that is, to have a democratic system of government.[62] Jean Salmon adds on: internal self-determination is 'an endogenous right protecting the rights of the people against its own government.'[63]

[58] Thomas M Franck *Fairness in International Law and Institution* (Clarendon Press 1998) 156.
[59] Antonio Cassese, *Self Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 306.
[60] ibid 312.
[61] Patrick Thornberry, 'The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism' in Christian Tomuschat, (ed) *Modern Law of Self-Determination* (Martinus Nijhoff, 1992) 101, 101
[62] Alan Rosas, 'Internal Self-Determination' in Christian Tomuschat, ibid, 225-251, 232.
[63] Jean Salmon, 'Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?' in Christian Tomuschat, ibid, 253-282, 265

David Raic's *Statehood and Self-Determination*,[64] considered to be the most detailed work to date on internal self-determination to-date,[65] also has much in common with Franck's account of internal self-determination as a right to participate. Raic argues that the main core of the right to self-determination is the right of peoples to decide their own destiny or the right of peoples to govern them. The *raison d'etre* of the concept of self-determination is the protection, preservation, strengthening and development of the cultural, ethnic and/or historical identity or individuality of a collectivity, that is, of a people and thus guaranteeing a people's freedom and existence.[66] In the post-colonial context Raic says internal self-determination is a 'method of implementing political self-determination within the boundaries of the state' and implies a 'right of participation'.[67] The right to participate can be anything from taking part in the central decision-making processes of the state to federalism and other forms of political autonomy.[68] The holders of the right to internal self-determination in Raic's account are two-fold: (a) nations (by which he means existing states) in the sense of an entire population and (b) peoples as subgroups or segments of the nation, i.e 'minority-peoples' (defined as an ethnic definition of 'peoplehood').[69] With regard to external self-determination, Raic makes the familiar argument that there is no right to unilateral secession for minority groups except in exceptional circumstances which endanger the very existence of the group.

The problem with these accounts of internal self-determination are that they reductionist in nature and suffer from a poor appreciation of the values that underpin the right to self-determination. Raic is right about self-government being the central value of self-determination but slips in his evaluation of internal self-determination in diluting it as anything ranging from taking part in central decision-making processes to the right of self-government. As argued in the previous section the right to self-government is the core of the right to

[64] David Raic, *Statehood and the Law of Self-Determination* (Kluwer Law International 2002]
[65] Jan Klabbers 'The Right to be Taken Seriously: Self-Determination in International Law' (2006) 28 Human Rights Quarterly 186 at 204
[66] Raic (n 64) 238
[67] Ibid 237
[68] Ibid 239
[69] Ibid 271-271

self-determination and that this core should manifest in any account of the right to self-determination including its internal dimension. The criticism here is that Raic's account of internal self-determination is too elastic.

The chief defect in the right to democracy/ right to participate argument is that it fails to appreciate that the right to self-determination is a collective right. The right to democracy/ participate argument assumes that the availability of democratic governance and access to such democratic governance would be satisfactory guarantors of the right to self-determination. Ensuring individual (participatory) rights within an existing state cannot be an exercise in the right to self-determination. Even a strong form of participatory right such as special representation rights for a group in the law-making process of the state cannot amount to self-government as Kymlicka's typology (referred to in the previous section) also affirms. The participatory right approach to internal self-determination disaggregates self-determination as rights held by individual members *vide* their membership of a particular community to participate in the affairs of the state while refusing to acknowledge the participation of the group *qua* group in the affairs of governance. The latter is in fact the essence of the right to self-determination.

A simplistic notion of participation in democracies that are by design and function nation-states makes such democracies majoritarian democracies. Franck's account of the right to democratic governance interprets it largely as a right to electoral democracy.[70] The liberal peace project promoted by a number of Western States believes that the promotion of liberal democracy

[70] Fox and Roth: "No generally agreed definition has yet emerged, though most international actors using the term [democracy] appear, at a minimum, to refer to the familiar pairing of free and fair elections and certain 'counter- majoritarian' political rights. Elections, as the procedural embodiment of 'popular sovereignty', though the UN Human Rights Commission recently included elections as only one of a long list of 'rights of democratic governance'. The non-exclusive list of rights thus referred to include a) the rights to freedom of opinion and expression, of thought, conscience and religion, and of peaceful association and assembly; (b) the right to freedom to seek, receive and impart information and ideas through any media; (c) the rule of law; (d) the right of universal and equal suffrage, as well as free voting procedures and periodic and free elections; (e) the right to political participation; (f) transparent and accountable government institutions; (g) the right of citizens to choose their government system though constitutional or other democratic means; and (h) equal access to public service.", 'Promotion of the Right to Democracy' Comm. HR Res. 1999/57 (27 April 1999) (approved by a vote of 51–0–2). Gregory H. Fox and Brad R. Roth, 'Democracy and International Law' (2001) 27 Review of International Studies 327-352 at 331

along the lines of what the right to democratic governance prescribes provides the recipe for settling self-determination conflicts.[71] However this is a misplaced diagnosis of what ails deeply divided societies. In a democracy with deeply divided societies electoral participation produces permanent majorities and permanent minorities along group identities which provide the recipe for protracted conflict. Similarly, rights-based counter majoritarian constitutionalism does little to address the problems raised by smaller nations. In deeply divided societies numerically smaller groups take up the claim to self-determination precisely because mere participation in democratic processes tends to reinforce the majoritarian character of the state. Hence self-determination claims in the context of deeply divided states are in fact a counter claim to simplistic procedural ideas of democratic participation.

The other argument made by the 'democratic governance' camp is that that liberal democratic constitutions which are based on the idea of counter-majoritarian, rights-based constitutionalism would provide the necessary protection for minorities through the provision of a bill of rights and an independent judiciary. But this again is an inadequate response to the nationalities question. As Colin Harvey and Alex Schwartz point out:

> (T)he worry in divided societies is not only that majority factions will violate the individual rights of minorities (although this is a danger) but also that certain group specific interests will be disregarded and marginalised. The problem then is that from the perspective of the standard model of rights-based constitutionalism, group-based

[71] Russell Buchanan in a recently published study argues that the democratic entitlement theory of international law propounded by Thomas Franck is part of the new international law rules being developed to assist the liberal peace agenda pursued by western states in the post-cold war context; Russell Buchanan, *International Law and the Construction of Liberal Peace* (Hart 2013).

Interpretation of internal self-determination as about the right to participatory government has also been interpreted as being part of the liberal peace project by scholars who adopt third world approaches to the study of international law. See for example: Kalana Senaratne, 'Internal Self-Determination in International Law: A Critical Third-World Perspective (2013) 2 Asian Journal of International Law 305-339

> concerns may not even register as matters of principle. If so, the interests of minorities (qua group) will be treated as matters of policy to be determined by majority rule.[72]

This is not to say that the arguments for the right to democratic governance are not important to the idea of self-determination. While international law does not prescribe a particular system of government (democracy, socialism etc) the idea of popular participation in governance is an ethically, politically defensible idea. Cassese might be even right that it is an emerging norm in international law. The idea of self-government clearly has democratic roots and a rich conception of democracy in fact may help explain the importance of the right to self-determination. One may even concede that the democratic behavior of a group may be considered as a pre-condition to evaluating the legitimacy of a self-determination claim. However, the argument here is that given that democracy is by default understood in procedural majoritarian terms (as providing for a system of governance run by those elected by a majority of individuals entitled to vote) it does not represent entirely the core ideas that the right to self-determination seeks to promote.

Franck's approach is representative of the early generation of liberal scholars who were pre-occupied with the notion of individual rights and who viewed collective rights with suspicion. Their assumption was that as long as individual rights were available and robustly protected by the state then the issue of autonomy and secession would not arise. Nationalism was viewed as tribalism and primordial and if any nationalism was acceptable by default it was the nationalism of the state. The truth is that individual rights focused liberal theory inadvertently or advertently endorses the dominant nationalism of the state. Liberal nationalists have shown that there need be no clash between the values of liberalism and nationalism. They have pointed to the impossibility of the state being neutral towards identity and culture.[73] Hence in plurinational settings it is important that the political claims of the numerically smaller groups

[72] Colin Harvey and Alex Schwartz, *Rights in Divided Societies* (Hart Publishing 2012) Chapter 1 Introduction.
[73] Tierney, Constitutional Law and National Pluralism, 52-58

are recognized as a claim to self-government. To repackage internal self-determination as the right to participate in democratic governance devalues internal self-determination's value as an alternative to external self-determination. If internal self-determination means right to participate it hardly is an alternative to independent statehood.

One final argument in the alternative warrants mention for this section to be deemed complete. Jan Klabbers in an influential piece argues that the modern manifestation of the right to self-determination is a right to be taken seriously.[74] He argues that the right to self-determination as an enforceable right is no longer tenable in the post-colonial context. Interpreting the law of self-determination as a legal principle rather than a right he argues that courts have severed the connection with secession and argues for self-determination to be conceived as a procedural norm. He argues, rightly, that self-determination conceived as a participatory right would strip it off its collective character but asserts that the 'right to be taken seriously' is a substantive right and practical. But unfortunately, he does not offer reasons for why the right to self-determination as a 'right to be taken seriously' is substantive or practical.[75]

2.8 Right to Participation, Minority Rights and Internal Self-Determination

The attempt to reduce the right to self-determination to a right to participate also limits the usefulness of the right to participate as a distinct right. The right to participate is provided for separately in the ICCPR, *vide* Article 25. It is not denied that the right to participate is important for numerically smaller nations within the larger state. Beyond their space for self-government these smaller nations also claim their rights to take part in the affairs of the central government and the right to participate provides credence for this argument.

[74] Jan Klabbers (n 65). Similar point is made by Jure Vidmar. He argues that self-determination should be best understood not as an entitlement, but as a demand that 'some democratic principles be followed' in the process of state formation. Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart, 2013), 141

[75] Klabbers (n 65) 204

The point that I am making here is, however, that the right to participate is insufficient to explain the core meaning of the right to self-determination as a right to self-government.

The right to participate is also now seen as part of minority rights and there have been suggestions that the right to participate read with the rights of minorities provides for the content of the internal dimension of self-determination. For example the entry under 'Minority rights' in the Max Plank Encyclopaedia on Public International Law makes the following claim when examining the relationship between minority rights and internal self-determination:

> All minority specific instruments contain clauses that the exercise of the minority rights enshrined therein do not justify secession. While it is generally accepted that minorities only have a right to external self-determination in the form of secession in the most exceptional circumstances, eg in case of gross and systematic human rights violations, it is increasingly accepted that minorities are entitled to forms of internal self-determination. Internal self-determination does not threaten the territorial integrity of States and is closely, even intrinsically linked with participatory rights.[76]

A number of scholars have similarly asserted a link between minority rights and internal self-determination. Geoff Gilbert thinks that a supposed right to autonomy bridges the right to self-determination and the right of minorities. This claim needs further scrutiny.[77]

International law on minority rights seeks to address the survival and existence, promotion and protection of the identity of the minorities, equality and non-discrimination and effective participation of individuals belonging to minority groups. The emphasis of the right to participate dimension of rights of minorities has led some scholars to suggest that the right to participate

[76] Kristin Henrard, 'Minorities, International Protection' in Max Plank Encyclopedia of International Law, (last updated February 2013) available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e847?rskey=ZMxEmB&result=3&prd=EPIL> accessed 15 December 2018.
[77] Geoff Gilbert, 'Autonomy and Minority Groups: A Right in International Law?' (2002) 35 Cornell International Law Journal 307

dimension of both the right to self-determination and minority rights might be suggestive of a confluence of these two legal regimes. This I think is again an attempt at reductionist reading for self-determination. If there is indeed a confluence and if this is seen as desirable, then there would be no need for an articulation for an internal dimension of the right to self-determination. But is there such a confluence?

Minority rights in international law have been difficult to define but the most widely cited definition comes from the report of Francesco Capotorti, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, who defined a minority group as follows:

> A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.[78]

It is important to note that Capotorti defines the interests of a minority group as being motivated by their desire to preserving their culture, traditions, religion or language and not as one relating to self-government. Minority rights referred to in Article 27 of the International Covenant on Civil and Political Rights have been interpreted by the UN Human Rights Committee as being the right to enjoy their own culture, to profess and practise their own religion, or to use their own language as opposed to the right to self-government which I have argued is the corner stone of the right to self-determination. The Committee states that Article 27 rights are ‘conferred on individuals belonging to minority groups’, ‘which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy

[78] Capotorti, Francesco, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities.* (United Nations 1991) para. 568.

under the Covenant.' The committee is also quite explicit in identifying minority rights as being in a different league to self-determination:

> The Covenant draws a distinction between the right to self-determination and the rights protected under Article 27. The former is expressed to be a right belonging to peoples and is dealt with in a separate part (Part I) of the Covenant. Self-determination is not a right cognizable under the Optional Protocol. Article 27, on the other hand, relates to rights conferred on individuals as such and is included, like the articles relating to other personal rights conferred on individuals, in Part III of the Covenant and is cognizable under the Optional Protocol.[79]

This distinction between Article 1 and 27 addressed here is not just merely the question of justiciability under the ICCPR's Optional Protocol. The character of the right of self-determination being of the group rights variety and that of minority rights as of the individual rights variety is made very clear.

It is important to note that individuals in a minority group enjoy those rights as members of such a group, meaning that they would not be entitled to such rights if they were not members of that group. Hence the HRC itself recognizes that despite the emphasis on minority rights being interpreted as individual rights the collective dimension in minority rights is definitely of importance. This is a reluctant acceptance but nevertheless a recognition that rights of individuals of minorities would not be safeguarded if the value of the group itself is not acknowledged by States. There has been indeed a slow move towards acknowledging that minority rights need group specific positive action from the state and not just negative assurances that they will have the right to enjoy their language and culture. In Europe it appears that there has been greater movement in this direction. The Lund Recommendations on Article 15 of the Framework Convention for the Protection of National Minorities (relating to the right of participation) provides that self-governance may be considered

[79] UN Human Rights Committee (HRC), *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, 8 April 1994, CCPR/C/21/Rev.1/Add.5

as a manifestation of the right to effective participation.[80] However even this development does not see self-government as essential to effective participation, only as optional. Regardless these developments are limited to Europe and do not reflect generally on Public International Law. For example, Ulrike Barten in a recently published work on Minorities and Self-Determination makes the claim that minorities have the right to internal self-determination but accepts that this conclusion applies only to Europe.[81]

The difference that I am seeking to draw between self-determination and minority rights centres on the issue of self-government. Minority rights do not and cannot include self-government as a right due to the essential nature of the right to self-government being an institutional group right. The subjective factors that define a minority group are their consciousness of their distinctiveness or differences and the will to preserve this distinctiveness or difference. Self Determination requires much more than a will to preserve their distinctiveness – it claims that such distinctiveness can be protected only through self-government. Minority rights demands recognition of the group but the rights are conferred to the individuals in the group and not to the group itself. The right to self-determination is not a right that can be enjoyed by individuals of the group but can only be enjoyed by the group in its character as a group. As Patrick Thornberry puts it:

> (W)e should distinguish between the collective rights of individuals by virtue of belonging to, or being perceived as member of, a particular group (collective as adjective); and the rights of a "collective" – a corporate conception implying rights for the group as such, against the world and even against its "members". Article 27 clearly eschews the corporate conception; rights are for: "persons belonging to...minorities.[82]

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[80] Office of the High Commissioner on National Minorities (OCSE), *The Lund Recommendations on the Effective Participation of National Minorities in Public Life* (OCSE 1999) Recommendation 15 & 16.
[81] Ulrike Barnet, *Minorities, Minority Rights and Internal Self-Determination* (Springer International Publishing 2015).
[82] Patrick Thornberry and Maria Amor Martin Estebanez, *Minority rights in Europe: A Review of the Work and Standards of the Council of Europe* (Council of Europe 2004) 14.

My argument here is that we need not and should not confuse minority rights and self-determination. Minority rights provide for a specific tool kit of rights that aim at certain special rights for members of the group *qua* their membership of the group but do not amount to an institutional over-arching right such as the right to self-government and self-determination. A group may consider minority rights to be sufficient to address the problems it faces and may not require the need for self-government. In years to come however such minority rights may prove to be inadequate for the group, which may then demand the right to self-government. This is when the group develops, as I have claimed in section I, a consciousness that self-government alone will help attain substantive equality and protection. Some groups to the contrary may shun minority rights altogether from the very beginning and seek the right to self-government. As to whether a group projects itself to be a minority or a people/nation is a matter of self-consciousness. The objective characteristics of a people/nation are the same but the subjective characters are different. The point here is that the right to self-government is a distinct claim, which should be kept distinct from minority rights. To confuse the right to self-government with minority rights would lead to the dilution of both sets of rights. This is, as has been noted, not to say that minorities are not entitled to self-government. The moment they decide to make the claim of self-government as a right they stop being minorities.

Section III

Internal to External Self-Determination

As already argued in this chapter self-determination should not be regarded as synonymous with independent statehood but rather with self-government and as such internal and external self-determination both are about self-government. But when does a case for self-government become a case worthy of statehood? In other words what is the link between internal and external self-determination?

As of late there has been much normative work done on secession. My interest here is not to exhaustively study this extensive scholarship. My interest is

narrow in this section in that I seek to explain what the relationship between internal and external self-determination might involve.

There are two major influential strands of secession theory in the scholarship.[83] the choice theory and the just cause or the remedial theory of secession.

The choice theorists of secession stipulate that the will of the people should be what matters most. It is an individualist approach to secession in that what matters is not that the typology of the group or the reasons it gives but that if a set of individuals democratically wills to set up its own political institutions in the form of a state they should be entitled to do so. This approach to secession grounds itself firmly on democratic choice theory. The primary draw backs of this approach for reasons argued elsewhere in this chapter is that it fails to acknowledge and address the ascriptive character of the claim to (self-determination and) secession. More importantly by basing their choice theory on democratic consent they refuse to acknowledge the boundary problem in democratic theory i.e., democratic theory cannot be brought to bear on the logically prior matter of the constitution of the group.[84] Given that the choice theorists base their arguments on consent the issue of how and when self-determination is justified in the form of a separate state does not bother them too much. The form that self-determination takes is also a matter of choice.

The just-cause theory denies that the right to self-determination is a primary right. It argues that individual autonomy-based justifications on democracy cannot justify self-determination as a collective right. Buchanan in fact argues that that secession is inimical to concerns relating to democracy - secession should not be available from a democratic state that provides for minimal justice. Secession according to this account is only justified as a last resort remedy against injustice. The strict conditions for secession Buchanan argues are capable of reducing 'the threat of secession being used as a strategic bargaining tool that gives the numerically smaller groups *de facto* veto over

[83] For an overview please see Allen Buchanan 'Theories of Secession' (1997) 26 (10) Philosophy & Public Affairs 31 – 61, Allen Buchanan, *Secession: The morality of political divorce from Fort Sumter to Lithuania and Quebec* (Westview Press 1991)
[84] F. G. Whelan, 'Prologue: Democratic Theory and the Boundary Problem', in J. R. Pennock and J. W. Chapman (eds.), *Liberal Democracy* (New York University Press 1983) 40.

majority decisions and by fostering the stability that is needed to make it rational for citizens to invest themselves in the demanding practices of deliberative democracy'.[85] As Moore has pointed out, given the difficulties with the question of who decides the justness of the cause, just cause theorists also then resort to procedural techniques similar to the choice theorists to ascertain whether a just cause in fact exists.[86] Much more importantly the just cause theory also ignores the ascriptive character of the claim to self-determination.

Buchanan's argument that international law should recognise only a remedial right to secession however does not mean that he acknowledges that there is a primary right to intrastate autonomy. Buchanan argues that intrastate autonomy or internal-self-determination will remain a remedial right but that compared to secession this would require violations of rights at a 'lesser level'.[87] Buchanan argues that it would be a mistake to begin with proposals for intrastate autonomy. He calls for an individual-rights (including minority rights[88]) approach as a matter of first resort. The arguments for favouring an individual rights-based approach is because Buchanan argues, 'respect for rights is not enhanced by proliferating rights',[89] that autonomy will be a distractor from holding states to account for their primary obligations *vis-à-vis* individual rights, because autonomy regimes themselves automatically guarantee individual rights and that autonomy regimes will act as an impediment to the state's role to further distributive justice.

Buchanan does not offer much detail as to what 'lesser level' violations would constitute. Given that he has already listed discriminatory laws, serious violations of international law and violations of arrangements for autonomy as justifying secession it is difficult to imagine what these lesser level violations would in practice include. More importantly though Buchanan's arguments for primacy for individual rights to deal with nationality questions for reasons are

[85] Allen Buchanan, 'Democracy and Secession', in Margaret Moore (ed.), *National Self-Determination and Secession* (Oxford University Press1998) 30
[86] Margaret Moore, 'Introduction: The Self-Determination Principle and Ethics of Secession' in Margaret Moore, (n 71), 6
[87] Allen Buchanan*, Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (OUP 2003) 250.
[88] ibid, 251.
[89] ibid.

based on assumptions and contingent arguments that autonomy need not necessarily enhance individual rights and that it could block distributive justice programmes of the central government. Buchanan also overlooks the fact that the demand for self-determination as self-government in fact is made mostly in a context where individual rights protection has failed to provide adequate safeguards for groups now claiming self-determination. But there is a more fundamental reason why Buchanan has no option but to put forward a remedial only right to intrastate autonomy. It is because Buchanan (and other remedial right only theorists) has no foundational argument for the right to self-government/ self-determination as such.

But can the remedial right only theory explain the reasons for which an argument for self-government is also a legitimate argument for secession? Buchanan's call for international policy making to look at claims to autonomy favorably do so largely on the basis of its strategic utility[90] in that its supports stability of the international order and prevents balkanization of states. But for the same reasons pointed out in section one this assumes that the claim to statehood is a cost-free choice. The claim to secede, like the claim to self-determination (See section I) is not an easy one to make and involves significant psychological and social costs to the community making the claim. It would be a mistake to think that communities look at international law rules on secession before they embark on a policy for demanding secession. Furthermore, that the international community is least interested in treating secessionist claims with interest may in fact operate as a disincentive. While the claim is made in scholarly circles that a lenient attitude towards secession may risk instability the contrary is rarely considered. The rather over-zealous emphasis on territorial integrity in fact can be an indirect factor that emboldens states to violently deal with self-determination conflicts and even worse commit egregious crimes against those groups that claim self-determination in order to weaken them and neutralize their political goals. International criminal law despite its significant development in the past decade or so remains a weak deterrence to crimes committed in self-determination conflicts.

[90] ibid

Arguments for stability and peace are those arguments that are primarily referenced for an adverse policy against secession. But on closer examination these arguments do not necessarily provide enough argumentation for a policy against secession. If secession in a certain context can be shown to be relatively the preferable option for the sake of peace between those communities who are embroiled in the self-determination conflict, the region and by extension for global peace, arguments for stability might actually require secession. In the absence of consensus, it is empirically true that secession results in instability, movement of populations, and large-scale crimes but these are also features of protracted self-determination conflicts is also true. As much as there are no normative reasons for equating demands for self-determination with secession similarly there are no normative or empirical reason why secessions need to be inherently objectionable.

It is from this viewpoint that the remedial-only secession theory is problematic. It reserves secession to a narrow set of circumstances primarily in situations that involve the egregious violation of human rights and humanitarian law by the dominant state community over the victim community and wherein there is a consistent denial of internal self-determination. The second limb of the remedial secession theory – the continuous denial of internal self-determination is hardly suggested as a stand-alone justification for secession. It is the first limb (that of serious violations of human rights) that is given focus in accounts of remedial secession. The justification of secession as a response to egregious violation of human rights and humanitarian law on its own is fraught with difficulty. It is rarely justified as a punishment on the dominant community for committing these egregious violations of human rights law. If it is indeed suggested as a means of guaranteeing the victimized community does not continue to be victimized the question, then arises as to whether secession becomes unavailable if it is proven that the egregious violations have stopped. This was one of the points made by States that opposed remedial secession that claimed that post-NATO intervention violations against the Kosovo community had stopped.

But I think egregious violations of human rights, and denial of internal self-determination as a justification for secession is better understood as a contributory factor to the larger normative justification for secession. The larger normative justification for secession I suggest is the irretrievable breakdown of trust between the host community and the one seeking self-determination. By irretrievable breakdown I mean the lack of any reasonable prospect for both communities living together in a common state. And by trust I refer to the relationship required between communities in a plurinational setting to cohabitate in a common state. This may seem like an amorphous principle but is widely used in the law of divorce between persons who have contracted a marriage. The difference in its usage here is that it is merely not the subjective opinion of the parties that matters as to whether there has been an irretrievable breakdown of the relationship but the involvement of a third party – be it a state, the United Nations or a non-state actor. This is an essential feature of peace agreements and settlements in the post- World War II and cold-war context. Many states play a role in the settlement of internal disputes mostly on the invitation of the parties involved in the self-determination conflict. The argument here is that this third party should form an objective assessment as to whether there has been an irretrievable breakdown of trust between the communities and if the answer is in the affirmative then there should be support from the international community for secession.

Two of such criterions that could be used in this assessment are the afore mentioned history of past violations and the consistent denial of internal self-determination. But these need not be the only criterion. These criterions may not be able to explain the demands for secession in Scotland, Quebec and Catalonia. There may be other criterion that may deserve recognition depending on the particularities of the context. For example, subtler forms of long standing discrimination such as economic discrimination and the consistent expression of the community that their survival as a group depends on them constituting a separate state may be factors that have to be taken into account depending on context.

The larger point that is being made here is two-fold. Firstly, that it is unnecessary to close secession as one of the forms, which the right to self-determination may take. It need not be even restricted to remedial-only prescriptions, though the remedial-only cases may in fact be the best possible scenarios where secession might indeed be the best option in a given situation. The point has been repeatedly made in this chapter that independent statehood need not and should not be confused with self-determination. But secession need not be and cannot be de-linked from self-determination is sought to be stressed here.

The second point seeks to draw a wider conclusion from the first point - that the internal and external self-determination forms of self-determination need to be seen as part of the larger whole and as a continuum. Internal and external self-determination are indeed part of the same continuum. The argument that there is only a right to internal self-determination and not to external self-determination is a mistake. The right is to self-determination and whether it takes an internal or external form should depend on the particularity of the circumstances. If self-determination is understood as self-government as I have suggested it to be, secession is also a form of self-government and indeed the highest form of self-government attainable in the current international architecture. As Susanna Manicini has pointed out one way of reducing the zeal of secession is to normalize it in our discourse as opposed to demonizing it.[91] Most often, if not always, the policy nudge in favour of self-determination within the existing state apparatus (internal self-determination) is given by making secession more difficult – the primary motivation of the remedial right only theories. But the other side of the possibility is rarely advocated that secession being one among the options on the table may in fact induce the dominant community within the centralized state to consider more proactively the possibility for recognizing plural forms of self-government within one state. The point here is not that international rules on secession (if any exist at all) must be relaxed. As it is often said states can probably never be expected to come forward to recognize that their own destruction and

[91] Susanna Mancini, 'Secession and Self-Determination' in Michel Rosenfeld and Andras Sajo, *Oxford Handbook of Comparative Constitutional Law* (OUP 2012), 481-493 at 482

recreation might be good sometimes. The point is that a focus on self-determination as self-government will allow us to understand demands for secession more critically and openly and perhaps also to the normalization of secession as an option where self-government within the state is not a feasible option.

Conclusion

This chapter has argued against the trend of scholarship that seeks to turn away from the most important problem raised by self-determination today: that the state conceived as a singular nation-state in plurinational societies is unjust. It has been further argued that the problem raised by stateless nations is one relating to their political status and it would be unproductive to read down this issue as one relating to minority rights and participatory rights. Minority rights and participatory rights are also important to stateless nations, but they are inadequate responses to claims to self-determination. Internal self-determination, if it is about self-determination, has to be about self-government.

Separate statehood is undeniably the highest form of self-government. But stateless nations, contrary to popular belief, are not fixated on a separate state as the only institutional setting that will satisfy their self-determination claims. This chapter has argued that secession and autonomous self-government within an existing state have to be interpreted as part of the same continuum of the right to self-determination. While there is indeed a right to self-government for national groups, what form it takes cannot be normatively theorized without going into the particularity of the circumstances.

Chapter 3

Understanding Kosovo's Trajectory from Internal to External self-determination.

Introduction

Members of the Assembly of Kosovo declared independence on 17 February 2008.[1] The impact of Kosovo's claim to statehood has been felt in many areas of public international law including the law relating to the legality of declarations of independence, the applicability of the rule of territorial integrity to non-state actors, the legality of unilateral secession, the post-colonial content of the right to self-determination *et al*. This chapter focuses on the reasons that explain the trajectory from internal to external self-determination in the process that led to deciding Kosovo's status and what lessons it might have for developing a better understanding of the post-colonial right to self-determination in Public International Law. Section 3.1 of this chapter considers the challenging question of whether this exercise is worthy of its stated objective given the argument that the 'Kosovo case' is *sui generis*. The political environment that shifted the debate on Kosovo's future from internal to external self-determination is considered in Section 3.2. Section 3.3 and 3.4 look at the justificatory reasons used by States arguing in support of or against this slide from internal to external self-determination in Kosovo's case through a study of their submissions before the International Court of Justice in *Accordance with international law of the unilateral declaration of independence in respect of Kosovo.*[2] Section 3.5 considers the question of whether international law can and should remain neutral or silent on the post-colonial content of the right to self-determination.

[1] Kosovo Declaration of Independence 47 ILM 467 (2008)
[2] 2010 I.C.J Reports. 403 [Kosovo Advisory Opinion case]

3.1 Is Kosovo worthy of being studied as a case study? – Assessing the *sui generis* claim.

The question of whether Kosovo is worthy of study as part of a project that seeks to evaluate the contemporary content of the law on self-determination needs to reflect and respond to the argument of Kosovo being a *sui-generis* case. Including Kosovo many states that argued in favour of the legality of Kosovo's Declaration of Independence [DoI] in the Kosovo Advisory Opinion case maintained that it was a *sui generis* case i.e. not applicable outside the context of Kosovo. The various reasons adduced for the argument for *sui generis* include[3] (a) the creation of a UN mandated Transitional Administration for Kosovo (b) the presence of the multinational Kosovo Force (KFOR), both mandated by UN Security Council resolution 1244[4] (c) the systematic violation of human rights against the Kosovo Albanian population (d) the unilateral abolition of Kosovo's autonomous arrangements within the Former Republic of Yugoslavia. In this section I discuss the motives and maintainability of referring to Kosovo as *sui generis.*

As Rein Mullerson has argued, whether certain situations, facts or acts can serve as precedents depends to a great extent on the beholders eye.[5] He argues that it is certain pre-conceived ideas, informed by beliefs, ideologies and prejudices that determine whether a situation is judged as unique or not. In broad terms concern for *sui generis* arises from the fear that Kosovo may be used as a precedent by groups and states that seek the creation of independent states elsewhere and that it might cause a rupture in the international law on territorial integrity of states. This particular political concern coupled with the perceived abuse of the precedential effect of Kosovo may

[3] See for example, Secretary of State Condoleezza Rice: "The unusual combination of factors found in the Kosovo situation – including the context of Yugoslavia's breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration – are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as a precedent for any other situation in the world today*"* US Recognition statement on Kosovo US State Department, *<http://2001-2009.state.gov/secretary/rm/2008/02/100973.htm>* accessed 30 June 2014

[4] UN Security Council, *Security Council resolution 1244 (1999) [on the deployment of international civil and security presences in Kosovo]*, 10 June 1999, S/RES/1244 (1999),

[5] Rein Mullerson, Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia, 8 (1) Chinese Journal of International Law 2, 5

have motivated States to articulate that Kosovo constitutes no precedent in legal terms. States did not want their conduct in Kosovo to give rise to the establishment of a general rule (or the clarification/ reinterpretation/ expansion of an existing rule – the rule on self-determination), presumably not because they necessarily disagreed with the self-determination related arguments that might have supported the Kosovo case, but because they feared how those arguments would be used in a different context. The concern with stating anything concrete on self-determination is also that groups seeking external self-determination would in future strategise their politics according to the content of the rule.[6] This is similar to the moral hazard argument that has been put forward as a criticism of the doctrine of the responsibility to protect or/and humanitarian intervention. The moral hazard argument asserts that the availability of humanitarian intervention/ R2P induces risky behavior on the part of vulnerable groups, which in turn invites a violent response from the State. However, one can doubt the suitability of applying a theory of economics to international law and international relations. As Bellamy and Williams have shown the moral hazard theory lacks empirical support and is too simplistic in understanding the complex social phenomenon of armed conflict and more particularly the notion of provocation in a conflict setting.[7]

The argument of *sui generis* has been disputed. In fact, it has not prevented the invoking of Kosovo as a precedent. Russian President Vladimir Putin in an address to the Russian Parliament[8] on 18 March 2014 cited the ICJ's advisory opinion to argue that Crimea's declaration of independence from Ukraine did not violate general international law. He cited US written submissions before the ICJ to argue that such DoIs will not be illegal merely for the reason that they violate the domestic constitutional order of the parent state. President

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[6] See for example: T Crawford and AJ Kuperman (eds) *Gambling on Humanitarian Intervention* (Routledge 2006).

[7] Alex J. Bellamy and Paul D. Williams 'On the Limits of Moral Hazard: The 'responsibility to protect', armed conflict and mass atrocities' 18 (3) European Journal of International Relations 539-571. Also see Jon Western 'The Illusions of Moral Hazard' 4(2) Ethnopolitics 225-236

[8] Official Website of the President of Russia, 'Address by the President on 18 March 2014' <http://eng.kremlin.ru/news/6889> accessed on 30 June 2014

Putin however went further and made the case for why Kosovo does constitute a precedent. Questioning the notion of Kosovo being a *sui generis* he argued,

> We keep hearing from the United States and Western Europe that Kosovo is some special case. What makes it so special in the eyes of our colleagues? It turns out that it is the fact that the conflict in Kosovo resulted in so many human casualties. Is this a legal argument? The ruling of the International Court says nothing about this. This is not even double standards; this is amazing, primitive, blunt cynicism. One should not try so crudely to make everything suit their interests, calling the same thing white today and black tomorrow. According to this logic, we have to make sure every conflict leads to human losses.[9]

Russia previously employed the Kosovo 'precedent' similarly to justify its actions in South Ossetia and Abkhazia. The then Russian President argued that they had consistently maintained the position that after Kosovo's DoI was recognized 'it would be impossible to tell the Abkhazians and Ossetians (and dozens of other groups around the world) that what was good for the Kosovo Albanians was not good for them.'[10] That Russia so far in the same spirit has not recognised Kosovo speaks obviously to their own duplicity. One may be able to distinguish Crimea, Ossetia and Abkazia's facts from that of Kosovo's[11] (there are unique features in all ethnic/armed conflicts anyway), but the underlying normative logic of Kosovo[12] (statehood for denial of internal self-determination and past injustices), is indeed what was being invoked by

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[9] ibid

[10] Dmitry Medvedev, 'Why I had to recognise Georgia's breakaway regions' (August 26 2008) <http://www.ft.com/cms/s/0/9c7ad792-7395-11dd-8a66-0000779fd18c.html#axzz35wAu99RL> (last accessed on 30 June 2014)

[11] Even those who conclude that Russia's invocation of the Kosovo precedent was instrumental concede that there are numerous similarities in both cases: Christian Axboe Nielsen, The Kosovo precedent and the rhetorical deployment of former Yugoslav analogies in the cases of Abkhazia and South Ossetia, (March–June 2009) 9(1&2) Southeast European and Black Sea Studies, 171–189.

[12] See for example Anne Peters, 'Crimea: Does "the West" now pay the price for Kosovo?' <http://www.ejiltalk.org/crimea-does-the-west-now-pay-the-price-for-kosovo/> accessed on 30 June 2014)

Russia despite the claim to *sui generis*. Crimea, South Ossetia and Abkhazia are unlikely to be the last of such invocations.

It is important to note that the ICJ itself did not say anything as with regard to the *sui generis* nature of Kosovo. In fact, it did not venture into the law of self-determination at all and decided to rule on the legality of Declarations of Independence *simpliciter*. The ruling was based on the notion that if there was an issue on which no positive rule of international law were to be found that it would be assumed that the action in dispute will not be deemed to be in violation of International Law.[13] Given that this is the law emanating from the Kosovo Advisory Opinion case, the ICJ's opinion neither supports or undermines Putin's assertion of the legality of Crimea's or for that matter even Kosovo's statehood.

However, Russia's invocations of Kosovo point to the fact that the intended purpose of the *sui generis* claim has been a failure. The fact is that the *sui generis* claim has not deterred the use of Kosovo as a precedent and has been a weak argument against those who wish to invoke the normative issues at play in Kosovo in other situations. I submit that rather than claiming that Kosovo is a *sui generis* case, it may be better for those worried about the 'abuse' of the Kosovo example to attempt to explain the rationale for Kosovo's statehood in normative terms, including the relevance of the right to self-determination to understanding Kosovo's trajectory to independent statehood. To take such an affirmative position is likely to help generate better substantive debates about the relevancy of Kosovo for other self-determination conflicts.[14]

The political motive for making a *sui generis* claim may for reasons outlined above be undesirable and unattainable. But irrespective of the political motive, the legal outcomes of a *sui generis* claim raise two further issues of importance which require our attention. A) The impact of the *sui generis* argument in assessing and attributing *opinio juris* of states' conduct and reaction to

[13] Kosovo Advisory Opinion Case, para 57

[14] See section 3.5 of this Chapter.

Kosovo's DoI B) as to whether the *sui generis* claim is on the merits of its contents justifiable, irrespective of its undesirability.

3.1.1 The impact of the *sui generis* argument in assessing *opinio juris*

The question that this section will try to respond to is, given that many of the states that participated, supported and were involved in the creation of Kosovo consider such action to be of a *sui generis* character, whether such characterization may be considered as impairing any interpretation of their action as contributing to state practice or *opinio juris* on the law of self-determination. Where state practice is contrary to an established rule of international law it is a well-accepted principle of international law that such practice should generally be considered to be in violation of the rule concerned and not as evidence that the state did not want to recognize the rule of customary international law in question.[15] Where, however, the existence of the rule itself is in doubt or where the rule is argued to be 'emerging', a state claiming that its conduct is not reflective of *opinio juris* does impair any assertion of customary international law. If customary international law is said to be where 'states generally believe that it is desirable now or in the near future to have an authoritative legal principle or rule prescribing, permitting, or prohibiting certain conduct'[16] then the fact that a number of states have considered Kosovo to be *sui generis* precludes identification of any (emerging) customary international law rule from Kosovo. Though the argument of *sui generis* was not commented upon by the ICJ in the Kosovo Advisory Opinion case, it is noteworthy that in the *Asylum* case the Court held that no customary international law rule is to be inferred where the relevant practice was conducted with political expediency in mind, as opposed to a sense of legal obligation.[17] While those states making the *sui generis* argument would not agree that their conduct in Kosovo was a matter of political expediency, the *sui*

[15] *Military and Paramilitary Activities* (Nicaragua v. US) [1986] ICJ Rep 14, 98.
[16] Brian D. Lepard. *Customary International Law. A New Theory with Practical Applications* (CUP 2010) 8, 97–98
[17] ICJ, *Asylum case (Colombia v. Peru)*, Judgment, 20 November 1950, *ICJ Reports* 1950, 277.

generis argument in fact was indeed a veneer for a form of political expediency to the extent that states invoking it did not want their handling of the Kosovo case leading or contributing to the development of a customary rule in international law. The question remains as to whether States that invoked the argument of *sui generis* deliberately seek to keep the law on self-determination in the post-colonial context indeterminate or deliberately silent for those concerns outlined above. The merits and demerits of this strategy are explored in section 3.5 of this chapter. For the purposes of this section it may be noted in conclusion that an evaluation of state conduct as is relevant for customary international law formation should not depend entirely on the state's own characterization of its conduct, ie its claim that the conduct is not precedent setting. However, such a claim may weaken its *weight* as *opinio juris* because it becomes more difficult to argue that it has the necessary 'law making' character[18].

3.1.2 The maintainability of the *sui generis* claim

This section seeks to evaluate the merits of the reasons adduced for Kosovo being *sui generis*. Much convincing is not required to show that the arguments of egregious human rights and humanitarian law violations and the denial of internal self-determination are not *sui generis* to the Kosovo case. Many groups that claim self-determination in fact for many years have grounded their claims precisely on these two phenomena. As Hurst Hanuum notes it will be difficult to distinguish Kosovo's circumstances from that of South Ossetia, Abkhazia, Nagorno-Karabakh, the Turkish Republic of Northern Cyprus, Chechnya, Tamils in Sri Lanka and Kurds in Turkey and Iraq.[19] Similarly the argument that Kosovo was unique to the Yugoslavia crisis also seems a flawed argument, given that all major states and institutions involved in the resolution

[18] C.f. Anne Peters, 'Has the Advisory Opinion's Finding that Kosovo's Declaration of Independence was not Contrary to International Law Set an Unfortunate Precedent' in Marko Milanovic and Micahel Wood, *The Law and Politics of the Kosovo Advisory Opinion* (OUP 2015) 291-313, 308

[19] Hurst Hanuum (2011), 'The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused?' 24 Leiden Journal of International Law 155-161, 161.

of the Yugoslav crisis such as the Badinter Commission and Dayton Accord process all considered Kosovo as not part of the Yugoslav crisis, but as a problem relating to minority rights.

The strongest argument for the *sui generis* character of Kosovo is the post-NATO intervention establishment of UN Transitional Administration in Kosovo (called the UN Mission in Kosovo – UNMIK) and the presence of a multinational force through UN Security Council Resolution 1244. The point is repeatedly made that these institutions could not be allowed to drag on with the issue of the final status for Kosovo. The creation and existence of these UN bodies, it is argued, provides the sui generis context within which a decision regarding the final status of Kosovo had to be made. The *sui generis* character of this may be contested at three different levels: (a) the creation of a UN territorial administration for Kosovo was not in itself *sui generis*; (b) members of the UN Security Council who drafted the UNSC resolution 1244 were aware even at that time than an independent Kosovo was an option (c) the UN territorial administration does not give Kosovo's status question a sui generis character because the status question would have arisen with or without the territorial administration.

Simon Chesterman has argued that it is disingenuous to argue that the exceptional circumstances that led to the establishment of a transitional administration in Kosovo and other places, may not recur elsewhere.[20] Chesterman argues that the idea underlying the setting up of transitional administrations has existed right throughout the twentieth century and points to such transitional administrations being used for different reasons including (a) the final act of decolonization leading to independence (Namibia, East Timor), (b) temporary administration of territory pending peaceful transfer of control to an existing government (Papua, Western Sahara), (c) temporary administration of a state pending the holding of elections (Cambodia), (d) interim administration as part of an ongoing peace process without an end state (Bosnia and Herzegovinia and Kosovo) and (e) de facto administration

[20] Simon Chesterman, *You, The People: The United Nations, Transitional Administration, and State-Building* (Oxford University Press, 2004), Chapter 2

or responsibility for basic law and order in the absence of governing authority (Somalia, Sierra Leone).[21]

As will be noted Chesterman classifies Kosovo's experience with interim administration in the context of an ongoing peace process without an end state.

When the UN created the transitional administration in Kosovo, despite the UN Security Council's explicit acknowledgment of Serbia's territorial integrity,[22] it is conceivable that the promoters of the idea of a Transitional Administration at the time of its creation were at least aware that one option for the final status of Kosovo was independent statehood, or perhaps even that the creation of a Transitional Administration would lead to the creation of an independent Kosovo.[23] The US in its written comments before the Kosovo ICJ case argued that the reference in UNSCR 1244 resolution [to Serbia's territorial integrity] referred to the territorial integrity of Serbia only in the interim phrase and that the UNSC did not preclude the Independence of Kosovo as a possible and legitimate outcome.[24] Serbia claimed during the debate in the Security Council prior to the passage of UNSCR 1244 that the setting up of a transitional administration would open up the possibility for the secession of Kosovo.[25] At the Rambouillet conference talks, which preceded the NATO bombings, the US Secretary of State promised the Kosovo delegation that after an interim period of three years that the Kosovars could determine their final status through a referendum which all actors concerned anticipated would inevitably

[21] Ibid, Chapter 2

[22] UNSC Resolution 1244 Preambular Paragraph 11 and point no 8 in Annex 2 of the resolution (Annex 2 provides the principles that should guide the resolution of the Kosovo crisis)

[23] US Written Submissions, pages 64-68, wherein US argued that the reference to the Rambouillet Accords in the UNSCR 1244 underscored the fact that the UNSC thought that Independence of Kosovo was a possible and legitimate outcome.

[24] Kosovo Advisory Opinion Case, US Written Comments, Page 26. UK however argued that the Resolution was 'status-neutral', UK Oral Statement, CR 2009/32, Para 23, page 43

[25] Remarks of Mr. Jovanović, Chargé d'affaires of the Permanent Mission of Yugoslavia to the United Nations, in Security Council debate on adoption of resolution 1244, S/PV.4011, 10 June 1999, p. 6, As cited in the US Oral Submissions to the Kosovo Advisory Opinion Case, para 25, footnote 55

end up in independence for Kosovo.[26] Initial attempts at either providing the appearance or genuine efforts at finding a solution within a united Serbia had failed; the intransigency of the entire Serbian political class towards the Kosovo question, and the lack of an alternative within Serbia to Milosevic (as will be discussed in the next section in greater detail) were the principal reasons for the failure of these processes. Given the above, the post- NATO intervention negotiation process towards a political solution particularly after the assumption of Former Finnish President Martii Atihssari as the UN's lead negotiator, was in fact to use a strong word (justifiably) biased towards the creation of an independent Kosovo.[27] Hence even before the creation of the UN Administration in Kosovo those who were involved in the establishment of the mission were aware, to put it mildly, that one of the options for resolving the status question was through independent statehood for Kosovo.

This I concede is a contentious argument. The point however remains that the final status of Kosovo would have remained a question that *had* to be resolved irrespective of the UN mandated mission and the multinational force. As was repeatedly pointed out by many states in support of Kosovo's DoI before the ICJ, the UN Security Council Resolution 1244 had nothing to say about the final status itself, nor did it require expressly the presence of the UN Transitional Administration or KFOR until the final status of Kosovo could be resolved. The reason why the UN Transitional Administration or KFOR could not leave without resolving Kosovo's final status was because the Contact Group[28] (with the exception of Russia) believed that exiting Kosovo leaving it in the hands of Serbia was not an option. Concomitantly, the reason why they did not want to revert back Kosovo to Serbian control was owing to the past

[26] Full text of the draft letter prepared by the then US Secretary of State Madeline Albright, available at, Stephen T Hosmer, *Why Milosevic Decided to Settle When He Did* (Arlington, VA: RAND, 2001) 14 at footnote 26, Also Marc Weller, *Contested Statehood: Kosovo's Struggle for Independence,* (OUP 2009) 232, 245

[27] James Ker-Lindsay, *Kosovo: The Contested Path to Statehood in the Balkans* (Tauris & Co. Ltd, 2009) 110-111: "Once Ahtissari took up his appointment he made almost no attempt to hide the fact that he believed that independence was the only outcome of the process" (page 110) "..(t)he Ahtissari proposals were not arrived at through a meaningful, let alone fair, mediation process over status" (page 111),

[28] The Contact Group in Kosovo was an informal grouping of countries - including the U.S., U.K., France, Germany, Italy, and Russia that was highly influential and played a direct role in the management of the Kosovo crisis: US State Department, 'Contact Group on Kosovo' <http://2001-2009.state.gov/p/eur/ci/kv/c13102.htm> accessed on 30 June 2014

history of persecution at the hands of Serbians and the lack of trust in Serbia to deliver on self-government for Kosovo within a united Serbia. Hence the argument of *sui generis* based on UN Resolution 1244, the Transitional administration and the presence of a multi-national force, it may be concluded, revert back to those concerns relating to egregious violations of international human rights and humanitarian law and the impossibility of internal self-determination for Kosovo within a larger, unified Serbia. To rephrase this in different terms, the idea of a transitional administration and a multi-national force were born out of recognition that Serbia could not be trusted with the security of the Kosovo people and that Serbia could not be allowed to continue to rule over Kosovo. While acknowledging that the 'Responsibility to Protect' doctrine remains controversial, it is noteworthy that the authors of the doctrine speak of the responsibility to rebuild in the aftermath of an intervention like in Kosovo.[29] Similarly, following the NATO intervention the establishment of a UN Transitional administration was the logical next step that had to be taken by those stakeholders involved in the intervention. In Gary Bass's terms this would be some sort of a *jus post bellum* duty to protect Kosovo and develop local capacity for self-governance.[30] The NATO intervention, the creation of the transitional administration and the final status of Kosovo hence have to be interpreted holistically. A culmination of these factors led to the assessment that Kosovo had to be removed from Serbian control. In short, while the UN administration of Kosovo might have driven a sense of urgency towards resolving Kosovo's final status, it is submitted that the creation of the UN administration itself cannot be considered as providing Kosovo with a sui generis character.

One final argument with regard to the *sui generis* nature of Kosovo must be considered. Colin Warbrick has argued that not one single factor but a combination of the above factors contribute to Kosovo being a *sui generis* case.[31] All situations are indeed unique and distinct, despite being comprised of different factors with parallels elsewhere. The combination of factors will

[29] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (International Development Research Centre, 2001), paras. 2.32, 5.1–5.6.
[30] Garry J Bass, Jus Post Bellum. (2004) 32 *Philosophy & Public Affairs*, 384–412.
[31] Colin Warbrick, 'Kosovo: the Declaration of Independence', 57 (2008) *International and Comparative Law Quarterly* 678

almost invariably produce a distinct situation in all cases, and hence this is not a strong argument for Kosovo being a *sui generis* case. As Mullerson argues, in the domain of the inter-state system within which international law functions most situations are relatively unique. But if they are seen as unique and have nothing in common, international law would become not only theoretical but also a practical impossibility.[32] All secessionist conflicts and situations, Mullerson points out, have one essential matter in common: "there is always a group of people who being part of a bigger political entity, want to secede from that entity in order to form an independent state or become a part of another political entity. In this essential respect, say, Quebec in Canada, Nagorno-Karabakh in Azerbaijan and Abkhazia in Georgia are in the same boat".[33]

3.2 The contextual setting that led to Kosovo's trajectory from internal to external self-determination.

The main purpose of this section is to understand the political factors that led to the abandonment of the internal self-determination option in the Kosovo context. An understanding of the political context is helpful in understanding the justificatory reasons for the legal positions that states took with regard to Kosovo's statehood.

3.2.1 Kosovo's constitutional status and its loss of 'internal self-determination'[34].

For the Kosovars, the modern constitutional- political history of their region has its seeds in the Bujan Resolution of 1943 in which Communist Albanians from Kosovo declared their wish that Kosovo and Dukajin Plateau should be part of united Albania. However, the drafters of the first federalist project of Yugoslavia did not take this demand seriously. Kosovo's 'consent' to be part

[32] Rein Mullerson (n 5) 3
[33] Rein Mullerson (n 5) 5
[34] For a more detailed account on this see: Marc Weller, *Contested Statehood: Kosovo's Struggle for Independence,* (OUP 2009), Chapter 2, 'Background to the Crisis'.

of federal Serbia was provided by a different group of Communists from Kosovo of which less than a quarter were ethnic Albanians.

The First Federal Republican Constitution of Yugoslavia (FRY) of 1946 did not recognize Kosovo as a republic. Per Article 2 of the Constitution, Serbia, Croatia, Slovenia, Bosnia and Herzegovina, Macedonia and Montenegro were the republics identified with the right of self-determination including the right to secede.[35] The republics were self-constituting in nature and the federation's sovereignty was limited to the extent to which it was given by the republics. Kosovo was given a much more inferior status as an 'autonomous region' within the Republic of Serbia. Vojvodina on the other hand was identified as an 'autonomous province'. However, the autonomous status that Kosovo had was constitutionally given, in that it found mention in the same Article 2 that identified the republics. The reason why Kosovo was not given the status of a republic was because of the distinction drawn between nations and nationalities. Albanian Kosovars were considered a nationality and not a nation given that they had a nation (Albania) elsewhere.

The 1953 Constitution of SFRY was similar in its recognition of the primacy of the republics as holders of sovereignty and in Article 113 it recognised Kosovo as an autonomous region like the 1946 constitution but diminished its status by saying that this status is derived from the Republic of Serbia as opposed to being derived from the Constitution.

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[35] Constitution of the Federative People's Republic of Yugoslavia, 1943, available at >http://www.worldstatesmen.org/Yugoslavia_1946.txt> accessed on 30 June 2014. Article 1. The Federative People's Republic of Yugoslavia is a federal people's state, republican in form, a community of peoples equal in rights who, on the basis of the right to self-determination, including the right of separation, have expressed their will to live together in a federative state.

Peter Radan Argues however that a majority of Yugoslav Constitutional lawyers were of the opinion that the recognition of the right to self-determination and secession was not understood as a continuing right, but as a right that has been used and exhausted. Peter Radan, 'Secession and Constitutional Law in the Former Yugoslavia' 20 (2) University of Tasmania Law review 183-204

The 1963 Constitution[36] removed the distinction between an 'autonomous province' and 'autonomous region'. Similarly, to the 1953 constitution, Kosovo's status was regarded as having been derived from the Republic of Serbia and not from the federal Constitution.

The 1974 Constitution, arguably the best of arrangements for Kosovo within Federal Yugoslavia, assigned the right to self-determination and secession to the different 'nations' of the republic and both 'nations and nationalities' were regarded to be free and equal.[37] Kosovo was given the status of a Socialist Autonomous Province and the constitution gave Kosovo an equal place in the determining of the affairs of the federation. For the first time Kosovo had its own constitution, distinct legislative bodies, executive organs, Supreme Court, National Banks, Attorney General etc. This, as Trbovich has claimed, gave Kosovo the status of a 'de facto republic'.[38] The Serbian Constitution technically applied to Kosovo but was in practice ineffective in Kosovo. The Kosovars were not, however, satisfied with the 1974 constitution and in 1981 Albanian demands for recognition as a separate constituent nation of Yugoslavia were suppressed by Serbia.[39]

The infamous Serbian Assembly for Science and Arts's Draft Memorandum put together by nationalist-minded Serbian intellectuals argued that that the roots of all evils in the Serbian polity lay in the 1974 constitution.[40] The 1974 Constitution, according to the document, had effectively partitioned the Republic of Serbia by increasing the powers of the autonomous provinces of

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[36] Constitution of the Socialist Federal Republic of Yugoslavia of 1963. Available at <www.worldstatesmen.org/Yugoslavia_1963.doc> accessed 30 June 2014

[37] But the Constitutional Court of Yugoslavia in two cases decided in 1990 and 1991 relating to Slovenia's attempt to secede, ruled that Slovenia could not exercise these rights unilaterally and that the preambular paragraphs referring to self-determination and secession had no normative status. The consent of all republics/nations were required, the court ruled. As cited by Radan (n 35)168-174.

[38] Ana. S. Trabovich, 'A Legal Geography of Yugoslavia's Disintegration' (Oxford: OUP, 2008) 167

[39] Radan, (n 35) 154

[40] For a detailed analysis of the Memorandum see Jasna Drgovic-Soso, *'Saviours of the Nation': Serbias Intellectual Opposition and the Revival of Nationalism,* (Hurst & Co., 2002) particularly Chapter 3. Also see Jasna Drgovic-Soso, 'Rethinking Yugoslavia: Serbian Intellectuals and the "National Question' in Historical Perspective', 13 (2) Contemporary European History 170-184

Kosovo and Vojvodina. It demanded the establishment of the republic as a state with rights and jurisdiction over its whole territory 'in the same way as other republics making up the Yugoslav union'. As an extension of this demand, the document called for the abolition of Kosovo's and Vojvodina's 'state sovereignty'. The demand of the abolition of Kosovo's sovereignty in practice called for the abolition of their right to direct representation in the federal centre as well as of their veto power in the republic's institutions. The document argued that the provinces had to be subordinated to the republic, in order finally to abolish the 'political inequality of the Serbian nation in the Yugoslav federation'.

This is what Milosevic in fact did in 1989. On 24 February 1989 amendments were passed to the Serbian Constitution that eliminated Kosovo's consent requirement for amending the Serbian Constitution. With tanks surrounding the Kosovo Assembly, the assembly voted to ratify the amendments on 23 March 1989.

'The Law on Special Circumstances' enacted by the Serbian Parliament on 26 June 1990 permitted the Serbian executive to overrule the decisions made by Kosovo's institutions. On 2 July 1990 the Kosovo Assembly issued a declaration of sovereignty expressing the desire to be a constituent unit within the Federal Republic of Yugoslavia as 'a sovereign and equal unit within the federal Yugoslavia'.[41] The Yugoslav Constitutional Court declared this to be unconstitutional, arguing inter alia that Kosovars were merely a minority/nationality, not a nation, and hence not entitled to the right of self-determination including secession.[42] The Serbian Parliament responded by enacting 'The Law Terminating the Work of the Assembly of the SAP of Kosovo and the Executive Council of the SAP of Kosovo' on 5 July 1990, which eliminated the trouble of having to overrule. Constitutionally there was no vertical superiority or subordination between the assemblies of the Republic of Serbia and SAP of Kosovo or their executive councils. These actions were manifestly unconstitutional in terms of the federal constitution. The Federation itself by that time was crumbling with Croatia, Slovenia, Bosnia and

[41] As translated by Trabovich, (n 38) 235
[42] ibid

Herzegovina, and Macedonia becoming independent states and hence there was no real challenge from within the federation to Serbia's unilateral dismantling of Kosovorian autonomy. On 7 September 1990 Kosovo enacted a constitution declaring Kosovo as a democratic, sovereign and independent state of the Albanian people and members of other peoples and national minorities. A year after, on 22 September 1991, Kosovo declared itself independent. A referendum was conducted wherein 87% of those voting endorsed the declaration of independence.

The FRY Federal Constitution enacted in 1992 completed the cycle of diminishing Kosovo's constitutional status. Article 2 of the 1992 Constitution provided that the FRY would be comprised of the Republic of Serbia and the Republic of Montenegro and dropped any reference to Kosovo being an Autonomous Province or region. From 1996 onwards, Kosovars chose to take up arms and the ensuing violence resulted in the NATO intervention of 1999.

Despite the abolition of their autonomous institutions, the Kosovars maintained what was called a 'parallel state/society' through which they kept alive equivalent institutions outside the state structure. The parallel society was an interesting experiment in exercising self-determination through a process parallel to the (Serbian) state structure, through which the Kosovars sought to keep alive their cultural institutions, health services, social assistance networks, local financial councils and a government in exile. Its larger objective, as Besnik Pula puts it, 'was to preserve the framework of a state inherited from the period of autonomy, defy the Serbian state's authority by demonstrating a collective political will to protest through civil disobedience and elicit international support for the goal of secession'.[43]

[43] Besnik Pula, 'The Emergence of the Kosovo "Parallel State," 1988-1992', 32 (4) Journal of Nationalism and Ethnicity 797-826, 797-798.

3.2.2 Attempts at settling the Kosovorian problem through the restoration of Kosovo's autonomy and providing for internal self-determination within a larger Serbia prior to the NATO bombing of 1999.[44]

Kosovo was ignored throughout by the powers involved in the post-1991 Yugoslav crisis. Its representatives were not invited to the European Community Conference on Yugoslavia in 1991. Similarly, in the same year the Organisation for Security and Cooperation in Europe also refused to allow Kosovo to express its views in its deliberations on Yugoslavia. Similarly the Badinter Commission also refused to consider the Kosovo case[45] on the basis that they were not one of the founding republics of Yugoslavia (the commission concluded that the founding republics had a right to self-determination).[46] The London Conference of 1992 also ignored Kosovo and on Milosevic's insistence only was prepared to deal with Kosovo as a minority rights issue.[47] A working group was formed at this conference to normalise the Kosovo educational system (which stood divided because of the parallel state) but this was soon to collapse. As Marc Weller has noted, the existence of the group gave the false impression that Kosovo was getting international attention.[48] The working group only served the purpose of trivializing Kosovo's status question and their leaders' hope for inclusion in the peace process.[49] Similarly in 1995 the Dayton Accords on Bosnia ignored Kosovo and affirmed the FRY's (Serbia's) territorial

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[44] This section largely draws from Weller (n 26) Chapter 6 'The Outbreak of Violence and the Hill Negotiations', Chapter 7, 'The Holbrooke Agreement and the OSCE Verification Mission', Chapter 8, 'The Rambouillet Conference'

[45] Letter from Dr. Rugova to Lord Carrington, Conference on Yugoslavia 22 December 1991, appearing in H Kreiger, *The Kosovo, Conflict and International Law: An Analytical Documentation 1974-1999* (CUP 2001)118. Marc Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia', 86(3) *American Journal of International Law*, 606

[46] EPC Declarations on the Recognition of New States in Eastern Europe and the Soviet Union and on Yugoslavia, 16 December 1991 (1992) 31 ILM 1486 Opinion 2.

[47] Alex Bellamy, *Kosovo and International Society* (Palgrave Macmillan, 2002) 29, Marc Weller, *The Crisis in Kosovo 1989-1999, International Documents and Analysis* (Cambridge Documents and Analysis Publishing, 1999) 87.

[48] Weller, (n 47) 93

[49] Bellamy (n 47) 31

integrity. The failure of Kosovo's moderate leadership to win international attention for Kosovo led to a discontent with the leadership and eventually to the rise of the Kosovo Liberation Army (KLA). It was only after the KLA's resort to armed violence that a serious negotiating processes with regard to Kosovo's status began.

The two processes that are of importance prior to the NATO bombing in 1999 are the Hill negotiations that led to the Holbrooke agreement and the Rambouillet conference. The process was designed with the objective of, in the words of the then US Secretary of State, Madeleine Albright, 'to keep Serbia out of Kosovo not Kosovo out of Serbia'.[50] There was a clear and unwavering commitment to preserving Serbian territorial integrity and sovereignty in both these pre-NATO bombing processes.

The process of negotiations initiated by Ambassador Hill, the then US Ambassador to Macedonia, was given very clear instructions by the Contact Group that the solution had to be found that 'supported neither the maintenance of the status quo nor independence for Kosovo'.[51] A final draft of the so-called 'Hill proposals' was given to both sides in October 1998. The proposals, initially conceived as an interim settlement, were however ambiguously worded enough to ensure that Serbia had a veto over how the process would move forward beyond the interim period. The proposals made no particular commitment as to Kosovo's status. As the Kosovo delegation was preparing its response to the Hill drafts, Ambassador Holbrooke claimed that he had arrived at an agreement with President Milosevic. The agreement contained a provision wherein Serbia consented to an 11-point agenda on reaching a political agreement within a certain timeframe, which Holbrooke argued was based on the Hill draft proposals. Kosovo was completely left out of this agreement. Kosovo agreed later to work with this agreement but issued its own set of basic principles for a political settlement. Serbia did not abide by

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[50] Statement by Secretary of State Madeleine K. Albright, Situation in Kosovo, 8 October 1998 in MarcWeller, (n 47) 278.

[51] Weller (n 26), 87

the deadline for arriving at a political settlement and convened its own conference where a counter to the Hill proposal was put forward. The process failed at this stage with a few more proposals being made, and no agreement being reached.

The Rambouillet conference that preceded the NATO bombings of 1999 adopted positions that were similar to that of the Hill proposals/Holbrooke agreement in that it considered the territorial integrity and sovereignty of Serbia to be a non-negotiable position. The Security Council, the Contact Group and all other relevant international stakeholders shared this position.[52] This and Russia's status as a 'committed mediator' on behalf of Serbia created what Weller calls 'structural inequalities' between the parties in the Rambouillet process.[53] Kosovo was promised as an interim solution self-governance and a restoration of human rights. Given that the federation had broken up by this time and that the bi-republic federation (Serbia and Montenegro) was dominated by Serbia, Kosovo felt that internal self-determination, or the actual phrase used 'meaningful self-administration', would be easily undermined by Serbia. In fact, Kosovo feared that the use of the terminology of 'meaningful self-administration' would legitimize Serbia's unconstitutional, illegitimate downgrading of Kosovo's self-constituting status in the federation. Weller comments that in the absence of a full federal status Kosovo viewed even full restoration of autonomy as being insufficient.

Serbia did not accept the Rambouillet proposals, primarily because they did not want to cede control over Kosovo territory – the proposals envisaged NATO troops taking physical control of Kosovo. Despite Serbian acceptance of the political content of the proposals (as Ambassador Hill put it, "there was nothing in the political agreement that was unsellable to the Serbs"[54]), they opposed the part of the proposals that provided for foreign troop presence on Kosovo soil. Additionally, Serbia also took exception to Madeline Albright's informal promise to the Kosovo delegation of a referendum after the interim arrangements expired. Control of territory was at the heart of the issue for both

[52] Weller (n 26) 121
[53] ibid
[54] Independent International Commission on Kosovo, *Kosovo Report*, (OUP, 2000) 157.

Kosovo and Milosevic. Kosovo believed that control of territory was important for any meaningful exercise of self-determination. This would mean that unless internal self-determination was coupled with placing Kosovo's security with Kosovo or an entity other than Serbia, Kosovo was not prepared to accept internal self-determination. For Serbia loss of control over territory meant loss of sovereignty over Kosovo. This aspect is crucial when it comes to understanding the failure of internal self-determination in Kosovo.

3.2.3 The Post-NATO bombing attempt at resolving the Kosovo question:

The stance of the Contact Group minus Russia dramatically changed in the post-NATO bombing context, particularly with an international administration having been put in place. Despite UN Security Council Resolution 1244 making reference to the territorial integrity and sovereignty of Serbia, the Contact Group in its private messages to the parties had communicated that a solution for Kosovo within Serbia was not possible. According to Martti Ahtisaari, the UN special envoy for Kosovo, the first ever private message to the parties sent by the Contact Group noted that 'the unconstitutional abolition of Kosovo's autonomy 1989 and the ensuing tragic events requiring international administration of Kosovo had led to the situation in which the return of Kosovo to Belgrade rule was not a viable option.[55] Contact Group statements prior to the bombing in 1997 and 1998[56] referred to the territorial integrity of FRY, but in the Group's statements of 2005 and 2006 this was notably missing.[57] While the Contact Group and even the Ahtissari Comprehensive proposal [what was this?] did not refer to independence *per*

[55] Julian Borger, 'Kosovo State Inevitable Says Nobel Laureate', *The Guardian*, http://www.theguardian.com/world/2008/oct/18/kosovo-serbia-martti-ahtisaari (18 October 2008)

[56] Krieger, (n 45) 121, 148

[57]See for example: Contact group on Kosovo September 20, 2005 New York Meeting Conclusions available at <http://2001-2009.state.gov/p/eur/rls/or/54040.htm>, accessed on 30 June 2014, Contact Group Meeting, July 24, 2006 'High level Meeting on the Future Status of Kosovo' available at <http://2001-2009.state.gov/p/eur/rls/or/69376.htm> accessed on 30 June 2014

se, Ahtissari said it was clear to all sides including to Serbia that independence 'was coming' right from the very beginning.[58] Post-NATO bombing, the 'structural inequality' that Kosovo was suffering from in the Holbrooke and Rambouillet processes had been entirely reversed. However, Weller is of the opinion that had Serbia offered a credible offer of self-governance to Kosovo at the beginning of the Vienna negotiations on a final status for Kosovo, the International Community might have persuaded Kosovo to accept a solution within a united Serbia.[59] But Serbia could never do this.

The approach of the West at the early stages of the post-NATO bombings process was to support a regime change in Belgrade that would be pro-West and pro-Kosovo. Milosevic was removed in the 'Bulldozer Revolution'[60] (a non-violent 'revolution' supported by the West) in the year 2000, but the regime that was installed did not turn out to be accommodative of Kosovo and definitely was not pro-West. The carrot of joining the EU in return for an accommodative stance on Kosovo did not work out, at least in the short term. The International Crisis Group in a report in 2001 noted that for the foreseeable future no government in Belgrade would be able to adopt a sensible policy on Kosovo without incurring the highly manipulatable anger of Serbian nationalists.[61] As Eric Gordy has argued, the NATO bombing in fact further solidified general public opinion against the West and Kosovo[62] in Serbia and entrenched a climate wherein no political actor was willing to lose political capital by being accommodative towards Kosovo. As a former US Ambassador to Serbia

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[58] Martti Ahtisaari interview to CNN, 10 December 2008 available at <https://www.youtube.com/watch?v=hIA7LrNPuvI> accessed on 30 June 2014

[59] Weller (n 26) 239

[60] See for example, United States Institute of Peace, 'Special Report: Whither the Bulldozer?: Non-Violent Revolution and the Transition to Democracy in Serbia' (6 August 2001) available at <www.usip.org/publications/2001/08/whither-bulldozer-nonviolent-revolution-and-transition-democracy-serbia> accessed on 30 June 2014

[61] International Crisis Group, 'Serbia: Reforms Under Siege' (Balkans Report No. 117, 21 September 2001) 21 available at <http://www.crisisgroup.org/~/media/Files/europe/Serbia%2018.pdf> accessed on 30 June 2014

[62] Eric Gordy, Human rights and the war in Kosovo 2000 1 (2*) Human Rights Review*, 69-77

observed, it was an illusion to consider that there existed a 'democratic bloc' in Serbia that was moderate on the Kosovo question.[63] A former EU Foreign Affairs Commissioner similarly opined in 2007 that Serbian politicians could not formulate a plan for integrating Albanians into Serbia, "because to do so would create terminal domestic political risks for Serbia's government, and any such plan would face deep difficulty in the nationalist-dominated parliament."[64] The Kosovo Independent Commission as early as 2000 argued that it was unrealistic to presume 'the possibility of two peoples who have been at war with each other one day living side by side inside the same state'[65] The commission categorically stated that,

> After what Kosovar Albanians experienced at the hands of the FRY authorities .. there seems to be no practical prospect however it may be desirable in theory, of Kosovars being willing to submit to any form of Serbian or FRY sovereignty.[66]

Interestingly, just before Finnish former President Martti Ahtisaari took over the negotiation process, the then Serbian Parliament adopted a new constitution in 2006, which the Serbian Government claimed provided autonomy for Kosovo. This was however quickly rejected as lacking *bona fides.* The European Commission on Democracy through Law opined that the autonomy of Kosovo was not in fact guaranteed at the constitutional level and that every important aspect of this autonomy was left to the central legislature.[67] In short, the 2006 constitution did not provide for an independent sphere of law making for Kosovo authorities free from being overruled by Serbia. Serbian scholars like Ana Trabovich, however, argue that Serbia's offers of autonomy short of independence were not assessed in good faith as Kosovars were aware that

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[63] As cited by Henry H. Perritt, *The Road to Independence for Kosovo: A Chronicle of the Ahtisaari Plan*, (NY: Cambridge University Press, 2010) 96
[64] Chris Patten, *A Ticking Clock on Kosovo*, (The Boston Globe*,* 10 Aug 2007)

[65] Independent International Commission on Kosovo (n 54) 270.

[66] ibid

[67] European Commission for Democracy through Law (Venice Commission) *Opinion on the Constitution of Serbia*, (Council of Europe, 2007).

the US in particular was preparing to recognize its claim for independent statehood.[68] Kosovo pointed to the fact that the 2006 Serbian constitutional process was unilateral and that its leaders were not consulted, and that neither were the Kosovo Albanians allowed to vote in the referendum that endorsed Serbia's new constitution.

From the preceding, the most important justificatory reasons[69] for the shift from internal to external self-determination in the Kosovo context took place in tandem with the change of perception of the relevant actors as to whether Serbia could be trusted with the governing of Kosovo given the long history of abuses and the realisation that Serbia's attitude towards Kosovo was not specific to the Milosevic regime. The justificatory reasons that guided the negotiations before the NATO intervention (and for a short period even after the intervention) focused on guaranteeing self-determination within a larger Serbia if a sufficient measure of autonomy could be guaranteed by a Serbian leadership that was willing and trustworthy. The initial focus on pro-democratic regime change policy failed to appreciate the historical factors that contributed to the intransigent nature of Serbians' attitude towards Kosovo. It soon appeared that even the post-Milosevic 'moderate' Serbian leadership was incapable of sufficiently responding to even the bare minimum of the demands of the most 'moderate' Kosovars. Once this was realised, external self-determination and concomitantly secession was the only option. This is very clear from the period since Martti Ahtisaari took over control of the negotiation process in 2006. The rest of the negotiation process was merely about demonstrating that all avenues had been tried and exhausted. By this time the Western bloc of countries had come to the conclusion that an independent Kosovo was in fact in the best interest of Serbians as well. As the US perceptively pointed out in its written comments before the ICJ, Kosovo's independent statehood did not just free Kosovo but also liberated Serbia 'from its illusory attempts at retaining control over Kosovo which had distorted its politics and stunted its development efforts'.[70]

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[68] Trabovich (n 38) 414.
[69] I use the term 'justificatory reason' in contra distinction to 'real reason' (such as geo politics) that in real terms might have influenced the actors.
[70] Kosovo Advisory Opinion Case, US Written Comments, Page 26

In conclusion, the Kosovo situation illustrates the difficulty of internal self-determination succeeding in the face of intransigent nationalism from the parent state and in the face of the group claiming self-determination refusing to accept any solution within the confines of a united state given past experiences. In such a context no amount of creativity in designing schemes for the realization of self-determination by two competing groups within a united state would be sufficient. The Kosovo case also illustrates that the demonstration of the failure of internal self-determination is a necessary condition for a legitimate unilateral exercise of external self-determination.

3.3 The *Opinio Juris* of States defending Kosovo's trajectory from internal to external self-determination.

This section will seek to illuminate how the justificatory reasons for the slide down from internal to external self-determination in Kosovo were reflected in legal parlance - in the *opinio juris* of states - as discerned in their submissions before the International Court of Justice in the legality of the Declaration of Independence case.

In total 43 states took part in the proceedings of the case. 36 states filed written submissions in the first instance and 14 of those states filed written comments in the second round responding to the earlier submissions. 27 states participated in the oral submissions of which 7 states did not take part in either round of the written submissions. Kosovo was allowed to take part in all three rounds of submissions as the authors of the DoI under the name of the 'Provisional Institutions of the Self Government of Kosovo [PISG]'.

The various positions that the 43 states took before the ICJ on the self-determination issue can be categorized as follows:

Firstly, states that argued in favour of a right to external self-determination in post-colonial situations under certain defined circumstances: Germany, Finland, the Netherlands, Denmark, Albania, Finland, Slovenia, Switzerland, Estonia, Ireland, Jordan and Poland. Helen Quane has suggested that the

strong support for remedial secession among European states might provide evidence of such a rule developing under regional customary international law.[71]

Secondly, states that argued for the legality of Kosovo's Declaration of Independence in International Law but did not want the court to rule on the question of self-determination or were silent on its relevance: United States of America, United Kingdom, France, Latvia, Maldives, Norway, Sierra Leone, Austria, Japan, Bulgaria, Egypt, Saudi Arabia, Croatia, Czech Republic, Japan, Luxemburg and Kosovo.

Burundi, was an exception in that while arguing for the recognition of Kosovo's DoI as being legal, it also argued that there is no right to external self-determination outside the colonial context.

Thirdly, states that argued that Kosovo's Declaration of Independence was illegal under International Law and that there was no right to external self-determination under International Law: Serbia, China, Argentina, Bolivia, Cyprus, Spain, Libya, Brazil, Azerbaijan, Venezuela, Iran, Slovakia and Vietnam.

Russia also argued for the illegality of the DOI but agreed that there was a right to external self-determination in exceptional circumstances. Kosovo, it claimed, was not such an exceptional situation. Romania explicitly was non-committal on the right to external self-determination being available outside the colonial context and argued that even if it did, it would not apply to Kosovo.

[71] Helen Quane, 'Self Determination and Minority Protection After Kosovo' in J Summers (ed) *Kosovo a Precedent?* (Martinus Nijhoff 2011) 203

The majority of the court agreed with those who argued that the court need not consider the issue of self-determination in providing its advisory opinion and delivered an opinion finding no prohibitive rule in International Law that outlaws DoIs. Judge Bruno Simma, while agreeing with the majority's conclusions, in a separate Declaration criticized the majority for the 'methodology' it chose. This involved (in his view) relying on an 'anachronistic consensualist vision of International Law'[72] which equates lack of a prohibitive rule with the existence of a permissive rule.

Judge Simma's invitation to consider whether International Law can be neutral or deliberately silent is an important question for this thesis project. I will focus on this issue in Section 3.5.

The crucial question that this section will seek to answer by recourse to state submissions is as to how and when the internal self-determination option is judged to have been exhausted. I will seek to answer these questions by organizing this section as answering the following two sub-questions:

a) **Is external self-determination an 'exceptional' right in the post-colonial context?**
b) **What role do past abuses play in evaluating the desirability of external self-determination?**

In addition to answering these two questions I will also in relation to these questions comment on the silence on the part of a number of states on the self-determination question while addressing some of the most relevant objections to its invocation.

[72] Kosovo Advisory Opinion case, Declaration of Judge Simma, para 2

3.3.1 Is external self-determination an 'exceptional' right in the post-colonial context?

Martti Koskenniemi, who co-presented Finland's oral arguments[73] before the ICJ, took the position that external self-determination had always been available as part of the rule on self-determination in international law where there were no internal guarantees for protection available.

Refusing to draw a hierarchical link between the rule on territorial integrity and self-determination, he argued for the need for an appraisal of values that inform these rules and as to how they interact within a given factual context.[74] In the Kosovo context, Koskenniemi argued that Serbian violence and their refusal to meaningfully accommodate Kosovo within Serbia resulted in a weighing of the values in favour of the right to self-determination:

> "(T)he most important countervailing consideration is that of self-determination that has always implied the possibility of secession in case the parent State is unable or unwilling to give guarantees of internal protection. In view of the violent history of the break-up of the SFRY and, in particular, the ethnic cleansing undertaken by or with the consent of Serbian authorities, as well as the deadlock in the international status negotiations thereafter, the people of Kosovo were entitled to constitute themselves as a State. This was achieved by the facts of history and symbolized by the Declaration of Independence of 17 February 2008"[75].

[73] Kosovo Advisory Opinion Case, Finland Oral Submissions, CR 2009/30 Prof. Martti Koskenniemi's submissions are to be found from pp 57-63 para 13-26

[74] Germany in its oral submissions submitted that the displacement of the 'stability' value from territorial integrity in favour of Self-determination has indeed taken place in the Kosovo context: 'Self-determination should for the sake of stability of the international system, normally be enjoyed and exercised within the existing framework of the state', secession may, by way of exception, it argued 'be considered legitimate if it is possible to establish that this is the only remedy to a prolonged, rigorous and oppressive refusal of internal self-determination'. Kosovo Advisory Opinion Case, Germany, Oral Submissions, CR 2009/26, para 32

[75] Finland Oral Submissions, CR 2009/30 Para 26, page 64

It is important to note Koskenniemi's insistence that secession has always been available in the absence of internal protection. He rejected the need to find a new interpretation or a new rule of self-determination applicable to Kosovo such as a "qualified right of secession"[76]. Koskenniemi argued before the court that external self-determination was always available as part of the right to self-determination to be balanced against territorial integrity. To buttress the historical character of his assertion Koskenniemi relied on the passage in the *Aaland Islands case* judgment[77], which acknowledged that secession was an option 'when the State was undergoing transformation or dissolution' and in which it cannot or will not give, "effective guarantees for protection". He argued that this was the traditional position, and not any new law, that became operative during decolonization and continues to be of relevance in the post-colonial situation.[78] For Koskenniemi, colonization was also an abnormality in which secession was justified. Koskenniemi argued that the *Aaland Islands* case reasoning was reflected in the Supreme Court of Canada's judgment in the *Quebec case* wherein it stated that "when a people is blocked from the meaningful exercise of its right of self-determination internally, it is entitled, as a last resort, to exercise it by secession".[79]

Koskenniemi's interesting thesis raises many questions. The principle of self-determination concretised itself as a right in international law in response to colonization – as a rule that sought to support decolonization movements across the Third World. Hence it is difficult to agree with Koskenniemi that the colonial context itself was an abnormality to which the self-determination rule's qualified right to secession applied. All states that appeared before the ICJ case agreed that there was a colonial right to (external) self-determination. It was the post-colonial context in which states had a sharp division of opinions as to the character of the rule. It was quite manifest that states before the ICJ did make the distinction between the colonial application of the right and the post-colonial. The *Aaland Island case[80],* on which Koskenniemi places heavy

[76] Finland Oral Submissions, CR 2009/30 Para 23, page 62
[77] *(1920) L.N.O.J. Spec. Supp. No. 3*.
[78] Also see Finland, Written Statement, para 8
[79] *Reference re Secession of Quebec*, 1998 2 S.C.R. 217 (Supreme Court of Canada) para 134.
[80] Discussed in detail in Chapter 1

reliance, belongs to a pre-colonial era (outside the Third World colonization movement, though the Aaland Island question rose out of the Russian de-annexation process of Finland). The case is, I would argue, better understood as one of the very few, if not the only concrete example, of a pre-colonial self-determination dispute. However, there is no denying, given that it does not belong to the colonial era, that the *Aaland Island case* is extremely illuminating in dealing with post-colonial context self-determination disputes.

Koskenniemi's account of self-determination in the Kosovo case is significant for its refusal to identify external self-determination as an exception. The refusal to identify an exception is rooted in his insistence that an evaluation of values that inform the rules is essential to resolving a situation where there is a clash of rules.

3.3.2 Difficulties with defining the 'exception' – what role do past abuses play in evaluating the desirability of external self-determination?

Except for Finland, almost all other states that identified the right to external self-determination with Kosovo identified it as arising in exceptional circumstances in a context where there was a serious denial of the right to internal self-determination and/or egregious violations of human rights/humanitarian law (the substantive conditions) subject to a procedural condition that all avenues of negotiating a solution should have been exhausted.

With regard to the substantive conditions, the question of whether those conditions needed to be met cumulatively or whether they were alternative conditions did not manifest itself clearly in most submissions. There appears to be a conflation in many submissions as to the application of these conditions. For example, the Netherlands argued that the right to external self-determination is available where there is a) a serious breach of the obligation to promote and respect the right to self-determination ***or*** b) there is a use of

force that deprives the exercise of this right.[81] Ireland, citing the *Quebec case*, took a similar position in its submissions. Poland also did not make an effort to make a very serious distinction between the right to external self-determination as an entitlement following denial of internal self-determination or as a form of remedy following egregious violations of international law.[82] It is conceivable that, given that these states believed that Kosovo fit within both these categories, the argument without much thought was offered cumulatively or in the alternative.

Germany in its submissions tried to address this problem. It argued that external self-determination was available when two conditions were satisfied.[83] The first of these conditions, which related to the substantive aspect of the right, had two components – that there should have been an "exceptionally severe and long lasting denial of internal-self-determination" that denies "decisional autonomy" and participation in the affairs of the central government, and that is accompanied by "severe human rights violations". While recognizing that the second criterion goes "hand in hand" with the first criterion, Germany argued that the first criterion can stand alone as a justification. In essence, Germany seemed to argue that the only 'real' substantive criterion for exercising external self-determination was an *in extremis* case of the denial of internal self-determination, wherein egregious violations of human rights contributed to the *in extremis* character of the situation. Germany's second condition - the exhaustion of all remedies including negotiations and resort to international organisations - also relates to the *in extremis* character.

But it is submitted that these conditions need not be seen as unrelated. The denial of the right to internal self-determination (in the context of armed conflicts) is generally accompanied by egregious violations of human rights, as was the case in Kosovo. The purpose of violence in such situations is *inter alia* targeted at weakening the strength of the collectivity and the assessment of the group as a 'people' and its consciousness as a political group seeking

[81] Netherlands, Written Statement, para 3.9 – 3.10
[82] Poland, Written Statement, Para 6.10, 6.13
[83] Germany, Written Statement, page 35

self-governance. Self-determination and the institutions that it develops in such situations can play a functional role of protecting the group under threat. Where self-determination institutions within the parent state (internal self-determination) are not sufficient in providing the protection then external self-determination might be necessary. In Kosovo's case, as was demonstrated in the third section of this chapter, the shift from insisting on internal self-determination took place when it was realized that pushing for a solution based on internal self-determination would not be sufficient to protect the Kosovo people.

The function then of the second substantive criterion (serious violations of human rights) is that it helps evaluate the potential of resolving the conflict within the parent state. The nature of the violence inflicted might make the possibility of internal self-determination, constitutional reconciliation with the parent state for the victim population, difficult if not impossible.

This, I would submit, is a better approach to evaluating the role of historical abuse in judging a self-determination claim of a people. On the other hand, to argue that external self-determination is available as a 'remedy'[84] for past injustices, as many states who argued for Kosovo's right to external self-determination did,[85] is fraught with problems.

For example, it was argued before the court[86] that even if external self-determination was available in cases such as Kosovo in response to past

[84] See for example Albania, Written Statement, para 79. The majority of the court in its advisory opinion used the term 'remedial secession', however noting that they were not asked to rule on its availability, Kosovo Advisory Opinion, Para 83, Two judges endorsed remedial secession in their separate opinions. Separate Opinion of Judge Cancado Trincade p. 53 para 175. Separate Opinion of Judge Yusuf pp. 3-4, para 11 (See Chapter 1 for further discussion)

[85] States that I listed as being in the first category in the beginning of this section. Not all states however used the term 'remedial secession'.

[86] Anonymously referred to by Netherlands in its Written Comments, Netherlands Written Comments Para 3.10

injustices, any violation of the principle of territorial integrity and the recognition of external self-determination would amount to a sanction on Serbia which would stretch the law on state responsibility, given the law of state responsibility's character as being inter-state. The Netherlands in response argued a) that the principle of self-determination is a peremptory norm of international law and the principle of territorial integrity does not enjoy such a status[87] b) that a serious breach of a peremptory norm of international law must have consequences, despite the fact that the International Law on State Responsibility is inter-state in character, under 'secondary norms' of international law which it argued are not very dissimilar to the law on state responsibility. The latter argument, that 'there must be consequences' for violations under 'secondary norms' even despite its weakness, only stands if the argument that self-determination is a higher norm than territorial integrity is accepted which itself is contested.

Another powerful objection to external self-determination being conceived as a remedy for past injustices was put forward by Cyprus. Cyprus claimed that the setting up of the ICTY has resulted in some of these past injustices being accounted for and that post-Milosevic there had been changes in the Serbian political system that had led to a better human rights record. It argued that 'allegations of ill-treatment several years ago cannot be a justification for allowing the dismemberment of a state now'[88]. Russia[89] and Romania,[90] who did not deny a possible right to external self-determination in the wake of serious abuses, also made similar arguments.

Germany's response, while acknowledging that the Serbia of 1998/99 is not the same as the Serbia of 2009, argued that the events of 1998/9 had left an

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[87] Netherlands Written Comments Para 3.10, 3.11
[88] Cyprus, WS para 146
[89] Russia Written Statement Para 88-89, Russia noted that none of the DoI supporters argued for self-determination for Kosovo in 1991 (when its autonomous institutions were abolished) or in 1999 (when it was subjected to the worst forms of ethnic cleansing_.
[90] Romania, Written Statement, para 140-151

'indelible mark on the collective memory of the Kosovar Albanians'.[91] This articulation strengthens the claim made in this thesis[92] that past injustice plays a role in an evaluative reasoning of the possibility of self-determination. It is an evaluative reasoning of trust, the lack of which challenges the efficacy/ functionality of institutions providing for internal self-determination in providing effective guarantees of protection.[93] Germany here seems to be arguing that given the incidents of the past the trust of the parent state (Serbia) has eroded to such an extent that a return to internal self-determination as the solution for the Kosovo problem no longer seemed to be an option.

Harold Koh, Legal Counsel for the USA, similarly used the history of past injustices to evaluate the possibility of internal self-determination. Responding to Serbia's claim that they had offered the highest degree of autonomy in post NATO negotiations, Koh, citing ICTY jurisprudence and Contact Group statements, argued.[94]

> (A)nyone who has read the factual findings of the Trial Chamber in the Mulutinovic case, who has seen photographs of Serbian tanks stationed outside the Kosovo Assembly building in March 1989, or who followed events in Balkans during the last two decades understands why the entire contact group identified Belgrade's disastrous polices of the past [as lying] at the heart of the current problem.[95]

[91] Germany, Further WS, page 20
[92] Please see Chapter 2
[93] Romania argued that both the question of the existence of abuse at the time of promulgating the DoI and the 'probability of mistreatment' by Serbia had to be accessed before determining whether Kosovo was entitled to 'remedial secession', Written Statement, para 151. Citing reports on the state of human rights in contemporary Serbia Romania argued that there was no such continuing abuse. It also argued that the Serbian Constitution of 2006 restored autonomy and hence internal self-determination. While this seems a logically compelling argument, Romania's submissions I submit fail to take note of the trust element in evaluating the future 'probability of mistreatment'
[94] US Oral Submissions para 31.
[95] US Oral Submissions CR 2009/30 Page 35, para 31 (footnotes in text omitted)

To summarise, the right to external self-determination is problematic when articulated in terms as a punishment for past injustices or as an entitlement for injustices suffered. A better justification for the right will make use of historical injustices as part of an evaluative reasoning in judging the possibility of internal self-determination in providing for security and prosperity for the people in question. If the evaluative reasoning leads to the conclusion that without the capacity to self-determine through independent statehood, the group in question will not be able to protect its existence in the present and future vis-à-vis the parent state, then external self-determination is justified. Needless to say, this will depend on assessment of the particularities. Certain rules of international law call for an assessment of particularities as such and the rule on self-determination is one such rule, as Koskenniemi stated before the court on behalf of Finland.[96]

3.3.3 Interpreting the Silence and the Objections

Even those countries that refused to take a position, those that desired to be silent on self-determination before the court and explicitly asked the court not to provide a ruling on the subject, seemed to follow the line of reasoning described above in justifying Kosovo's trajectory from internal to external self-determination.

The UK, for example, took the position in its written submissions that the court did not have to consider the question of self-determination in deciding the question before it.[97] It however included a section on remedial secession in its initial written submissions before the court, where without commenting it noted, *inter alia*, the reference in the Quebec Supreme Court decision that there may be a right to remedial secession.

[96] Finland Oral Submissions CR 2009/30 Page 58 para 15
[97] UK Written Statement paras 5,33 and 6.65

The UK has however in other instances used language that seemed to justify a right to external-self-determination for Kosovo - language comparable to that used by states explicitly invoking the existence of the right before the ICJ. For example, the UK Permanent Representative Sir John Sawers stated during a UN Security Council debate on Kosovo 'that the government in Belgrade must accept that the legacy of Milosevic's oppression and violence has made it impossible for Kosovo to return to control by Belgrade'.[98] Though the UK refused to be drawn into the self-determination debate before the ICJ, Professor James Crawford, who presented oral submissions on behalf of the UK, after reiterating that it was not necessary for the court to go into the question of whether the law of self-determination supports Kosovo's DoI, argued that there is considerable support for the exercise of self-determination outside the colonial context and that this is supported by the fact that common Article 1 of the two Human Rights Covenants does not limit self-determination to colonial cases but articulates a general right, which Crawford notes, 'must have some content, especially *in extremis'.*[99] Crawford, it may be safely assumed, was talking about external self-determination here, and suggesting that it is available outside the colonial context 'in extreme situations'. Referring to the Quebec case he pointed out that the Supreme Court of Canada was in no need of deciding that question 'given the advanced position of Quebec within Canada'. But (in the event of the ICJ deciding to go into the substantive question) he argued that in Kosovo's case the Court would have to determine whether a remedial right to secession existed. Crawford argued:

> Remedial self-determination was left open by the Canadian Supreme Court which did not need to decide it, given the advanced position of Quebec within Canada. But you would need to decide it before you could answer the question in the negative, against Kosovo. I stress that Quebec has never had its distinct status negated and then

[98] UK Written Statement, para 4.9, UN Security Council Debate, 18 February 2008, S/PV.5839, 12
[99] UK Oral Submissions, CR 2009/32 para 29 page 54

> constitutionally denied, nor two thirds of its people chased violently from their homes and lands.[100]

This may be understood as the UK indirectly showing sympathy for the arguments by those states that put forward the right to external self-determination case explicitly. Similarly, the US, while clarifying that it took no position on the question of external self-determination, responded to Serbia's submissions that there was no right to external self-determination. Noting that the international community through the UNSC had thought it fit to take steps to respond to the egregious violations of Human Rights in Kosovo, the US pointed out that even Serbia's 'staunchest supporter' Russia was not against remedial secession/external self-determination in exceptional circumstances.[101] Reference has already been made to Harold Koh's reliance on past injustices to justify Kosovo's DoI in his oral submissions before the court, representing the US.

As referred to earlier, despite the fact that Russia took up the position that the Declaration of Independence was illegal under International Law, it conceded that remedial secession was available "in truly extreme circumstances, such as an outright armed attack by the parent state, threatening the very existence of the people in question."[102] Russia seemed to be relying more on the second condition of egregious violations of human rights as constituting the application of the right to external self-determination, but the invocation of the past is once again used more in an evaluative sense rather than as a remedy. However, Russia disputed that such an extreme circumstance had in fact arisen in Kosovo's case.

If those states that supported Kosovo's DOI did implicitly recognize the external self-determination rationale, as I have argued above, the question

[100] UK Oral Submissions, CR 2009/32 para 30 page 54 (footnotes in text omitted)
[101] US Written Comments, page 21.
[102] Russia Written Statement, para 88

arises as to why they did not openly articulate this. One possible reason is that they deliberately did not wish to assert a general statement on post-colonial self-determination for extra-legal reasons. They might have thought that the ICJ was not the best of forums to decide on what Vaughan Lowe calls issues of law that are in a 'state of flux'.[103] These and other reasons for the silence of states on the self-determination issue are considered in the next section.

Most of the states that took the position of Kosovo's DoI being illegal took a very dogmatic, narrow, positivist view of international law – that even when there is a large-scale violation of human rights and humanitarian law, the principle of territorial integrity must be respected, without any exception. Most of them also relied on some of the age-old problems with self-determination such as whether Kosovo's constituted a people or a minority and whether minorities are entitled to self-determination.

China's argument seemed to link the right to self-determination to the colonial context but did not explicitly reject the relevancy of the principle in the postcolonial context. It however sought to argue that the right could not trump the territorial integrity and the sovereignty of existing states. It took the position that secession was always illegal under international law. Serbia argued that in the post-colonial context only the right to internal self-determination was available, and then only to peoples and not to minorities. It argued that only in the case of indigenous peoples did this involve a right to autonomy and that in the case of peoples this involved a 'participation in the governance of the state'.[104] Spain, plagued by its own secessionist worries and hence the only European Union member state to argue for the illegality of Kosovo's DoI, argued that the principle of territorial integrity was a 'non-derogable right'.[105]

[103] Vaughan Lowe, 'The Function of Litigation in the International Community', Text of the First Annual lecture of the UCL Centre for International Courts and Tribunals. Available at http://www.ucl.ac.uk/laws/cict/docs/Function%20of%20Litigation.pdf Last accessed on 25 August 2014

[104] Serbia WS, paras 544-577
[105] Spain WS, page 25

Cyprus argued that in the post-colonial context there was *only* a right to internal self-determination.[106] It interpreted the right to internal self-determination as a right belonging to all of a State's population to choose the form of government and have access to constitutional rights. Arguing that Kosovars were only a minority and not a people, it took the view that they were entitled only to those rights protected by international law for minorities. It further argued that a remedial secession theory could not be asserted through *a contrario* interpretation of a clause in the Friendly Relations Declaration and that it could only be asserted through the enunciation of a positive right in international law.[107] Romania took the position that Kosovo could have had a legitimate claim to remedial self-determination as of 1999 but not in 2008.[108] It further argued that even then the International Community did not consider remedial self-determination to be available to Kosovo but to the contrary insisted on Serbian territorial integrity.

If one chooses to ignore the dogmatic positions with regard to territorial integrity and orthodox questions relating to the definition of a 'people', the most significant challenge posed by those who oppose the invocation of the right to external self-determination in the event of egregious violations of human rights and the consistent denial of internal self-determination is as to whether external self-determination is available as a remedy for past atrocities. I have already argued that this objection is best handled by approaching past atrocities as an evaluative criterion in judging the feasibility of internal self-determination.

It is noteworthy that both states which argued for the DoI's legality (for example Germany, Denmark, Ireland) and against (for example Cyprus, Serbia) referred widely to the notion of internal self-determination. Helen Quane is of the opinion that the written statements made by States 'represent the first

[106] Cyprus, WS Para 135
[107] Cyprus, WS, para 141-143
[108] Romania WS, Para 147

substantial body of practice to explicitly recognize such a right outside the indigenous context.[109] But none of these statements provided a clear idea as to what internal self-determination actually meant. Germany spoke of internal self-determination being the enjoyment of a 'degree of autonomy within a larger entity', 'deciding issues of local relevance at a local level'.[110] Cyprus for example defined it as a the 'right belonging to the people of the population as a whole to choose a form of government and have access to constitutional rights'.[111] Most states, for example Albania,[112] Denmark,[113] Estonia,[114] Ireland,[115] and the Netherlands,[116] chose not to provide an explanation or a definition at all. This points to the need for a broader normative theory of internal self-determination something that this thesis has put forward *via* Chapter 2.

3.4 Should International Law be silent on the post-colonial content on Self-Determination?

The majority of the court as previously stated agreed with those who argued that the court need not consider the issue of self-determination in providing its advisory opinion and delivered an opinion finding no prohibitive rule in International Law that outlaws DoIs. Judge Bruno Simma, while agreeing with the majority's conclusions, in a separate Declaration criticized the majority for the 'methodology' it chose.[117] He opined that the Courts reasoning leading to the holding that declarations of independence as being not illegal under international law, was 'disquieting'.[118] It was disquieting Judge Simma argued, for two reasons: Firstly, the restrictive reading of the question put to the court by the majority and through such reading relieving itself from the duty to give a full treatment of the issue at hand including on the right to self-determination,

[109] Helen Quane, (n 70) 181-212
[110] Germany WS, p. 33
[111] Cyprus, WS, para 135
[112] Albania WS, para 75
[113] Denmark WS, p. 12
[114] Estonia WS, p. 4
[115] Ireland WS, p. 30
[116] Netherlands WS, para 3.6
[117] Kosovo Advisory Opinion Case, 478-471m Declaration of Judge Simma, para 1
[118] Ibid, para 2

remedial secession which was important to determine whether the declaration of independence[119] was in accordance with the law. Secondly, having chosen to answer the restricted question of the legality of the declaration of independence, the implicit relying by the court on 'anachronistic consensualist vision of International Law'[120] as it found representation in the *Lotus* Judgment.[121] The infamous *Lotus* principle provides that restrictions on the independence of States cannot be presumed because of the consensual nature of the international legal order.

Judge Simma then proceeded to make the following important observation:

> "I am concerned that the narrowness of the court's approach might constitute a weakness, going forward, in its ability to deal with the great shades of nuance that permeate international law. Furthermore, that the international legal order might be ***consciously silent or neutral on a specific fact or act has nothing to do with non liquet, which concerns a judicial institution being unable to pronounce itself on a point of law because it concludes that the law is not clear. The neutrality of international law on a certain point simply suggests that there are areas where international law has not yet come to regulate, or indeed will never come to regulate***. There would be no wider conceptual problem relating to the coherence of the international legal order.[122]

Judge Simma's invitation to consider whether International Law can be neutral or deliberately silent (Simma was referring to probably on the law relating to Declarations of Independence but it is possible that he includes the right to remedial secession, external self-determination as well) is an important question for this project. It is important because the question as to whether international law is and must be deliberately or consciously silent or neutral on the post-colonial content of the right to self-determination must be answered

[119] Ibid para 6
[120] Ibid para 2
[121] "Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10, 18
[122] Ibis, para 9

by anyone who is interested in staking out a normative theory of self-determination in the post-colonial context.

The crux of Judge Simma's view on the subject as gleaned from the above cited paragraph is that when the law is on a matter is unclear it may be indicative of the law wanting to be consciously silent or neutral but that this does not constitute *non liquet* and hence that it does not affect the completeness of law.

Judge Simma subscribes as is evident from the above seems to subscribe to the view that *non liquet* is not part of International Law. Scholarly opinion has strongly rebuked the idea of '*non liquet*' in International Law. For example Lauterpacht noted that 'with negligible exceptions international practice shows no instances of a non liquet' and he infers that the 'subject partakes of a measure of unreality.[123] He contends that the prohibition of *non liquet* and the completeness of international law are well-established principles and even among 'the most indisputably established rules of positive international law'. But the ICJ in its advisory opinion of 08 July 1996 concerning the *Legality of the Threat or Use of Nuclear Weapons*[124] without invoking the term in name, indirectly averred to *non liquet*. Judge Roslyn Higgins in her dissenting opinion labelled the court's majority opinion as a finding in *non liquet*, of which she was critical of.[125]

The literal meaning of the term 'non liquet' is 'unclear'. In an illuminating article Bodanksy distinguishes between two types of *non liquet* situations – ontological (where there is no such rule in international law to cover the situation) and epistemological (where rules do exist but not in sufficient

[123] Hersch Lauterpacht, 'Some Observations on the Prohibition of '*Non Liquet*' and the Completeness of the Law.' in F. M. van Asbeck (eds) *Symbolae Verzijl: Présentées au Prof J.H.W. Verzijl, à l'occasion de son LXXième anniversaire*. (Nijhoff, 1958) 196–221, 198
[124] I.CJ. Rep. 1996, 226.

[125] Dissenting opinion, I.CJ. Rep. 19%, 226,583, para.2

'richness' to address the situation).[126] It is doubtful whether the latter category could constitute *non liquet*. Judge Simma does not appreciate this differentiation. He appears to conflate 'law not being clear' with 'law has not come to regulate'. Given that Judge Simma is also asserting that he is not saying that the law on self-determination is *non liquet* without further dwelling on *non liquet* we must turn to the question of silence.

Hans Kelsen was also quite vehemently against the notion of *non liquet*. But he recognized that there may be areas where international law is silent. But international law being silent itself is a positive rule of international law, Kelsen asserted:

> That neither conventional nor customary international law is applicable to a concrete case is logically not possible existing international law can always be applied to a concrete case, that is to say, to the question as to whether a state (or any other subject of international law) is or is not obliged to behave in a certain way. If there is no norm of conventional or customary international law imposing upon the state (or another subject of international law) the obligation to behave in a certain way, the subject is under international law legally free to behave as it pleases; and by a decision to this effect existing international law is applied to the case. He who assumed that in such a case the existing law cannot be applied ignores the fundamental principle that what is not legally forbidden to the subjects of the law is legally permitted to them.[127]

But as is seen from the above quote international law being silent on a particular subject may in fact constitute a manifestation of the *Lotus* principle, which Judge Simma so eloquently criticizes as being anachronistic. Hence the

[126] D Bodansky, '*Non Liquet* and the Incompleteness of International Law' in LB de Chazournes and P Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (CUP 1999) 161-165.

[127] Robert W Tucker, Hans Kelsen's Principles of International Law (2nd edition, Holt, Rinehart and Winston, 1966) 438-440

only way in which one may argue that the law is silent and still claim that it is not an invocation of *non liquet* is by invoking a Kelsenian positivist take on the subject.

But leaving this aside one must engage seriously with the question of silence in international law. Lucien Siorat[128] makes the distinction between inadvertent silence ('*lacunes*') and deliberate/intentional silence – deliberate silence is chosen by states as a result of what Siorat calls '*insuffisances sociales*' or social insufficiencies. By social insufficiencies Siorat means the lack of willingness of States. But as Stone argues if silence is not to be a matter of *ex-post facto* rationalization then it should have to be expressed in a legal norm created by States by which they have removed the particular matter from legal regulation.[129] But this is a very unlikely situation States are unlikely to willing and make a statement that they have removed a particular matter from regulation by international law.

Is the law on self-determination silent? The answer as was argued in Chapter 1 is that it is not. Repeatedly the status of the principle of self-determination as a general principle of international law has been reiterated. During the process of decolonization the application of the principle took shape as a right to statehood for former colonies. There was nothing unclear about the status of the principle during the process of decolonization as shown in Chapter 1. But its application in the post-colonial context is in a state of flux. But does this mean that international law is silent or should remain silent.

What is evident from the discussion above is that the principle of *non liquet*, its application or non-application cannot help us guide this discussion. Firstly, the debate on the status of the principle of *non liquet* is centered around the judicial function in international law. It is centered around the question of how the ICJ on a very politically charged question packages as an Advisory Opinion must somehow dodge the main question asked of it. Secondly it does not have much to say about why the law is unclear and hence shields the real question behind

[128] As cited in J Stone, '*Non Liquet* and the Function of Law in the International Community' (1959) 35 BYIL 124, 141-142

[129] ibid 144-145 text in footnote 4

the purported lack of clarity or purported silence. Thirdly, ontologically speaking there is no question of international law being silent on self-determination. States continue, in general be reiterative of its application but wish to remain indeterminate about its application in the post-colonial context.

Martti Koskenniemi's sophisticated approach to understanding the lack of clarity or perceived gaps as described hereunder I submit is a better way of understanding the question of international law's lack of clarity in relation to the principle of self-determination. I will attempt to show that applying Koskenniemi in the way which I do can assist us in approach the problem at hand in a more nuanced way.

Koskenniemi's magnum opus *From Apology to Utopia: The Structure of International Legal Argument*[130] would urge us to look at the issue from the point of indeterminacy of international law. As Koskenniemi points out indeterminacy 'does not emerge out of the carelessness or bad faith of legal actors but from their deliberate and justified wish to ensure that legal rules will fulfil the purposes for which they were adopted'.[131] Purposes however, Koskenniemi points out, even with regard to the same rules, are conflicting as between different legal actors and unstable in time even in regard to single actors.[132] Hence according to Koskenniemi there is a plurality of 'purposes' both between actors and internal to the actors.

Koskenniemi further clarifies that the indeterminacy he is referring to is not about the semantic openness of legal speech - but about the relationship between those expressions (found in rules) to their *underlying reasons* and to other rules and principles and their underlying reasons and purposes. Hence, he argues his account points to the necessity of applying the reason for the rule over the empty form of the rule. This deformalisation he argues calls for a pragmatic balance between various rules and principles and other normative materials (such as rights) and choosing between rules and exceptions.[133] This choice is inevitable, and it is the inevitability of this choice that Koskenniemi

[130] Martii Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2nd edition, CUP 2008)
[131] ibid 591
[132] ibid
[133] ibid 595

calls the politics of international law.

Hence purpose/s or reason/s of rules in international law pose two levels of indeterminacy problems. On one level there is a plurality of purposes/ reasons that exist with regard to a rule. The additional level of plurality is that the reason of a rule when it interacts with the reason of another rule/s may give plural results depending on the rule and circumstances.

As with regard to the principle of self-determination I have submitted vide Chapter 1 and Chapter 2 that the underlying reason for the principle is a right of peoples to self-government. The manner in which this right is expressed I have further argued varies with context. Depending on the context they interact with other rules and produce different results. As was shown in Chapter 1 during the decolonization era the principle of self-determination *qua* independent statehood trumped the principle on territorial integrity. Lesser forms of self-government were possible and available but independent statehood could not be denied because of the principle of territorial integrity. This changes in the post-colonial context where territorial integrity and the value it represents the stability of the world order trumped the principle of self-determination. However, in certain circumstances the principle of territorial integrity may have to give way to the value of self-determination because the value of stability requires it. As argued in Chapter 2 in the context of the struggles mounted by sub-state national societies in the plurinational context against dominant host states it is a struggle for self-government seeking to transform the uni-national state into a plurinational state. To read self-determination in this manner I submit in this thesis is in accordance with the core of the principle of self-determination.

In conclusion I turn to the reasons for why States must abandon the employment of various techniques such as *sui generis*, *non liquet* and silence and engage head on in articulating the post-colonial, post-cold war content of the right to self-determination.

Firstly, the issue at hand is at the centre of issues that International Law is concerned about – peace and security. Louis Arbour, formerly UN High Commissioner for Human Rights as President of the International Crisis Group

noted drawing from sixty conflict situations on which Crisis Group reports and argued that 'a recurrent source of potential – and actual – deadly confrontation, and a frequent theme in our reporting, lies in a clash between the principle of territorial integrity and the right to self-determination'.[134] While agreeing that the analysis in this regard must be contextual given that each conflict is different, she averred that 'it is useful to explore the contours of the right to self-determination in order to offer prescriptions for conflict prevention that are as well anchored in law as they are in political reality'.[135] No further emphasis is needed as to why the issue is a pressing one which requires the attention of International Law.

Secondly, even though internal self-determination is in a strict sense an internal matter for states as is demonstrated in this chapter and the ones succeeding this is an issue where there is plenty of international involvement – by third party states and international organisations. International law relating to Human Rights, Environmental law, Labour Law, Trade Law are shaping and influencing national constitutions both directly and indirectly. However it is true that the case of choice of political institution, its form and content is a matter on which international law cannot and should not be prescriptive. But it is possible that International Law can guide and nudge the behavior of States. Hart argues that law's conception simply as about goading individuals into desired courses of behavior is inadequate. What a legal system that lives up to the ideal of the rule of law does is to guide individual's choice as to behavior by presenting them with reasons for exercising choice in the direction of obedience but leaving them to choose.

Thirdly, flowing from two above, the value of guiding state behavior on the treatment of its plural *demos* should trump the concern that such an enterprise might lead to destructive behavior on the part of groups seeking self-determination. The fear is over stated as argued in Chapter 1 and should not

[134] Louis Arbour, 'Self-Determination and Conflict Resolution: From Kosovo to Sudan' (Speech Delivered at the Carnegie Council for Ethics in International Affairs, 22 September 2010) <https://www.crisisgroup.org/global/self-determination-and-conflict-resolution-kosovo-sudan> accessed on 15 December 2018.
[135] ibid

hold up a more definitive articulation of the principle of self-determination in contemporary public international law.

Conclusion:

A number of those states which were against Kosovo's DoI argued that prior to Kosovo's DoI, no state had openly mentioned or recognised Kosovo's right to self-determination. They point to how the territorial integrity of FRY/Serbia was mentioned in most if not all documents in the long, troubled history of Kosovo. This charge is a valid one. Germany in its oral submissions of the case came up with a puzzling explanation for this:

> In the debate about the right to self-determination, concerns have been voiced that a broad exegesis of its content might trigger risks for stability, peace and security. In order to prevent the concept getting out of hand, attempts have been made to narrow and limit the scope of the right to self-determination. Yet, the perspective of those arguments is the *ex ante* viewpoint: namely, the situation *prior to* the exercise of a possible right to self-determination. Our case is different. Ours has an *ex post* perspective.[136]

The argument that the only way in which one can prevent the use of self-determination 'going out of hand', is by justifying its usage after it has been used (*ex post*) and not before its used (*ex ante*) devalues the role of the rule of self-determination as a fundamental guiding principle in situations like that in Kosovo. No state that supported the independence of Kosovo in the process leading to its DoI ever referred to self-determination as a guiding value/principle in the negotiation process. That a reference to self-determination might be misunderstood as supporting separatism is the universal explanation given for such refusal to utilize the language of self-determination. This points to the necessity to clarify and engage through open political communication as to the scope and extent of the right to self-determination in the post-colonial context. Otherwise, like Germany alluded to,

[136] Germany Oral Submissions, CR 2009/26, para 34 and 35

self-determination will always have to remain an idea useful for an *ex-post* justification.

In this chapter I have tried to demonstrate that the Kosovo case, far from being a *sui generis*, characteristically represents the complexities associated with violent self-determination conflicts in the post-colonial context: the feasibility of internal self-determination, the intransigency of actors in a socially protracted ethnic conflict, and the role of past atrocities in justifying independent statehood. The Kosovo case before the ICJ for the first time brings forth interesting *opinio juris* on the post-colonial content of the right to self-determination, one that is deeply divided, but which provides a spring board for engaging in a normative conversation on the content and nature of the right to internal and external self-determination. I have also suggested a better way of understanding the relationship between external self-determination and internal self-determination and as to how past atrocities in the context of armed conflict may be used to evaluate the move from internal to external self-determination which strengthens the theoretical claims made in Chapter 2 in relation to self-determination being in a state of continuum. The chapter has also suggested that International law cannot and need not be silent on the post-colonial content of the principle of self-determination.

Part II

Internal Self-Determination: Lessons from Comparative Constitutional Law

Introduction to Part II

1. Introduction

The second part of the thesis focuses on what a theory of internal self-determination can learn from comparative constitutional law. These case studies are premised on the argument that the principle of self-determination in international law can learn from Comparative Constitutional Law in furthering its understanding of the right to self-determination. The purpose of these chapters is not to argue that there is state practice and *opinio juris* on self-determination which has crystallised into a new customary rule of international law, but rather that rules of international law can be interpreted and read in a way which reflects upon the experience of States, which through constitutional processes engage with right to self-determination claims within their territory.

Chapter 1 provided an outline of the current law of self-determination. It was shown in Chapter 1 that it is not disputed that the principle of self-determination continues to remain an important principle of international law beyond colonial self-determination i.e that the instruments of international law that deal with the principle do not restrict it to the colonial context. It was also shown that international law is clear that statehood was not the only form in which the right to self-determination could be realised. While it was shown that there have been instances of the use of 'internal self-determination' as a principle of international law in international legal forums, there is little to suggest that it is a developed sub-set of the principle of self-determination in international law. But given the long-standing recognition within international law that self-determination could be realised in forms lesser than statehood, the conceptualisation of the idea of internal self-determination as propounded in

Chapter 2 will not contradict the fundamentals of the principle of self-determination.

In Chapter 2 it was argued that a necessary condition of the right to self-determination was the right to self-government and that the right to self-determination could and should not be confused with minority rights. This, it was argued in the chapter, also applied to any internal (intra-state) application of the right to self-determination. Chapter 2 also argued for a more fluid understanding of the relationship between different claims to self-determination and accordingly contested a remedial right only argument for external self-determination. Chapter 3 was both a detailed study on how states dealt with a post-colonial invocation of the right to self-determination before the International Court of Justice but also a study on why Kosovo with all the international attention it got could not resolve its claim to self-government within Serbia/ Yugoslavia. It belongs to both part I and II.

The chapters in Part II that follow draw on experiences of constitution making in plurinational[1] contexts in their handling of the right to self-determination. The case studies seek to reflect on the arguments advanced in Chapters 1 and 2. Because the case studies draw from comparative constitutional law this brief note seeks to explain methodologically as to why in expounding upon the international law on self-determination it may be useful to draw from comparative constitutional law experiences.

2. What can comparative constitutional law tell us about internal self-determination?

For a norm to amount to a principle of international law it needs to form part of a treaty or be accepted as a customary rule of international law. It is beyond doubt that self-determination is a principle of international law. There is however a core and penumbra[2] to the principle on self-determination in

[1] As defined in chapter 2

[2] I am making use of H.L.A Hart's distinction between the core and the penumbra, in which Hart argues that there is a certain core to a legal norm core which has a single and settled right answer, while in its penumbra the application would be responsive to contextual

international law. The core of that principle clearly provides for a right to be a state in the colonial context[3] and for the principle of self-determination to be applicable beyond the colonial situation. It is suggested, however, that the question of *how* the principle applies in the post-colonial context forms part of the penumbra of the modern rule on self-determination – an area in which its meaning is contested and its application in practice does not necessarily appear consistent. This penumbra cannot be interpreted coherently without an appreciation of the particularities of the context[4] and circumstances that relate to the application of the principle.

How does one make sense of the particularities of the context in a legal sense? One important arena of law that deals specifically with this question is that of Constitutional Law. Constitutional law provides for the framework that defines the nature of the state, its people and the exercise of power. The 'will of the people' which is at the centre of the law of self-determination in Public International Law is expressed in the language of popular sovereignty in constitutional law. As Martin Loughlin most lucidly explains the will of the people in a singular mode is non-existent and it rests on a multitude and is relational[5]. The will of this multitude tends to be conflictive (all the time) which gives rise to politics. Managing this multitude is the function of politics. The idea of democracy is fundamentally that this will need to be absorbed through a system of representation. As Loughlin puts it:

> (The) idea of democracy can only be expressed through a representative form, and therefore through certain institutional arrangements, it also follows that constitutions are not simply devices

reasoning, and reference to extra-legal standards. HLA Hart, *The Concept of Law* (1st edition, OUP 1958) 607- 615. In a later edition of *The Concept of Law* Hart would argue that the penumbral content will have to be applied by reference and in coherence with other legal standards and with the objective of justice. (Ibid 612-14) HLA Hart, *The Concept of Law* (OUP 1994)127-28)

[3] As Crawford puts it: 'If independence is the decisive criterion of statehood, self-determination is a principle concerned with the right to be a state': James Crawford, Creation of States in International Law (2nd edn, OUP 2006).

[4] For a detailed treatment of the argument in relation to the need to appreciate the particularities of the circumstance please see Chapter 3.

[5] Martin Loughlin, *The Idea of Public Law* (OUP 2003), See particularly Chapter 6 on 'Constituent Power'.

> that impose restraints on the exercise of power. Like all representational frameworks a constitution is a way of organising, and hence also of generating political power. A constitution is not essentially an act of authorisation; it is a mode of generating and orchestrating the public power of a state. The constitution is not a segment of being but a process of becoming[6].

In plurinational contexts then, the constitution is the site of contestation regarding where that power lies - in other words a struggle for a plural understanding and accommodation of constituent power. As detailed in Chapter 2 sub-state national societies challenge the monist understanding of the power being exercised, orchestrated and organised. Hence it is submitted that a study of constitutional design and responses to claims of self-determination in the plurinational context will help us to understand 'the particularities of the circumstances' under which the penumbral meaning of the right to self-determination could be understood.

The possible cross fertilisation of ideas between constitutional law and international law is not a novel suggestion. Many scholars have over the last decade or so drawn our attention to the possibility. Research into the phenomenon of what has been described as the 'internationalisation of constitutional law' popularised in the past decade or so suggests that both international law and domestic constitutional increasingly draw from each other. Constitutionalisation of International Law is understood broadly to refer to the impact of ideas such as rule of law, separation of powers and accountability which have a domestic constitutional law pedigree on the organisation and management of international institutions. This relationship between international law and constitutional law is a two-way relationship. As Chan Chang and Rong Yeh have pointed out,

> 'when some domestic constitutions extend their influences to transnational or international levels, they become part of the inspirations, persuasions, or in some cases even binding sources of international law or other national laws. This facilitates a reciprocal

[6] Ibid 113

> relationship between international and domestic laws having the possibility of influencing each other. As a result, our understandings of both international and domestic laws, their natures, and boundaries are fundamentally altered'.[7]

The most important area within which this impact has been felt is in the area of human rights. The International Covenant on Civil and Political Rights has had an enormous influence on the drafting of fundamental rights / human rights chapters in domestic constitutions and/or legislation and national courts have used jurisprudence from international bodies and from other jurisdictions in their interpretative work on human rights. Similarly, the jurisprudence of domestic courts and the constitutional practice of states have influenced the way in which the international human rights framework has developed. Beyond human rights, international law and constitutional law have significantly cross-fertilised ideas over the design of environmental laws, minority rights, intellectual property regimes and various other fields. There is significant scholarship that has been produced over the past years exploring these interactions.

However there has been precious little scholarly study on how constitutional law and international law have cross fertilised ideas on self-determination. One area where there has been bourgeoning literature on the subject is in the area of law relating to peace agreements and international law. Christine Bell's seminal work titled, '*On the Law of Peace: Peace Agreements and the Lex Pacificatoria'* and Marc Weller's '*Escaping the Self-determination Trap'*[8] focus on the impact of peace agreements on international law and constitutional law. More recently, Cindy Wittke has concluded very strongly as follows:

> (C)ontemporary constitution-making generally and post-conflict constitution-making in particular are increasingly shaped by multiple actors and sets of norms that seem to derive their legitimacy and authority from a complex, fragmented international legal order and set

[7] Wen Chan Chang and Juin Rong Yeh, 'Internationalisation of Constitutional Law' in Michel Rosenfeld and Andras Sajo (Eds) *The Oxford Handbook on Comparative Constitutional Law* (OUP 2012) 1165- 1184, 1166

[8] Marc Weller, *Escaping the Self-Determination Trap* (Martinus Nijhoff Publishers, 2008)

> of regulations. In such constellations, constitution-making becomes a post-national, i.e. internationalised or globalised, project[9].

But as I have shown in Chapter 2 the norms as they are relevant to self-determination are not very clear in international law and hence there must be a possibility that international law can learn from below (constitutional law) as well.

Christine Bell, in the context of the Scottish referendum, very recently pointed to the potential for cross fertilisation in this field as follows:

> (G)lobal legal developments illustrate a dynamic whereby the attempt to regulate polity formation by reference to international legal argument carries an extraordinary capacity to reshape international law. I suggest that this was the case with the Scottish independence referendum. Arguments as to how international law applied that relied on an incomplete and inapposite international legal framework, point to the ways in which international legal doctrine relating to secession needs 'completed' and so have a capacity to reshape the law. I therefore consider the ways in which Scottish independence arguments themselves became or could become constitutive of international law'[10].

Another area linked to the interaction between international law and constitutional law is the significant literature on international territorial administrations. International territorial administrations that are established in the aftermath of a violent conflict seek to tutor entities subject to such administration on how to achieve statehood. Through the instrument of state-building then international actors try to define the normative contours of

[9] Cindy Wittke, *Law in the Twilight: International Courts and Tribunals, the Security Council and the Internationalisation of Peace Agreements Between State and Non-State Parties* (CUP, 2018) 210

[10] Christine Bell, 'International Law, the Independence Debate and Political Settlement in the UK' in Aileen McHarg, Tom Mullen, Alan Page, and Neil Walker (eds) *The Scottish Independence Referendum: Constitutional and Political Implications* (OUP 2016) 197 – 222 at 203

sovereignty and constitutions.[11] This again points to the ever-increasing cross fertilisation of international law and constitutional law.

The chapters that follow are an endeavour in this tradition of scholarly work and seek to demonstrate that the learnt experiences in constitutional design in countries affected by self-determination conflicts can help us to broaden our understanding of self-determination in international law.

Previously in this chapter it was argued that the penumbral meaning of self-determination can only be understood by looking at how self-determination is applied in specific contexts. The chapters seek to provide some clarity as to the scope of the penumbral meaning. They also seek to a) bolster the theory of internal self-determination advanced in chapter two and b) clarify the major themes / policy areas that will have an impact on whether the internal variant of self-determination can prove to be successful as an alternative to secession.

3. Methodology employed in selecting the case studies.

The selection of case studies in this thesis has been approached with the cautious understanding that learnings for international law from comparative constitutional law cannot be gleaned by cherry picking a certain number of case studies.

In selecting the case studies, I have followed the 'prototypical case selection'[12] approach. The case studies have been selected on the basis that they exhibit

[11] Dominic Zaum terms this as the 'sovereignty paradox' in that sovereignty is denied by the international territorial administration in the interim so that sovereignty can be properly developed leading to the constitution of a 'proper state'.

> 'By treating sovereignty as a composite concept, which addresses the relations between states internationally as well as the relations between states and their societies domestically, and which has both legal and political attributes, it is possible to explore and resolve these contradictions, and understand the relationship between state building and sovereignty'. Dominic Zaum, *The Sovereignty Paradox: The Norms and Politics of International State-building* (OUP 2007), 28.

Also see further. Ralph Wilde, International Territorial Administration: How trusteeship and the Civilising Mission Never went away (OUP, 2008). Chapter 4 contains a discussion of the concept of 'earned sovereignty' in light of the above.

[12] The rationale of the prototypical cases logic as Ran Hirschl explains is that 'if a researcher wishes to draw upon a limited number of observations or case studies to test the validity of a theory or argument, these should feature as many key characteristics as possible that are

characteristics of self-determination conflicts that can be found in many if not all self-determination conflicts. The characteristics that I identify as common are as follows: a) The existence within the borders of a larger state (referred to as the 'host-state') of a sub-state nation demanding self-determination constitutionally (internal self-determination) and extra-constitutionally (external self-determination); b) a struggle within constitutional sites for internal self-determination; c) the explanatory reasons offered for claiming external self-determination i.e the explanatory reasons for the move away from internal self-determination; and d) international involvement in the mediation of self-determination claims. Chapter 3 on Kosovo and Chapter 4 on Sri Lanka and Aceh look at self-determination disputes that had a violent phase as part of their disputes whereas Chapter 5 looks at those cases where disputes did not involve extensive violence. The impact of violence as a variable is discussed. Hence Chapter 5 compared to the other chapters also incorporates the 'most different cases' logic to selecting case studies so that independent variables that may impact the outcome of the comparative study are also factored into the explanatory conceptualisation of internal self-determination offered through the thesis.

One final methodological note must also be made with regard to the 'legal nature' of the material used in case studies. Most of the materials discussed are constitutional/ legal but the case studies venture out of the legal and emphasise the need for understanding the political context of the constitutional sites discussed. As Hirschl puts it,

> Constitutions neither originate nor operate in a vacuum. Their import cannot be meaningfully described or explained independent of the social, political, and economic forces, both domestic and international, that shape them. Indeed, the rise and fall of constitutional orders—the average lifespan of written constitutions since 1789 is 19 years—are important manifestations of this idea. Culture, economics, institutional structures, power, and strategy are as significant to understanding the

akin to those found in as many cases as possible' Rans Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (OUP 2014) 256

> constitutional universe as jurisprudential and prescriptive analyses. Any attempt to portray the constitutional domain as predominantly legal, rather than imbued in the social or political arena, is destined to yield thin, ahistorical, and overly doctrinal or formalistic accounts of the origins, nature, and consequences of constitutional law[13]

The thesis however does not claim or pretend to be inter-disciplinary. An inter-disciplinary approach is beyond the scope and space of this project. In explaining constitutional phenomena, it merely seeks to contextualise the discourse within the larger politics that informed the constitutional developments under discussion[14].

[13] Hirschl (n11)

[14] As Armin von Bogdandy argues "empirical, theoretical, and critical examination of the law but also essayistic speculation, are needed for a vibrant discipline. Such scholarship cannot limit itself to doctrinal terminology but needs to employ research interests, concepts, theories, and methods from other disciplines and must be linked to larger cultural debates. This pluralization has a transforming character: It follows that scholarship is no longer shaped by a single, so-called 'legal method.' This new approach will in turn transform the disciplinary identity, i.e. what it means to be a scholar and what one is expected to do in order to become one." See Armin von Bogdandy, 'National Legal Scholarship in the European Legal Area—A Manifesto' 2012 (10) International Journal of Constitutional Law 614, 624

Chapter 4

Internal Self-Determination in Asia: Lessons from Aceh (Indonesia), Bougainville (Papua New Guinea) and Tamils (Sri Lanka)

Introduction

This chapter focuses on the practice of internal self-determination in protracted social conflicts.[1] For the purposes of this chapter I define protracted social conflicts as intra-state conflicts between the state and a sub-state society over self-determination, state formation and contestation of state power, which more often than not take a violent form. They are protracted owing to the deep, intractable divisions that characterises the conflict between the state's dominant nation and the sub-state society. A feature of it being protracted is also that the divisions are played out not just among elites of the dominant nation and sub-state nation but that these divisions run deep into society (albeit initially fuelled by elite competition) and that they become a facet of everyday politics.[2] This chapter is different from the next in that the contexts studied therein (Scotland, Quebec and Catalonia) are not marked by such deeply divisive violent politics.

I have selected Aceh in Indonesia, Bougainville in Papua New Guinea and Tamils in Sri Lanka as the case studies for this chapter. These case studies have been chosen because in addition to being examples of protracted violent conflicts, they have had a substantive international involvement in efforts at resolving the conflict - in Aceh the involvement of Former President Martti Ahtisaari and the European Union in monitoring the implementation of the

[1] The term was first coined by Edward Azar: Edward E. Azar, *The Management of Protracted Social Conflict: Theory and Cases* (Aldershot: Dartmouth, 1990).

[2] Sujit Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?* (OUP 2008).

agreement through the Aceh Monitoring Mission, in Bougainville the involvement of New Zealand and Australia in the facilitation process and the stationing of a UN observer mission to help create a secure environment for negotiations and the involvement of Norway, India, USA and UK in the peace process of 2002-2006 in Sri Lanka. The international involvement in a negotiated settlement to ethnic conflicts is a matter that should interest international law and policy and hence the preference for choosing case studies wherein there was significant international involvement. These case studies are not intended to be exhaustive comparative treatments of the contexts studied but intend to tease out the different themes that are important in exploring self-determination's internal dimension.

4.1 Aceh: Negotiating Internal Self-Determination within a Unitary State

Aceh is a province in Indonesia that distinguishes itself as a distinct society based on language and religion[3] from the rest of Indonesia. It was an independent Sultanate for more than 500 years before Dutch colonial rule was established in 1873. However, the Acehnese during the colonial period saw themselves as wedded to the Indonesian project. They took part in the anti-colonial uprising against the Dutch. In that spirit the Acehnese people rejected a Dutch imposed federal constitution for Indonesia[4] given its colonial intentions. Post-colonial Indonesian nationalism was built purely on a shared opposition to colonialism by elites across the different groups of Indonesia. It was in Indonesia that Benedict Anderson observed the link between colonialism and nationalism which he then used to explain in general the rise of nationalism in colonial territories which hitherto had no common basis to forge a nationalist project.[5] As Anthony Reid has pointed out, in many

[3] For how religion played a role in the Acehnese nationalist project see Edward Aspinall, *Islam and Nation: Separatist Rebellion in Aceh, Indonesia* (NUS Press 2009). While the Acehnese rebels emerged out of the Islamic movement (Darul Islam Movement) they would later give up on the religious identity of their nationalist project.

[4] Jacques Bertrand, *Nationalism and Ethnic Conflict in Indonesia* (CUP 2009) 162.

[5] Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Revised edition, Verso 2006) See Chapter 7.

instances and locations of decolonisation, including Indonesia, leaders of sub-state nations took part in the 'revolutionary politics' of anti-colonialism side by side with the leaders of the majority community seeking the overthrow of colonial government.[6] A by-product of this revolutionary politics – a centralised unitary state that sought to build a single identity would come to haunt them later. These sub-state nations had hoped that the revolutionary politics of decolonisation will be accommodative of their aspirations but were disappointed with the response. The Acehnese when they rejected the Dutch federal constitution hoped that a future Indonesian independent state would accommodate their aspirations. But they would be proven wrong. Independent Indonesia enacted a strong unitarian constitution[7] based on the idea of a singular conception of a Javanese Indonesian nation-state.[8] Aceh which was initially granted 'special status' was later stripped of the same and included as part of the province of North Sumatra. Acehnese went on to support the Darul Islam rebellion in an attempt to secure independence which led to Indonesian efforts to appease the Acehnese. Special status was restored in 1959. But this proved inadequate and was incrementally stripped away leading to the formation of the Free Aceh Movement (GAM) in 1976. The armed movement was suppressed by Indonesia's dictatorship – the 'New Order' Government of President Suharto. Consequent to the advent of electoral democracy following Suharto's death in the mid-90s the struggle of the Acehnese people resurfaced. Some legislative efforts were made to respond to the Acehnese problem. Law No. 44/1999 enacted by the Indonesian Parliament titled "Implementation of the Specialty of the Special Province of Aceh" was enacted on 4 October 1999. The law provided for Aceh freedom to enact laws to

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[6] Anthony Reid, 'Revolutionary State Formation and the Unitary Republic of Indonesia' in Jacques Bertrand and Andre Lalberte (eds) *Multination States in Asia: Accommodation or Resistance* (CUP 2010); Anthony Reid, *The Indonesian National Revolution, 1945-1950* (Longman 1974).

[7] The Constitution of the Republic of Indonesia of 1945 (last amended in 2002) Preamble, arts. 1 and 18.

[8] See for a detailed exposition on the Javanese hold over the nation state: Edward Aspinall, 'Modernity, History and Ethnicity: Indonesian and Acehnese Nationalism in Conflict' in Damien Kingsbury and Harry Aveling, (eds), *Autonomy and Disintegration in Indonesia* (Routledge 2003).

introduce Syari'at Islam, to implement traditional norms and culture in the governance of the province, to implement education, including elements of Syari'at Islam, to give the religious (Islamic) leaders a role in policy making (creation of a board of religious leaders). These recognitional aspects of autonomy GAM interpreted as being deceptively offered as an alternative to decisional autonomy.

But the new democratic regime also despite its avowed commitment to democracy continued its military approach to resolving the Aceh question. A peace process in 2001 failed to deliver results as both the Free Aceh Movement (GAM) and the Indonesian state refused to give up on secession and a unitary state respectively. The Special Autonomy Law that was passed in 2001 as part of the peace process contained some progressive provisions on the sharing of oil revenue but made no progress on furthering the competences of Aceh.

The 2004 Asian Tsunami which left Aceh the most affected led again to a peace process which led to a Memorandum of Understanding between the warring parties signed in 2005. The Memorandum of Understanding signed between the Free Aceh Movement (GAM) and the Government of Indonesia has been hailed as an agreement that led to the establishment of peace in Aceh and as an example for other similar conflicts for resolving disputes through state reforms.[9] The significant breakthrough that led to the adoption of the MoU, was GAM agreeing to consider self-government as an alternative to independence. The repackaging of independence as self-government GAM argued was an argument for 'effective and sustainable self-determination'[10] and as the right and capacity of Aceh to determine its own affairs within the context of the Republic of Indonesia.[11] Damian Kingsbury who was advisor to GAM during the peace process has noted that while GAM was indeed always

[9] For example, the US Institute for Peace in a special report released in 2007 described the Aceh process as 'Nothing less than success': Pieter Feith, 'Aceh: Nothing less than success' (United States Institute of Peace: Special Report 184, March 2007).

[10] Press Release by Dr Damien Kingsbury, Advisor to GAM, 11 April 2005, as reproduced in Damien Kingsbury, *Peace in Aceh: A Personal Account of the Helsinki Peace Process* (Equinox 2006) 74.

[11] GAM Statement, 10.07.2005, reproduced in Kingsbury (n 10) 111.

associated with their ideal solution of a separate state that it was for some time preceding the talks, willing to ask the question of whether the 'goal was independence as such or was independence a means of achieving something else, and if so was this possible by other means?'[12]

The first round of talks was a non-starter as Martti Ahtisaari, former President of Finland and the Crisis Management Institute's Chief Mediator took up the position that Aceh must agree to 'Special Autonomy' and argued that there would be no settling of the humanitarian aspects of the conflict without agreement on the political question –or in other words the infamous 'nothing is agreed until everything is agreed' standard.[13] 'Special Autonomy' meant the status quo for GAM and hence they refused it bluntly leading to the possibility of the peace process failing. However, when GAM came up with an alternative terminology – self-government – Ahtisaari agreed to pursue it. The Indonesian Government was reluctant to accept the terminology but conceded later. However, the terminology of self-government was to be used within the framework of a unitary state.

The preamble of the Memorandum of Understanding[14] provided that the objective of the agreement 'was to create the conditions within which the government of the Acehnese people can be manifested through a fair and democratic process within the unitary state and constitution of the Republic of Indonesia'.[15] The key passage that sought to define self-government, read that Aceh shall exercise Aceh 'authority within all sectors of public affairs' barring foreign affairs, external defence, national security, monetary and fiscal matters.[16]

The MoU provided that international agreements entered into by the Government of Indonesia which relate to matters of special interest to Aceh and decisions with regard to Aceh by the legislature and executive of the

[12] Kingsbury (n 10) 31.
[13] Kingsbury (n 10) 30.
[14] Memorandum of Understanding Between the Government of Indonesia and the Free Aceh Movement, 15 August 2015 [MoU] <https://peacemaker.un.org/sites/peacemaker.un.org/files/ID_050815_Memorandum%20of%20Understanding.pdf> accessed on 15 December 2018.

[15] Preambular paragraph 2 of the MoU.
[16] Clause 1.1.2 (a) of the MoU.

central government required consultation and consent from the Acehnese Government. The agreement also had provisions that were to do with constitutional recognition of Aceh's distinctiveness. The MoU provided that the name of Aceh and the titles of senior elected officials will be determined by the legislature of Aceh[17] and that Aceh has the right to use regional symbols including a flag, a crest and a hymn.[18] It also provided that Aceh has the right to raise funds with external loans and the right to set interest rates beyond that set by the Central Bank of the Republic of Indonesia. It also generously provided that Aceh is entitled to retain seventy (70) per cent of the revenues from all current and future hydrocarbon deposits and other natural resources in the territory of Aceh as well as in the territorial sea surrounding Aceh. Development and administration of all seaports and airports within the territory of Aceh were also left to the Aceh Government and it further provided that Aceh shall enjoy direct and unhindered access to foreign countries, by sea and air.

The content of the MoU despite being labelled as providing for self-government within a 'unitary state', prima facie provides for strong federal-like powers for the Acehnese legislature and Government. The grant of all legislative powers except for national security, foreign policy and monetary policy[19] (that even limited by Aceh's right to borrow externally and set interest rates independently[20]) are in fact features of what a state within a confederation would enjoy. The term unitary state hence within the framework of the agreement alone should have made very little constitutional sense except for placating those on the Indonesian side who were worried that an abandonment of the unitary terminology would tantamount to agreeing to secession. But as it turned out retaining the description of the state as unitary did have an impact on the way the agreement was interpreted and applied.

The strange combination of strong self-governmental powers within a unitary state has led to the political scientist Alfred Stepan describing Aceh as a

[17] Clause 1.1.3 of the MoU.
[18] Clause 1.1.5 of the MoU.
[19] Clause 1.1.2 (a) of the MoU.
[20] Clause 1.3.1. of the MoU.

possible example of a 'federacy' – a model of self-government within a unitary state. Alfred Stepan reflecting on Aceh defined federacy as follows:

> 'A federacy is a political-administrative unit, in an independent unitary state, with exclusive power in certain areas, including some legislative power, constitutionally or quasi-constitutionally embedded, that cannot be changed unilaterally and whose inhabitants have full citizenship rights in the otherwise unitary state'[21]

Stepan differentiates a federacy from a federation owing to the fact that in a federation the entire state is federal in that there are more multiple units of self-government, whereas in a federacy there is a particular territory of the state that is linked to the State through a special agreement – an agreement that is at least quasi-constitutionally embedded. But was there a guarantee for even partial constitutional entrenchment? The Indonesian Government had right at the beginning of the negotiations indicated that abandoning the unitary wording was impossible. However, Kingsbury in his personal memoirs asserts a promise made by the Indonesian side to entrench the provisions of the agreement in the unitary constitution, but the promise failed to materialise.

The problems for Aceh began immediately after the signing of the agreement. The Indonesian Parliament enacted a law in 2006 titled the Law on the Governing of Aceh No 11 of 2006 [LoGA]. The law contains many provisions that are deviatory from the letter and spirit of the MoU. The law provided that in addition to powers over defence, foreign affairs and monetary policy, the Indonesian Parliament will also have powers over any subject that may be deemed by it as a 'national affair'.[22] Further another provision of LoGA provided that the central government will set norms, standards and procedures and conducts the supervision over the implementation of government functions by the Government of Aceh and District/City governments.[23] LoGA also delineated Aceh's autonomy as being capable of being exercised by both its provincial government and district local government bodies thereby effectively

[21] Alfred Stepan, 'A Revised Theory of Federacy and a case study of Civil War Termination in Aceh, Indonesia' in Joanne Mcevoy and Brendan O'Leary (eds), *Power Sharing in Deeply Divided Places* (UPenn Press 2013) 234.
[22] Article 7 (2) of LoGA.
[23] Article 11.1 of LoGA.

to dilute the authority of the province. The MoU's stipulation of the Indonesian Parliament's need to consult and receive concurrence from Aceh for the signing of international agreements that have an impact on Aceh were reduced to a consult-only provision.[24] The power to borrow externally provided for in the MoU was whittled down by LoGA which required the consent of the central Minister of Finance for any such borrowing.[25] The arguments made by the Indonesian officials for watering down these key provisions of the MoU was the possibility of such stipulations contradicting the Constitution of the Republic and being called for judicial review. It has been argued that the Indonesian Government knew right from the beginning that it would not implement these provisions and that they agreed to their inclusion in the MoU hoping that they can 'hide behind the national parliament's sovereign authority' should Aceh choose to reject the adoption of such provisions in the law.[26]

It is surprising that Aceh did not consider constitutionalisation of the provisions of the MoU as a top priority during the peace process. It has been argued that the provisions of the MoU itself were not dramatically different from the previous Special Autonomy Law that Aceh was granted or any of the other laws governing the matter passed by the Indonesian Parliament. The symbolic aspects of recognition had already been granted in the earlier laws and even the spectacular provision granting self-government devoid of certain central functions was Edward Aspinall argues, taken word-for-word from a previous law on the subject dealing with regional governmental powers in particular those of the districts. Aspinall argues that 'few of the political provisions set down in the MoU are innovative or suggest a substantial extension of authority beyond what was already conferred on Aceh'.[27] In fact academic writing on previous attempts had identified that most of these previous laws despite their

[24] Articles 8(1), (2) and (3) of LoGA.
[25] Article 186.1 of LoGA.
[26] Bernhard May, 'The Law on the Governing of Aceh: The Way Forward or a Source of Conflicts?' in Aguswandi and Judith Large (eds), *Reconfiguring Politics: The Indonesia-Aceh Peace Process* (Conciliation Resources 2008) 45
[27] Edward Aspinall, *The Helsinki Agreement: A More Promising Basis for Peace in Aceh* (Policy Studies, No. 20, East-West Centre 2005) 44

content were severely qualified in practice because of the insistence that the special autonomy laws would function within a unitary state.[28]

Why did GAM accept the MoU? Robb McGibbon writing prior to the signing of the MOU, on the special autonomy legislation passed unilaterally by Indonesia argued that the reason why these laws were fundamentally unacceptable to GAM because these were unilateral concessions on the part of the Indonesian state.[29] The state refused to engage with GAM. The thinking that drove the process leading to the enactment of the Special Autonomy Laws was that Aceh and Papua were matters relating to stability which had to be managed by conceding certain powers to be exercised at the periphery. Once the issue of stability was addressed the laws could be rolled back and the centre could refuse to implement the provisions of the law as it saw fit.

Autonomy had always been viewed by the Indonesian political elite from an instrumental perspective in that their aim with regional autonomy was always to promote the 'national ideal' and to 'strengthen the unity of the nation'. The regions and local governments were seen as implementing agencies of the decision taken by the centre. Hence as Gabriele Ferrazzi puts it 'while legislation at times appeared to assign entire functions sectorally, subsequent regulations showed the Indonesian model to entail a more generic division of labour, with policy and regulations set at the centre and the districts held responsible for their administration'.[30] Ferrazzi quotes a senior minister of an Indonesian Government in the 1990s stating that 'the purpose of autonomy was to serve as an adhesive for the unitary state of Indonesia'.[31] As Jacques Bertrand makes it absolutely clear, 'autonomy laws in Indonesia were not devised as a tool for accommodating ethnic groups and were integrated to constitutional frameworks that emphasize the existence of a single Indonesian

[28] Rodd McGibbon, *Secessionist Challenges in Aceh and Papua: Is Special Autonomy the Solution?* (East West Centre, 2004) 25.
[29] ibid 16.
[30] Gabriele Ferrazzi, 'Using the 'F' word: Federalism in Indonesia's Centralisation Discourse, (Spring, 2000) 30 (2) *Publlius: The Journal of Federalism* 63, 69.

[31] As quoted by Gabriele, 79.

nation.'[32] Bertrand goes on to argue that, 'although de facto recognition is provided by extending autonomy to sub-state national groups, a single nation discourse is maintained'.[33]

GAM's acceptance of the MoU with no explicit agreements with the Government on the constitutional status of the agreement i.e. with no promises of amending the constitution to reflect the foundational principles of the agreement stands in contra-distinction to its insistence that it would not accept 'special autonomy'. LoGA though modelled on its previous special autonomy incarnations omitted the term 'special autonomy in its title as well. The non-insistence on constitutional guarantees and the placing of the agreement within a framework that acknowledged the continuance of the unitary character of the state should come us a surprise to any observer of sub-state nationalism. But it appears that Aceh had a more fundamental concern where it seemed to have devoted it's negotiating energies. This was on the question of the formation of local political parties. The Indonesian State until then had outlawed the creation of provincial/local parties which meant that Aceh based parties could not form political parties and contest elections to be represented in institutions of self-government in Aceh. The outlawing of provincial parties was in Indonesian Constitutional culture the most excessive manifestation of centralisation. The creation of local parties it was feared would assist the disintegration of the Indonesian nation-state. In the aftermath of East Timor seceding from Indonesia the participation of regional parties in Indonesian elections was banned[34]. The requirement by Indonesian law was that for a political party to contest in Indonesian elections it had to be a national party with branches in at least half of the provinces and with its headquarters in Jakarta. This turned out to be the most difficult point of contention during the negotiation process. GAM took up the position that 'this restriction amounts to centralised control which does not and cannot reflect the wishes of the people

[32] Jacques Bertrand, 'The Double-Edged Sword of Autonomy in Indonesia and Philippines' in Jacques Bertrand and Andre Laliberte (eds), *Multination States in Asia: Accommodation or Resistance* (CUP 2010) 165.
[33] Ibid 167.
[34] Ben Hillman, 'Ethnic Politics and Local Political Parties in Indonesia, (2012) 13 (4) Asian Ethnicity 419-440, 422

of Aceh'.[35] GAM was offered by the Indonesian Government the possibility of contesting on national party tickets in Aceh elections, but GAM refused this. GAM also refused the possibility of forming a national party with pseudo provincial branches in the rest of Indonesia as a compromise. At one stage the Indonesian Government even openly offered to appoint GAM members to important positions of Government in Aceh. Such was the extent that they were willing to go to prevent the creation of local political parties. At one point it looked like that the peace process will break down on this issue.[36] In the final agreement Indonesia reluctantly agreed to the setting up of local parties within 12-18 months of the agreement being signed. Indonesia kept its promise and provided for the creation of Aceh based political parties in the LoGA to take effect from the 2009 legislative elections.

It appears then that the creation of local parties was quintessential from the Acehnese view, to the exercise of self-government and this may explain why their decision not to emphasise on the constitutional protection of the arrangements for self-government. There are other factors that may have contributed to GAM accepting a less than ideal arrangement including the fact that the facilitators alleged bias to the Indonesian Government and the 'nothing is agreed until everything is agreed' standard which meant that the Indonesian military continued to wage war in Aceh as the peace talks were underway in Aceh. The enormous pressure on Aceh to arrive at an agreement with the Indonesian Government particularly so in the aftermath of the December 2004 Tsunami may have also contributed to Aceh accepting a less than ideal agreement.

This sober conclusion aside the Aceh experience is instructive in many ways. Firstly, sub state actors like GAM do settle for less than independence and are willing to acknowledge that self-determination does not merely entail the creation of a separate state. The use of the terms 'functional independence' used in the peace process to reflect their understanding of self-determination is particularly instructive.

[35] GAM Statement 13 July 2015 reproduced in Kingsbury (n 10) 139
[36] Kingsbury (n 10) 153, 154.

Second, while sub-state actors do settle for forms of self-determination less than separate statehood an important lesson from the Aceh experience is that there is much emphasis on the requirement for institutional recognition of the sub-state actor as an actor of equal worth and that of the stateless nation's position vis à vis the state. Aceh's rejection of previous special autonomy arrangements that were unilaterally given by the Indonesian Government is noteworthy. Also, of similar import is the insistence on the recognition of local level parties which were seen as not only fundamental democratic rights to which the Acehnese were entitled but also a challenge to the centralised nature of the Indonesian polity. The demand for separate political parties was in essence a demand for the creation of a separate sub-state polity while remaining within the larger polity of Indonesia. The focus of the peace process on the acceptance of the Acehnese people's right to form their own political parties, points to the different forms that the demand for self-determination can take. It is simply impossible for the demand for recognition of local parties to be seen as a demand for the right to participate in public affairs, an approach to internal self-determination that this thesis has criticised. There was no shortage of Acehnese participation in the main 'national' political parties. In fact, one of the ministers on the Indonesian delegation to the Helsinki talks was an ethnic Acehnese. The special autonomy laws had also previously created legislatures in which Acehnese had taken part, albeit in a marginal manner. So, the issue of local parties was more than a demand to participate in the democratic affairs of a state. It was also more than a simple assertion of the right to freedom of assembly. It was a demand that sought recognition for the Acehnese people to set up forums where through they could pursue maters of self-government. It would be a mistake to read down the particularly collective nature of this demand.

Thirdly, the political-cultural attachment to the idea of a unitary state as being fundamental to the unity of the state in Indonesia and as in many other places in Asia remains a major concern to the possibility of realising self-determination within the larger framework of a state. I shall come back to this subject later towards the end of this chapter.

Fourthly, the Aceh experience also cautions us to the limitations to autonomy arrangements that are entered to in the context of violent conflict where the sub-state actor is militarily in a weak position. The weakening of GAM military, the war weariness of the Aceh population and the facilitators 'no agreement until we agree on everything' meant that GAM did not have parity of status at the table and was desperate for an agreement[37] to create the conditions of normalcy, reinforcing the lessons of many subs-state armed movements that they should not negotiate from a position of military weakness. Aceh also is an example of illiberal peace cascading as liberal peace. While refusing to honour key provisions of the autonomy agreement the Indonesian Government provided vast amounts of block grants to the now GAM controlled Aceh Government thus creating the foundations of a patron-client relationship between the Indonesian political elite and the new entrants into electoral politics, the GAM commanders. The competition among the GAM elite leadership over political positions, privileges, facilities, business activities, and contracts with major state-owned enterprises have been a major source of factionalism and antagonism in post-agreement Acehnese politics. The return to 'normal' electoral politics and splits within GAM often supported by the Indonesian Army and Government also provided the space for the Indonesian Government to deflect attention from their dishonouring of the agreement. Edwards Aspinall calls this a predatory form of peace[38] that produces stability but without the attendant values and goals of self-government that fuelled the self-determination conflict in the first place.

4.2 Bougainville: Negotiating peace recognising a continuum between the internal and external dimensions of Self-Determination

[37] GAM's precarious position is best illustrated by the fact that when the Indonesian Government just a few days before the MoU went back on the promises about the agreed arrangements on the withdrawal of Indonesian Army from GAM was presented with the option of taking the agreement or walking away and they chose the former. Katri Merikallio and Tapani Ruokanen, The Mediator: A Biography of Martti Ahtisaari (Hurst & Co 2015) 313-314

[38] Edwards Aspinall, 'Special autonomy, predatory peace and the resolution of the Aceh conflict', in Hal Hill (ed), *Regional Dynamics in a Decentralized Indonesia*, (Institute of Southeast Asian Studies (ISEAS) 2014) 460-481.

Bougainville is an autonomous region currently part of the State of Papua New Guinea (PNG). The claims for autonomy and secession in Bougainville were based on a mixture of a perception of being a distinct society and grievances over exploitation of its mineral resources by PNG to the detriment and economic exclusion of Bougainville.[39] Bougainville at the point of PNG's decolonisation from Australia in 1975 sought autonomy.[40] The possibility of a provincial government for Bougainville was negotiated but the PNG authorities at the last minute decided not to include provisions for a provincial government in the constitution. Bougainville political actors quickly responded with a declaration of independence that did not win any international support. The PNG Government later in 1976 set up Provincial Governments through constitutional amendments and the adoption of an organic law on provincial autonomy.[41] These arrangements despite being the outcome of negotiations between the Bougainville and PNG, the PNG leadership retained the right to extend the autonomy to all of PNG's 18 provinces fearing that any special recognition for Bougainville would destabilise the country.[42] Despite the 1976 arrangements not being tailored to the specific needs of Bougainville, the provincial government made good use of the autonomous provisions and ran an administration superior to that of the other 17 provincial governments where

[39] Bougainville like PNG is made up an extremely heterogenous population. But the Blackness of the Bougainville coupled with solidarity generated through grievances associated with PNG's exploitation of their natural resources led to the formation of a distinct society in the 20th century. Anthony J Reagan, 'Autonomy and Conflict Resolution in Bougainville, Papua New Guinea' in Yash Ghai, *Practicing Self-Government: A Comparative Study of Autonomous Regions* (CUP 2013) 412-448, 414.

[40] This section on the history of Bougainville's quest for autonomy draws heavily from the following: Yash Ghai & Anthony J. Regan, 'Unitary state, devolution, autonomy, secession: State building and nation building in Bougainville, Papua New Guinea' (2006) 95 The Round Table 589-608; Yash Ghai. and Anthony Regan, 'Bougainville and the dialectics of ethnicity, autonomy and separation', in Yash Ghai, Chris Arup and Martin Chanock (ed), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (CUP 2000) 242 – 265.

[41] Organic laws are special laws which elaborate on constitutional provisions and are considered to form part of the constitutional laws of PNG. The adoption, amendment and repeal of organic laws is similar to the procedure adopted to amend the constitution.

[42] Yash Ghai & Anthony J. Regan, 'Unitary state, devolution, autonomy, secession: State building and nation building in Bougainville, Papua New Guinea' (n 40) 594; Yash Ghai, and Anthony Regan, 'Decentralisation: 1976 – 1995', in A. Regan, O. Jessup and E. Kwa (eds), *Twenty Years of the Papua New Guinea Constitution*, (Law Book Co, 2001) 161 – 180.

there was no real appetite for autonomy.[43] However increasingly the central government unilaterally withdrew from the commitments made under the arrangements particularly on matters relating to natural resources, a key concern for the Bougainvilleans. These developments in the late 1980s gradually led to groups within the Bougainville polity taking up arms against mine-owners broadly under the umbrella of the Bougainville Republican Army, which then following the intervention of PNG in favour of the mine owners transformed itself into a civil war. The demand for secession gained prominence during this time. The armed conflict and a ceasefire in 1990 created the conditions for the BRA to make a unilateral declaration of independence following which PNG dismissed the provincial government. Following the withdrawal of PNG forces from Bougainville under the ceasefire BRA attempted to take control over Bougainville a process which led to splits within the BRA and led to the creation of the Bougainville Resistant Forces which opposed secession in favour of autonomy fearing a future independent Bougainville under full control of the BRA. Meanwhile the PNG Government between 1990 and 1995 while the Provincial Government of Bougainville remained suspended rolled back the organic law on provincial government almost completely. However shortly before these amendments came into effect those preferring autonomy within Bougainville insisted that the Provincial Government be reinstated. The PNG conceded but between 1995 and 2001 it had to provide for interim arrangements for the Provincial Government in Bougainville to continue because of the repeal and replacement of the organic law. Interestingly the Bougainville authorities did not campaign against the rolling back of the entire system of autonomy across the country as they believed that this would allow them to negotiate a special autonomous arrangement for Bougainville which will recognise the specific needs and demands of the Bougainvilleans.

A peace process was initiated with the presence of an unarmed military contingent led by Australia and New Zealand along with a UN Observer mission that provided the secure space for the negotiations to take place. The

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[43] Yash Ghai & Anthony J. Regan, 'Unitary state, devolution, autonomy, secession: State building and nation building in Bougainville, Papua New Guinea' (n 40) 595

peace process culminated in the Bougainville Peace Agreement of 2001,[44] which to date remains the most impressive settlement providing for internal self-determination within the host state in the Asian context. The purpose of the agreement was defined as follows: 'Empower Bougainvilleans to solve their own problems, manage their own affairs and work to realise their aspirations within the framework of the Papua New Guinea Constitution[45]'. The wordings reflect most aptly the rationale of self-determination, internally exercised.

The agreement provided for all other powers not specifically assigned to the National Government – a method of allocation of powers followed by federal constitutions.[46] In addition arrangements were provided wherein Bougainville was given the right to be consulted over many of the powers that are traditionally associated with that of the Centre such as foreign affairs and defence.[47] The agreement also innovatively provided that the transfer of powers will be incremental in that the Centre would transfer powers to the Bougainville authorities as the latter develops capacity to handle these subjects. Highly complex dispute resolution mechanisms were put in place for the two parties to negotiate this transition of powers. While the agreement provided for a very high degree of self-government for Bougainville it also in contrast to the experience in Aceh provided for constitutionalisation of the agreement and for arrangements that the Papua New Guinea Government could not unilaterally change the provisions of the constitution that provided constitutional protection for the agreement. The constitution was also amended to provide that the provisions of the agreement should be used as an aid to interpretation by courts when interpreting aspects of the autonomy provisions of the agreement.[48] But given their past experience with the PNG Government of unilaterally withdrawing from previous settlements the Bougainville negotiators insisted for a second level of entrenchment that

[44] Text available at www.c-r.org/our-work/accord/png-bougainville/key-texts37.php (accessed 15 December 2018), or www.usip.org/files/file//resources/collections/peace agreements/bougain 20010830.pdf (accessed 15 December 2018).
[45] Clause 3 (b) of the Agreement.
[46] Clause 50, 51 and 52 of the Agreement.
[47] Clause 53 of the Agreement.
[48] Clause 3 (a) of the Agreement.

provided that no proposed amendments to constitutional provisions implementing the agreement can become law unless approved by the legislature of the Bougainville.[49] The agreement also provided for a Bougainville Constitution which would draw its authority from the PNG constitution but with regard to matters within Bougainville's jurisdiction the PNG constitution provided that Bougainville's constitution will be supreme over national laws.[50] The agreement also required the PNG agreement to deposit the agreement with the UN Security Council so as to boost the international standing of the agreement and to act as a pressure on the PNG towards full implementation of the agreement.[51] The Bougainville negotiators were acutely aware of this multiple levels for entrenchment of the agreement both constitutionally and politically in that they wanted the agreement to last beyond the PNG Government that agreed to it.[52]

One of the most impressive features of the agreement was that while it provided for arrangements for internal self-determination it did not preclude external self-determination for Bougainville. In fact, Yash Ghai and Anthony Regan argue that Bougainville was persuaded to accept autonomy because of the guarantee of a referendum.[53] The Bougainville parties which were split between the option of independence and autonomy in the lead up to the 2001 referendum engaged in an in-depth dialogue weighing the benefit and costs of insisting on a referendum. Anthony Regan has documented the process in detail, wherein Bougainville parties engaged in a detailed cost-benefit analysis of the referendum option.[54] They considered options ranging from accepting an autonomy-only option to unilateral independence. Options considered included a deferred referendum coupled with a strong package for autonomy in the interim, accepting a strong form of self-government while giving up on the demand for a referendum and an immediate referendum with a deferred

[49] Sections 345-346 of the PNG Constitution.
[50] S. 286 (1) of the PNG Constitution.
[51] Article 334 of the Agreement.
[52] Anthony J. Regan, 'Autonomy and Conflict Resolution in Bougainville' in Yash Ghai, (n 39) 427.
[53] Yash Ghai & Anthony J. Regan (n 40) 599.
[54] Anthony Regan, 'Resolving two dimensions of conflict and division: the dynamics of consent, consensus and compromise', in Lorraine Garasu (ed), *Weaving Consensus: The Papua New Guinea –Bougainville Peace Process* (Conciliation Resources, 12 Accord, 2002) 36–43

declaration of independence. The Bougainville parties thus came to an agreement on the common negotiating position for a higher form of autonomy with a deferred referendum. However, the Government was very hesitant on accepting a referendum even if it was deferred for a long period. Both parties after intense negotiations that continued over 18 months agreed to a deferred referendum. The referendum was postponed to a minimum of 10 and a maximum of 15 years following the advent of the autonomous Bougainville Government. But Bougainville had to concede that the outcome of the referendum would only be advisory and not binding. The ultimate authority to act would remain with the PNG Parliament. The Australian Foreign Minister who was facilitating this aspect of the negotiations assured the PNG Government that this would make sure that the State remains undivided while telling the Bougainville side that the International Community would support an overwhelming desire from the Bougainville people if they chose secession. Reference was made to the East Timorese referendum where there was no guarantee of a referendum being binding on Indonesia, but which had been put to effect following an overwhelming support of the East Timorese people for secession.[55] This bargain is riddled with political short-term thinking. But that should not prevent us from taking notice of the principled position that was articulated publicly as reasons for the deferred referendum. The reason why PNG argued it agreed to the referendum was based on the hope of convincing the Bougainvilleans of the benefits of autonomy which would induce them to vote against separation. Bougainville also thought that the prospect of a referendum would apply pressure on the PNG to deliver its promises under the agreement.[56]

As Ghai and Regan pointed out:

> The non-binding outcome of the referendum was contrary to the strong position of the Bougainvilleans for the first 18 months of the negotiations on political agreement. It was an issue on which they eventually compromised, under international pressure, in order to persuade the

[55] Anthony Regan, *Light Intervention: Lessons from Bougainville* (United States Institute of Peace, 2010) 89-90.
[56] Regan in Ghai (n 39) 421.

> national government to agree to a constitutionally guaranteed referendum. They did so in the belief that, if they could unify Bougainvilleans and achieve a very high vote for independence, then, provided that the international community remained interested and involved, the PNG government would find it difficult to ignore the result. For its part the national government agreed not just because of international pressure, but also because it could argue that a nonbinding referendum did not undermine its sovereignty, and it would have 10 to 15 years to demonstrate to Bougainvilleans that it would be in their interests to vote against independence.[57]

The reference to the referendum and autonomy in the preamble of the Constitution of Bougainville (enacted following the signing of the peace agreement) demonstrates a sophisticated understanding of the notion of self-determination: One of the purposes of the constitution, the preamble provided, would be 'to provide for the self-determination of the People through both autonomy arrangements and the referendum on independence'[58]. It is significant that the referendum and not secession was identified as providing for the Bougainvilleans right to self-determination.[59] Given the split of opinion within Bougainville between the secessionists and integrationists an interpretation of the referendum as a procedural manifestation of the right to self-determination irrespective of its outcome is significant. From the point of view of the Bougainville actors the act of PNG agreeing to the people of Bougainville voting to determine their political status was an act of polity-creation or framing of the relevant 'people'/ demos. This as the Catalan-Spanish experience bears out is not an easy concession and as I have argued in chapter 2, is essentially a pre-democratic question that has to yield to

[57] Yash Ghai & Anthony J. Regan, 'Unitary state, devolution, autonomy, secession: State building and nation building in Bougainville, Papua New Guinea' (n 40) 599-600.
[58]Constitution of the Autonomous Region of Bougainville, available at <http://www.abg.gov.pg/uploads/documents/BOUGAINVILLE_CONSTITUTION_2004.pdf> accessed on 15 December 2018.
[59] Joanne Wallis, 'Nation-Building, Autonomy Arrangements, and Deferred Referendums: Unresolved Questions from Bougainville, Papua New Guinea' (2013) Vol. 19 Issue 3 Nationalism and Ethnic Politics 310-332 at 317.

political realities. The PNG in the political realities that were prevalent in 2001 came around to granting this recognition to Bougainville.

The experience of internal self-determination since the signing of the agreement has been mixed for Bougainville. The Government of PNG has been slow in transferring powers and there has been slow progress with fiscal support for Bougainville to carrying out its functions from the PNG Government. This it is assumed will mean that Bougainville will vote for a separate state when referendum is held.[60] However, the PNG Government is hoping to hold on to technicalities associated with laying down of arms to postpone the need for holding a referendum. The PNG Government also hopes that with the demobilisation of the armed groups and the overwhelming desire to avoid a return to war on the part of the Bougainville people that a choice by the Government not to honour a referendum where there is an overwhelming support for secession will not result in serious consequences. The President of Bougainville has said that the referendum should be held irrespective of the progress with demobilisation and an assessment of whether standards of good governance have been met.[61]

The criterion of attaining good governance standards as a condition for a referendum is an impact of the idea of 'earned sovereignty' promoted as an alternative to the 'self-determination-first' or 'sovereignty-first' conundrum.[62] The crux of the argument promoted by its believers is that the solution to self-determination conflicts lie in providing 'conditional sovereignty' or 'phased sovereignty' for sub-state actors if they develop certain standards of governance such as maintaining a sufficient standard in the rule of law, good governance, free markets and the treatment of minorities. Further the 'earned sovereignty' approach also calls for the imposition of restrictions on the exercise of sovereignty even after the final status question has been resolved such as constraints of the defence and foreign policies of the new entity in a

[60] Joanne Wallis, Ten Years of Peace: Assessing Bougainville's Progress and Prospects, 101 (1) The Round Table 29-40 at 40

[61] Wallis, 34.

[62] Paul Williams, 'Earned Sovereignty: Bridging the Gap between Sovereignty and Self-Determination' (2004) 40 Stan. J. Int'l L. 347.

way that does not threaten the parent state. It is argued that this approach will help sub-state actors achieve their political aspirations while addressing the concerns of the host state. The earned sovereignty approach hence places conditions on the right to external self-determination of a sub-state actor. It however has nothing substantive or normative to say about the internal dimension of the right to self-determination and the forms that it must take, i.e., there is an assumption that creation of a separate state is the only option.

It appears that the conditions that this school of thought lays down for external self-determination is adopted from those which the colonial powers laid down for colonies to achieve full independence. As we saw in Chapter 1 the colonial powers believed that the colonies had to be tutored and prepared for full independence before affording them full independence. The earned sovereignty approach has thus a colonial attitude to the question of self-determination that is inherently problematic from a moral point of view.[63] It is morally problematic primarily because the conditions it imposes are selectively applied: Principles of liberal peace and order are only for aspiring entrants to the club of states but are not standards by which its current members are evaluated. Hence it automatically disadvantages sub-state actors in comparison to state actors. It also advances through its conditionalities a particular form of conducting Government and organising politics whose assumptions are essentially contested. The concrete application of these conditions is also a matter that is susceptible to pre-determined conclusions. For example, the standard of 'practices of good governance' can be hard to evaluate and hence because of their essentially contested nature the judgment on the delivery of good governance can be guided by a pre-determined view of what would follow from a finding or non-finding of the existence of good governance.

The argument here is not that the protection of minorities within sub-sate societies, rule of law and even good governance (and I am leaving free markets deliberately out of this catalogue) are not important on their own right.

[63] For an authoritative study on the subject please see Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilising Mission Never Went Away* (OUP, 2008) See in particular Chapters 7 and 8.

The argument here is that these principles should not be converted into conditionalities in the evaluation of a self-determination claim. In fact, there is every reason why sub-state actors should aim to the highest possible standard of democratic government and human rights. As I have argued in Chapter 2, the motivation for sub-state actors should not be to emulate the draconic practices of monist nation-building which I have argued is a necessary character of nation-states. But rather than pushing these as conditions that form part of a judgment of whether sub-state actors are worthy of self-government, these norms should be encouraged rather than prescribed.

In the Bougainville context the President of Bougainville argued that the conditions on the holding for a referendum only applied as to when the referendum should take place within the 10-15 year framework i.e., the conditions only mattered whether a referendum should be held on an earlier occasion within the 10-15 year framework or closer to 2020 (the 15th year in the framework). He argued that the referendum could not be postponed beyond 2020 on the basis that demobilisation or good governance standards had not been adhered to.[64] However the President argued that the good governance standards had an internal logic even as they related to the referendum. He noted in a speech to the Bougainville Legislative Assembly that the existence of weapons and lack of good governance may lead to determining the outcome of the referendum as being not 'free and fair'[65]. He pointed out in the speech the importance of the international community's support in giving effect to the result of the referendum. The date for the referendum has been now set at 15 June 2019.[66]

In conclusion, Bougainville then represents a creative linking of the external and internal dimensions of the right to self-determination in a constitutional framework. It confirms that opting for internal self-determination need not be

[64] Hon. Chief John Momis, President Autonomous Region of Bougainville, 'Preparations For The Referendum On Bougainville's Future Political Status' (House of Representatives, Statement to the House, 26 March 2015) <https://bougainvillenews.com/2015/03/28/momis-speech-bougainvilles-preparation-for-a-referendum-on-our-future-political-status/> accessed on 15 December 2018

[65] Ibid.

[66] ABC News, 'Bougainville and Papua New Guinea set target date for independence referendum' (23 May, 2016). <http://www.abc.net.au/news/2016-05-23/bougainville-referendum-set-for-2019/7436566> accessed on 15 December 2018

seen as abandoning external self-determination but that the internal and external dimensions of self-determination are two ends of a continuing spectrum in the politics of sub-state societies, a point that thesis made in Chapter 1. But the experience of Bougainville also perhaps suggests that Asian states are (given their tradition of unitary nationalism) unlikely to agree to state reform as a matter of principle, but rather only agree to reforms as a response to the necessities of the context. Hence while the Bougainville Peace Agreement was signed in the context of the Bougainville side being the dominant military actor, the normalisation of the situation and demobilisation of Bougainville's armed groups in the post-agreement context may act as a disincentive to the central government in keeping up to its promises made in the peace agreement. Hence in a situation of peace the sub-state actor is heavily reliant on international actors to put pressure on host-states to honour their commitments. This I submit explains the drive towards internationalisation of peace agreements in the context of a post-war situation.

4.3 Tamils in Sri Lanka: Explaining the sub-state society's lack of trust in internal self-determination

Sri Lanka, formerly Ceylon, witnessed a 30 year old civil war which ended in 2009, fought on the back of a long standing protracted ethnic conflict. The antecedents of the conflict are to be found in the colonial era and the conflict continues to date, despite the brutal end of the war in 2009. The National Question in Sri Lanka pertains to the nature of the state, i.e., the manner in which the State is organised in response to aspirations for self-government. The introduction of procedural democracy in 1931 to what then known as Ceylon, a first for any British Colony, introduced the possibilities of doing electoral politics on ethnic lines.[67] Political parties took on ethno-political agendas and its worst consequences manifested itself first in the form of a question over the official language of the state. The forces of ethno-national politics were unleashed less than a decade after colonial independence when Sinhala the majority language was declared the official language in 1956. Policies over land redistribution, access to education and agriculture were all

[67] cf Nira Wickremesinghe, *Ethnic Politics in Colonial Sri Lanka* (Vikas 1995) and Jane Russell *Communal Politics under the Donoughmore Constitution* (Tissara 1982).

successively tainted by majoritarianist laws and policies and soon the Tamils, the largest numerical minority asserted its claim to self-government in the form of a federal demand. The federal demand which sought a radical reorganisation of state power was side lined and was met by systematic state sponsored violence which eventually led to the Tamils taking up violence and pursuing secession. A 30 year old war ensued which ended brutally in 2009 with the defeat of the Liberation Tigers of Tamil Eelam (LTTE).

4.3.1 The inadequacy of minority rights.

The British initiated Constitution of 1947[68] that came into being on the eve of Ceylon becoming a dominion of the UK (known as the Soulbury Constitution following the name of Lord Soulbury who headed the Commission sent by the British Government to study and report on self-government for Ceylon) sought to address the concerns of the numerically smaller communities particularly the Tamils by providing for a minority rights clause in the constitution. The Tamil leadership at the time forewarned about the dangers of a permanent Sinhala Buddhist majority hegemony and appealed for weighted representation for the numerically smaller communities in the parliament and in the executive. This consociational scheme envisaged 50% representation for Tamils, Muslims and other minorities thus hoping to prevent an automatic majoritarian control of the legislature by the numerically larger Sinhala Buddhist community. The Tamil leadership at this point in history did not make a claim for territorial self-government but only for certain adjustments within the unitary state. The Soulbury Commission acknowledged the problem but went along with the draft constitution presented by the then Board of Ministers.

The minority rights clause in the 1947 constitution, Section 29, sought to place limits on the plenary powers of the parliament to make legislation in that any law that provided privileges or advantages to a person belonging to a particular community or religion, or disabilities or disadvantages to a person belonging

[68] Contained in the Ceylon (Constitution) Order in Council, 1946, the three Ceylon (Constitution) (Amendment) Orders in Council all of 1947 and the Ceylon (Independence) Order in Council, 1947.

to a particular community or religion would be *void abinitio.* Section 29 thus was a classic liberal constitutionalist – individual minority rights response to the emerging Tamil National Question.

Section 29 could not however prevent Parliament passing legislations that disenfranchised the Up Country Tamil community in 1948 and made Sinhala the official language in 1956. The former piece of legislation was passed on the basis that the Ceylonese Parliament could pass a legislation defining its citizenship[69] and that *prima facie* there was nothing in the legislation to suggest that it was brought to disadvantage persons belonging to a particular community. Litigation challenging the official language act[70] was also similarly dismissed on procedural grounds[71]. Section 29 as a minority rights provision hence turned out to be inadequate in preventing the overwhelming dominance of majoritarian nationalism in the constitutional structures of the state. As Harshan Kumarasingham succinctly puts it more generally in the context of post-colonial constitutions in Asia:

> Minority rights, whatever their legal status, owed their success or failure to the precarious realm of the political exigencies of the centre, which often functioned without credible minority representation. Eastminster worked with the Damoclean threat of suspending both reality and rights[72].

The two pieces of legislation and the failure of Section 29 contributed to the changing of perception in Tamil politics. There was loss of confidence in the liberal constitutionalist approach to minority rights. A recent study confirms that the Sri Lankan judiciary contributed to the institutional failure that led to ethnic tensions in the country[73]. In 1949, a party was formed articulating the distinct

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[69] *Kodakan Pillai vs*. *Mudannayake* (1953) 54 NLR 433.
[70] Official Language Act No 33 of 1956.
[71] *AG vs Kodeeswaran* (1967) 70 NLR 121 (SC) (On the basis that a servant of the crown could not sue the crown for a breach of contract of employment). The decision in the Supreme Court was overturned in *Kodeeswaran vs AG* (1969) 72 NLR 337 (PC).
[72] H. Kumarasingham, 'Eastminster – Decolonisation and State-Building in British Asia' in H. Kumarasingham (ed.), *Constitution-Making in Asia – Decolonisation and State-Building in the Aftermath of the British Empire* (London, Routledge, 2016).

[73] As Kishali Pinto Jayawardena *et al* have argued 'The judiciary's failure to consistently uphold the values of equality and justice no doubt exacerbated these frustrations. The rise of Tamil militancy in Sri Lanka, therefore, cannot be divorced from institutional failure, including

nationhood of the Tamils, their right to self-determination and demanding the creation of a Federal Ceylon. This moment signalled a turn in Tamil politics from minority rights to self-determination, in its internal dimension. The party swept the polls in Tamil areas in the 1956 General Elections.

Irrespective of the fact that Section 29 had not thwarted the majoritarian project of building a monist polity, Section 29 was the source of much discomfort and irritation to Sinhala Buddhist nationalist forces. The section was considered to be a colonial imposed limitation on the independence of Ceylon's sovereignty. A Privy Council decision on a matter relating to parliament's competency to enact laws (but not with regard to the substantive limitations set by Section 29) argued that Ceylon did not possess sovereignty in the same sense as the British Parliament's sovereignty.[74] Another decision again that had nothing to do with legislation making on ethnic relations articulated the view that Section 29 was not open to constitutional amendment as it represented 'the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which *inter se* they accepted the Constitution; and these are therefore unalterable under the Constitution'.[75] These decisions further infuriated nationalists who drew a connection between minority rights protection and colonialism. It was argued that Section 29 would have a perpetual effect beyond the 1947 constitution and had to be part of even a new constitution unless there was a legal revolution. There was a convergence around section 29 of the anti-colonialist and the monist state-building objectives of Sinhala Buddhist nationalism. And hence in the lead up to the enacting of the 1972 constitution the issue of doing away with Section 29 came to represent in the words of the minister tasked with coordinating the constitution drafting process breaking the umbilical cord with colonialism and consolidating the state around the notion of a unitary monist, hierarchical nation- state. The 1972 constitution broke the umbilical cord by a legal resolution, the setting up of a constituent

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that of the judiciary, to address genuine grievances. Kishali Pinto Jayawardena (ed), *The Judicial Mind in Sri Lanka: Responding to the Protection of Minority Rights* (Law and Society Trust, 2014) 271. Also see for the wider debate on the role of judiciary in mediating conflicts in plurinational settings: Stephen Tierney, *Constitutional Law and National Pluralism* (OUP 2010), Chapter 7: 'The Judicial Role: Mediating National Diversity in Plurinational States.'

[74] *Liyange vs Queen* (1962) 68 NLR 265.

[75] *The Bribery Commissioner vs Ranasinghe* (1964) 2 All ER 785 at 789.

assembly outside of the 1947 constitution which then enacted the new constitution. The basis of the 1972 constitution it was argued lay in the idea of popular sovereignty – a monist unitary idea of sovereignty where sovereignty lay with the dominant nation within the imagined nation-state.

4.3.2. The fixation with a unitary state

During the 1970 General Elections the Sri Lanka Freedom Party which spearhead the constitutional reform efforts that led to the enactment of the first Republican Constitution sought a mandate to establish a constituent assembly to draft a republican constitution. The main Tamil political party at that time the Ilankai Tamil Arasu Katchi (in English The Tamil Federal Party, ITAK) campaigned on a platform of federalism. Their manifesto asserted that:

> The Tamil-speaking people of Ceylon also believe that a Federal-type of Constitution that would enable them to look after their own affairs alone would safeguard them from total extinction. Only under such a Constitution could the Tamil speaking people of this country live in dignity and with our birth right to independence as equals without Sinhala brethren[76]

By that time some Tamil actors who had been previously aligned with the Federal Party, frustrated by the failed attempts to secure Tamil regional autonomy and parity of status for their language in the official business of state, campaigned on a platform of secession. Two pacts signed between the Federal Party leader and the Prime Minister of the day in 1957 and 1965[77] had been unilaterally abrogated by the then Governments. These pacts provided for reasonable use of Tamil in the North and East and for forms of regional autonomy less than federalism However, the ITAK campaigned on a platform that called upon the Tamil people to reject secession and to give them a

[76] Cited in Rohan Edrisinha, 'Debating Federalism in Sri Lanka and Nepal' in Mark Tushnet and Madhav Khosla, *Unstable Constitutionalism: Law and Politics in South Asia* (CUP 2015) 291-319, 300

[77] Bandaranaike-Chelvanayagam Pact (1957) and Dudley Senanayake-Chelvanayagam Pact (1965) Full text in Rohan Edrisinha, Mario Gomez, V.T. Thamilmaran and Asanga Welikala, *Power Sharing in Sri Lanka: Constitutional and Political Documents 1926-2008* (Centre for Policy Alternatives 2008) 220-224 and 228-230

mandate to negotiate a federal constitution in the constituent assembly. The relevant paragraph in the manifesto read as follows:

> It is our firm conviction that division of the country in any form would be beneficial neither to the country nor to the 'Tamil speaking people'. Hence, we appeal, to the 'Tamil speaking people', not to lend their support to any political movement that advocates the bifurcation of the country.[78]

The federal party was returned with an overwhelming majority by the Tamil people across the North and East where Tamils live in a majority. At the constituent assembly the Government put forward a series of basic resolutions on the main themes of the new constitution. The second resolution proposed that Sri Lanka would be a unitary state. The Federal Party proposed amendments substituting unitary for federal. The idea was shot down and was not even given the opportunity of a serious debate. The Federal Party at this stage eager to show flexibility proposed that they would be satisfied if at least a scheme of decentralisation at the district level could be considered:

> If the government thinks that it does not have a mandate to establish a federal constitution, it can at least implement the policies of its leader, Mr S.W.R.D. Bandaranaike, by decentralising the administration, not in the manner it is being done now, but genuine decentralisation, by removing the Kachcheris [District Secretariats of the Central Government] and in their place establishing elected bodies to administer those regions.[79]

This idea was also rejected. Even at this stage the Federal Party remained engaged with the Constituent Assembly. But when subsequent basic resolutions were tabled and enacted recognising Sinhala as the official language of the state and providing Buddhism the 'foremost place in the State', the Federal party had no option but to walk out of the constituent assembly.

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[78] Jeyaratnam Wilson, *Sri Lankan Tamil Nationalism*: *Its Origins and Development in the Nineteenth and Twentieth Centuries* (Hurst & Co 2000) 86
[79] Constituent Assembly Debates, 16 March 1971, vol 1, col 431.

The leader of the party resigned from parliament and called for a by-election which he contested seeking a mandate from the people for the establishment of a separate state. The same party that had actively campaigned and won on an anti-secessionist platform had now made a definite turn to external self-determination, the pinnacle of which was the passage of the *Vaddukoddai* Resolution in 1976 seeking a mandate from the Tamil people to establish a separate state[80]. The Second Republican Constitution came into effect in 1978 reiterating the unitary and Buddhist character[81] of the state and further establishing both as unalterable entrenched provisions of the Constitution[82] unless approved by the people at a referendum by a simple majority. Given that a majority of the Sinhala Buddhists have to agree to such a change in a referendum the 1978 constitution arguably perpetually locked the Sri Lankan Constitutional imagination within a unitary state, beyond its current confines in the second republican constitution.

The federal party's stance on a separate state however was mere political posturing. Even after being elected at the 1977 elections on a separatist platform the Federal party continued to explore solutions within a united Sri Lanka and even was willing to explore solutions less than federalism when it agreed in 1981 to take part in a scheme of elected District Development Councils that were completely beholden to the central government's whim.

But following repeated episodes of state sponsored violence, the tipping point of which was the 1983 anti-Tamil pogrom, the Tamil militancy displaced the elected Tamil political class as the bearers of the self-determination project. This phase of the evolution of Tamil nationalist politics was founded on the unshakeable belief that a solution within a united Sri Lanka could not be found.

[80] Full text available at Edrisinha et al, *Power Sharing in Sri Lanka: Constitutional and Political Documents 1926-2008* (Centre for Policy Alternatives 2008).
[81] Articles 2 and 9 of the Constitution of the Democratic Republic of Sri Lanka (1978 as amended last in 2015).
[82] Article 81 (3) of the 1978 Constitution.

4.3.3. Internal Self-Determination within a rigid unitary state.

The Indian intervention of 1987[83] produced the 13th amendment to the Constitution which provided for a scheme of devolution within a unitary state with the province as the unit of devolution. The system provided for a Governor appointed by the Executive President who had control over the provincial executive over and above the elected Chief Minister. The provisions of the amendment addressing significant subjects of Tamil concern such as land, police and education were ambiguously worded so that their interpretation within the unitary state by design would err in favour of the Centre[84]. The concurrent list was designed to be a second list of powers available to the centre. As G.L. Peiris has pointed out the 13th amendment provided for a 'veneer of devolution of power because what was given with one hand was taken back with the other'.[85] Edrisinha has categorically noted that there is no subject that has been properly devolved to the Provincial Councils[86]. There is no coherence in the manner in which power is apportioned in the 13th amendment. And hence Asoka Gunwardena confirms that the central government is thus given an opportunity to interfere and micro manage devolved governance[87].

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[83] Following the pogrom of 1983 which led to the mushrooming of Tamil militant movements, India intervened and coordinated a series of negotiations culminating in the Indo Lanka Peace Accord of 1987 and the enactment of the 13th Amendment to the 2nd Republican Constitution. Documents from this period are available here: Tamil United Liberation Front, *Towards Devolution of Power in Sri Lanka: Main Documents: August 1983 to October 1987* (Jeevan Press 1988).

[84] See for detailed critique of the 13th amendment: K. Guruparan, 'The Irrelevancy of the 13th Amendment in finding a political solution to the National Question: A Critical note on the Post-War Constitutional Discourse in Sri Lanka', (2013) 3 Junior Bar Law Review 30-42.

[85] G.L. Pieris as cited by Rohan Edrisinha, 'APRC Process: From Hope to Despair', (Groundviews, 03 February 2008) <http://groundviews.org/2008/02/03/the-aprc-process-from-hope-to-despair/> accessed on 15 December 2018

[86] Rohan Edrisinha, 'Federalism Myths and Realities' appearing in Rohan Edrisinha & Asanga Welikala (Eds.) *Essays on Federalism in Sri Lanka* (Centre for Policy Alternatives 2008) 85-108

[87] Asoka S Gunawardena, *Beyond Legal and Administrative Constraints Confronting Provincial Councils: Issues in Devolution and Governance Change in Sri Lanka*, (Sri Lanka Institute of Local Governance, Year of Publication not mentioned) 62

The Supreme Court was asked to rule on whether the amendment would dampen the entrenched clause of the constitution relating to a unitary state and hence require endorsement at a referendum. The majority of the Supreme Court interpreted the amendment restrictively so as to avoid the need for it having to be ratified at a referendum[88]. Consequently, the already weak provisions of the devolution scheme in the context of a rigid unitary state structure failed to satisfy even the minimum demands for autonomy of the Tamils. Furthermore, even the inadequate provisions of this scheme were ignored by successive Governments. The experience raises serious questions of the possibility of internal self-determination succeeding within a state which has a weak tradition of upholding the supremacy of the constitution. The non-honouring of constitutional and legal obligations as we have seen also in the context of Aceh and Bougainville are indicative of the problem being not unique only to Sri Lanka.

The experience with the provincial council system in Sri Lanka within a unitary state also raises a further question about whether the practice of constitutional politics within a unitary state can provide a reasonable chance for the practice of internal self-determination. In Sri Lanka the constitutional philosophy of Sinhala Buddhist nationalism believes that the unity of Sri Lanka rests on the country being unitary. There is a deliberate conflation of 'united Sri Lanka' with 'unitary Sri Lanka' in this approach to constitutional politics. Jayadeva Uyagoda explains:

> In the Sinhalese political idiom, the concepts of national unity (*eksath rata* – united country) and the unitary state (*ekiya rajyaya*) have been collapsed into one. In ordinary political parlance, the two are closely intertwined. This unification of the categories of 'unity' and united' has in turn constituted the ideology of constitutional monism – advocacy of a single and unified constitutional political system for the entire country – of the Sinhalese nationalist project, as opposed to the ideology of

[88] *In Re the Thirteenth Amendment to the Constitution* (1987) 2 Sri L.R. 312.

constitutional dualism which presupposed a political system composed of two constitutive units of the Tamil Nationalist project[89].

Hence when the federal debate picked up in the mid-1990s and in the early 2000s, forces associated with the federal debate were associated with the Tamil secessionist agenda. For example, in 1995 when the Government came out with a draft set of proposals along federal lines a Sinhala Commission made up of retired Supreme Court judges, senior lawyers and intellectuals was set up who came up with a report in 1996[90] which warned the Sinhalese that the Government's proposal for a federal Sri Lanka will be inimical to the country's sovereignty and territorial integrity. The commission argued that the unitary character of the state, as an entrenched provision of the constitution, was part of the basic structure of the constitution which had to be carried over to a new constitution unless endorsed by the people at a referendum or unless there is break in legal continuity. The all-pervasive unitary constitutional culture in Asia (as the Aceh experience also bears out) and the association of centralisation of powers with the continuity of the state poses a huge problem for the possibility of sub-state actors exercising self-determination within the confines of their host-state. Dave Rampton reflecting on Sri Lanka has argued that the hugely powerful commitment to a unitary state founded on a hegemonic ideology warns us of the 'constraints on constitutionalism as an instrument of liberal peace-building, due to the primacy of hegemonic socio-political forces in the relation between politics and legal norms'[91]

4.3.4. The sub-state polity's distrust in internal self-determination

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[89] Jayadeva Uyangoda, Sri Lanka's State Reform Debate – Unitarism, Federalism, Decentralisation and Devolution in Jayadeva Uyangoda (ed) *State reform in Sri Lanka: Issues, Directions and Perspectives* (Social Scientists Association 2013) 25-108, 27

[90] Report of an Independent and Representative Committee (2003), *A Case against a Federal Constitution for Sri Lanka* (National Joint Committee 2000).

[91] Dave Rampton, 'A Game of Mirrors: Constitutionalism and Exceptionalism in a Context of Nationalist Hegemony' in Asanga Welikala (ed) *Republic at 40,* (Centre for Policy Alternatives, 2013) 365 – 401.

But the contrary is also true. Years of distrust of broken promises contribute to the lack of trust on the part of sub-state actors towards accepting a solution within the confines of the host-state. This was evident in the LTTE's handling of the peace process mediated by Norway in 2002-2003. At the 3rd round of peace talks held in Oslo in December 2002 both sides agreed to 'explore a solution to end the island's conflict founded on the principle of internal self-determination in areas of historical habitation of the Tamil speaking peoples, based on a federal structure within a united Sri Lanka".[92] Explaining their decision the LTTE spokesperson and theoretician Anton Balasingham argued that contrary to popular perception their stance did not signify a shift in policy[93]. He argued that the demand was always for self-government and that they were willing to explore means by which it can be given constitutional form, the form preferable being that of federalism. The strategic thinking behind this articulation was that if the International Community involved in the peace process could be seen to be associated with the idea of internal self-determination, when and if the Government of Sri Lanka failed to honour its promises towards realising self-determination internally within a united Sri Lanka the International Community could be expected to support the Tamil quest for a separate state. In fact, the LTTE was extremely sceptical of the Government agreeing to federalism for those reasons argued above and hence the agreement to explore a federal solution along the lines of internal self-determination may have been strategic.

However, the reference to internal self-determination and federalism in the Oslo Communique was construed by the Sri Lankan Government and international actors involved in the peace process as LTTE's renunciation of external self-determination. This led to internal criticism within the Tamil nationalist polity over what was seen as the abandonment of the struggle for a separate state. The Government of Sri Lanka for its part was under tremendous pressure to backtrack from the Oslo Communique. It was unable to persuade the majority community on federalism. This and the failure of the

[92] Tamilnet, 'LTTE-GoSL reach exploratory agreement' (05 December 2012) available here: <https://www.tamilnet.com/art.html?catid=13&artid=7937> accessed on 15 December 2018

[93] Anton Balasingham, *War and Peace: Armed Struggle and Peace Efforts of the Liberation Tigers of Tamil Eelam,* (Fairmax 2004) 403

peace process led to the LTTE distancing themselves from the Oslo Communique. The Government of Norway in an assessment published in 2011 on their efforts to mediate the process between 1997 and 2009 came to the conclusion that the Oslo Communique 'rather than locking the parties, caused them to step back'[94].

The talks continued with the parties now moving to considering interim arrangements for governance. The LTTE put forward a set of proposals that were criticised for being centrist and unitary in character. Edrisinha and Welikala criticised that a sub-state national actor critical of unitariness should produce a document that reproduced ideas of centralised governance[95]. More broadly the LTTE's treatment of the Muslims, whom they expelled from Jaffna *en masse* in 1990, who form a minority within the majority Tamil homeland, has led to criticism that the LTTE's vision and hence the dominant vision of Tamil Nationalism suffers from the same pitfalls of Sinhala majoritarianism leading scholars like Jayadeva Uyangoda to conclude that 'Sri Lanka's separatist Tamil nationalism has also developed, in reaction to Sinhalese majoritarian unitarism, a project of minoritarian unitarism. Hence, Sri Lanka's Sinhalese as well as Tamil nationalisms do not offer possibilities for the resolution of the conflict resolution on the basis of political pluralism'.[96]

This is a serious dilemma that risks a situation of policy paralysis. But one must be careful about equating sub-state nationalisms and majority nationalisms, generally but particularly in the context of a war. The 'all-sides-are-bad' approach equation leads to international fatigue and gives a free hand to majoritarian nationalism to impose solutions. The failure of the peace process, the growing disenchantment of the international community via-a-via the

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[94] Gunnar Sorbo et al, *Evaluation of Norwegian Peace Efforts in Sri Lanka 1997-2009* (Norwegian Agency for Development Cooperation 2011) 88

[95] Rohan Edrisinha and Asanga Welikala, 'The Interim Self-Governing Authority Proposals: A Federalist Critique' in *Essays on Federalism in Sri Lanka* (Centre for Policy Alternatives 2008) 292-308, 307

[96] Jayadeva Uyangoda, 'Pluralism, Democracy and Ethnic Conflict Resolution: Trajectories in Sri Lanka', Paper for the Conference 'Democratizing and Developing Post-Conflict Sri Lanka' (May 06, 2003, University of Oslo, Norway), <http://www.constitutionnet.org/sites/default/files/Uyangoda%20Sri%20Lanka.pdf> accessed on 15 December 2018

warring parties, led to a renewal of war that led to egregious violations of human rights and humanitarian law that resulted in severe human costs. The LTTE was defeated in 2009.

After the defeat of the armed phase of the Tamil struggle for self-determination there are fewer reasons and incentives for Sri Lanka's majority to consider constitutional reforms[97]. The Government elected in 2015, defeating the triumphalist regime that won the war in 2009, promised a new constitution that would satisfy the political aspirations of the Tamil community, albeit as an offer to soften the Tamil demand for accountability during the war.[98] A constitutional assembly has been appointed.[99] The current efforts are focussed on maximum devolution of power within a unitary state. The Tamil dislike for the label unitary state and the Sinhala insistence on the unitary label has led to the drafters exploring whether they can retain the unitary label in its Sinhala expression while including a Tamil word which will give the meaning of a 'united' country (as opposed to a unitary state).[100] The definition of these terms offered by the report states that Sri Lanka shall comprise of both institutions of the centre and the province while insisting that sovereignty shall remain undivided and indivisible.[101] The reference to indivisible and inalienable it has been suggested by one of the key drafters as evidence that the new constitution will not be federal. Given the Sri Lankan politico-cultural understanding of unitary in its most literal sense, the possibilities of any real sense of autonomy for the Tamils look very bleak. On the substance itself the report does not say much, and deliberations are still ongoing. But more recently given the rising tide of

[97] Kumaravadivel Guruparan, '18 May 2009 as a Constitutional Moment: Development and Devolution in the Post War Constitutional Discourse in Sri Lanka', (2010) *Junior Bar Law Review* 41-51.

[98] Kumaravadivel Guruparan, 'The Difficulties and Probable Impossibility of a Coherent Conception of Transitional Justice in Sri Lanka' in Bhavani Fonseka (ed), 'Transitional Justice in Sri Lanka' (CPA, 2017)

[99] Constitutional Assembly of Sri Lanka: <https://english.constitutionalassembly.lk/constitutional-assembly> accessed 15 December 2018

[100] Interim Report of the Constitutional Assembly of Sri Lanka, <https://english.constitutionalassembly.lk/images/pdf/interim-report/ReportE%20CRR.pdf> accessed 15 December 2018, p.1- 2

[101] ibid.

Sinhala Buddhist Nationalism again the future of the process itself seems bleak.

The above points to a very sobering conclusion about the prospects of internal self-determination in the context of protracted social conflicts. It needs to be acknowledged that the distrust that exists between the sub-state actor on account of the failed past attempts and the violence associated with suppressing the political project of the sub-state society may negate the prospects for internal self-determination.

4.4. Lessons from protracted social conflicts from Asia

This section summarises some of the key themes that arise from a consideration of the case studies above.

Firstly, the idea of the nation-state in its most rudimentary form is very much alive in Asian states and as I have argued in Chapter 1 an ideological commitment to the idea of the nation-state is anathema to the possibility of internal self-determination. As Nandy puts it, 'Any proposal to decentralize or to reconceptualize the state as a truly federal polity goes against the grain of most postcolonial states in the third world.'[102] The only exception to this is it has been suggested in India[103] where a weak federation has proven capable of accommodating sub-state claims to state power in at least some instances. But even the Indian experience is only a qualified success story given the history of its poor handling of self-determination claims in Kashmir, Nagaland and most of the North-Eastern states where it continues to use military force to respond to claims made by sub-state societies.[104] In most if not all other

[102] Ashis Nandy, 'Federalism, the ideology of the state and cultural pluralism' in Nirmal Mukarji and Araroa Balveer (eds) *Federalism in India: Origins and Development* (Vikas Publishing, 1992), 39

[103] Gurpreet Mahajan, 'Indian Exceptionalism or Indian Model: Negotiating Cultural Diversity and Minority Rights in a Democratic Nation-State', in Will Kymlicka and Bagong He (eds), *Multiculturalism in Asia* (OUP 2005), 288-313

[104] Prof. Atul Kohli of Princeton University after a careful study of the different self-determination movements in India provides the following explanatory trajectory: He has

instances of protracted social conflict in Asia including those studied here, the dominant nations have remained steadfast to a unitarian ordering of the constitutional order, with state power jealously concentrated in the dominant nation leading to a hierarchical state. The worst form of such sacrosanctity afforded to the idea of a unitary state is to be found in Sri Lanka while Aceh represents a reluctant attempt at conceding to autonomy without affecting the idea of a unitary Indonesia. In these contexts, the idea of autonomy is available in the form of only 'devolution', where the unitary state retains its status at the *locus* of state power symbolically and legally. The idea is that any form of autonomous institution would be treated as a subordinate institution to the centre (and hence the dominant nation) but not as a coordinate body that has parity of status with the dominant nation. This kind of autonomy within a unitary state then does not dismantle the hierarchical state. Papua New Guinea exhibited similar tendencies in its handling of Bougainville between 1976 eventually leading to the abolition of provincial governments, but the 2001 agreement marked a radical departure from its previous history. This as we have seen could not have been possible without the state of affairs prevailing between the two warring parties in terms of military power. A comparison of Aceh's achievement in 2005 Bougainville's in 2001 and Sri Lanka's short-lived success in 2002 is then suggestive that Asian unitary states will only substantively consider a reordering of the state in favour of genuine internal self-determination where military necessity requires such concession. The vulnerability in these situations hence is then that if the conditions of necessity disappear that the settlement arrived at is also threatened. As Kymlicka rightly points out that territorial autonomy is typically only granted as a last-ditch effort to avoid civil war or indeed as the outcome of civil war in the Asian political

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argued that (1) in the context of a well institutionalized central authority within a multi-cultural democracy and (2) the willingness of the ruling groups to share some power and resources with mobilized groups, self-determination movements typically follow the shape of an inverse "U" curve. The process is as follows: a democratic polity in a developing country encourages group mobilization, heightening group identities and facilitating a sense of increased group efficacy; mobilized groups then confront state authority, followed by a more-or-less prolonged process of power negotiation; and such movements eventually decline as exhaustion sets in, some leaders are repressed, others are co-opted, and a modicum of genuine power sharing and mutual accommodation between the movement and the central state authorities is reached. Atul Kohli, 'Can Democracies Accommodate Ethnic Nationalism: Rise and Fall of Self-Determination Movements in India' (1997) Vol 56 Issue 2 *Journal of Asian Studie*s 325-344.

scene. Many countries have preferred to engage in civil war than concede this sort of autonomy and have only been prepared to contemplate multination federalism when a military solution become too costly or protracted.[105]

But it must be realised that the problem is far deeper than merely a choice of one institutional form (unitary) over another (federal). While federalism given its entrenched constitutional guarantees of differentiated powers provides more fertile grounds for the possibility of self-government these must not be assumed as the Aceh example shows. Firstly, for a successful working of federalism a deep commitment to constitutionalism is required. In a climate of unstable constitutionalism (where there are no basic commitments to the supremacy of the constitution) a federal solution or for that matter any constitutional solution offers very little hope for success. Secondly, federalism is not just about self-rule but also about shared rule and this requires a commitment to work together. One of the postulates of plurinational theory is the existence of multiple identities among individuals belonging to sub-state societies. But in contexts that have been affected by violence the possibilities of cultivating shared identities across ethnic groups will take time. This might prove to be a heavy strain on the effective functioning of shared mechanisms that are essential for any mechanism of internal self-determination to work.

Secondly, the case studies despite the drawbacks pointed above, are still supportive of the claim made in Chapter 1 that the claim to self-determination that sub-state actors make is a claim to self-government. In all instances that have been studied in the Chapter sub-state actors have been willing to consider strong autonomous arrangements. It would be unwise to read such willingness as merely 'strategic' or as a stepping stone concession for secession. As argued in Chapter 1, sub-state actors are aware of the costs of the politics of secession and there is no proof that sub state actors take secessionist claims lightly. The claim is for powers over certain core functions of government and for such powers to be vested in them as a matter of right and not as a matter of privilege. This is important for these sub-sate societies symbolically but also as a matter of law. Symbolically it is important as a matter

[105] Kymlicka (n 103) 41

of recognition. Legally it is important because it is an act of recognition of the sub-state demos as a constituent power. This also explains why sub-state societies studied above make demands for the best possible entrenchment of this recognition in domestic law.

Thirdly, following through on the issue of entrenchment of the sub-state society's status as a constituent power arises the biggest obstacle of fear and distrust associated with internal self-determination by sub-state actors in situations of protracted social conflict. The fear is grounded on the fact that the dominant nation would always remain numerically superior within the larger state, which means it can unilaterally revoke the status and recognition afforded by a constitutional instrument. The question more straight forwardly is, how does a sub-state society ensure that an arrangement for internal-self-determination is entrenched (and their status safe guarded) beyond the confines of the current constitutional arrangement? This I submit is the biggest dilemma confronting internal self-determination as a matter of constitutional law in the context of protracted social conflicts. In protracted social conflicts where there has been violence, a history of broken pacts and promises in the past and a political culture of extra-constitutionalism, internal self-determination, purely as a matter of constitutional law cannot provide adequate answers to this question. The analysis of the case studies in this chapter shows that sub-state societies then reach out to the international realm to provide the guarantee necessary for sustaining the gains made under a peace agreement. In Bougainville the involvement was formalised at a very high level in that the treaty was deposited with the UN. In Aceh and Sri Lanka, the Third State/s were involved as mediators/facilitators in the signing of the MoU's between the warring parties. In the implementation phase both in Aceh and Sri Lanka the European Union was involved directly as monitors. Sub-state societies are desirous of converting agreements reached on internal self-determination into international obligations that are binding on host states. Furthermore, sub-state societies also attempt to perpetuate their hard-won deals on internal self-determination by keeping the option of external self-determination open as part of the peace agreement. This is even more difficult than internationalising peace agreements but not altogether impossible, as the Bougainville case

study shows. The Bougainville case is not *sui generis* at all in providing an option for external self-determination for a group that is not satisfied with internal self-determination. The Comprehensive Peace Agreement of Sudan of 2005 for example provides another example of how a peace process kept external self-determination open as it considered the viability of internal self-determination[106].

The above argument provides impetus for us to consider the possibility of a more definitive statement about internal self-determination in international law as a matter of *lex ferenda*. A more definitive articulation of internal self-determination as centred around the idea of the right to self-government may (a) help strengthen the confidence and overcome the distrust of sub-state actors towards self-government and (b) nudge the state to abandon unitary notions of 'nation-state' statehood and provide guarantees for the territorial integrity of the state where there is a *bona fide* plurinational constitutional arrangement.

[106] For a detailed study of the Comprehensive Peace Agreement on the Sudan of 2005 see Scott P. Sheeran, 'International Law, Peace Agreements and Self-Determination: The Case of the Sudan' (2011) 60 ICLQ 423-458

Chapter 5

Internal Self-Determination in the Global North

Introduction

This chapter deals with two case studies (Catalonia and Scotland) from the Global North wherein there have been recent and ongoing attempts of sub-state entities that are trying to redefine their relationship with the parent state constitutionally but also extra-constitutionally by way of seeking to democratically secede from the parent state. The classification of these studies as pertaining to the 'Global North' should not be read as an attempt to reify the experiences of the Global North as demonstrating a particular kind of behaviour. The reason for classifying these experiences and studying them separately is primarily on the basis that the struggle of these sub-state entities within the parent states are of a primarily constitutional / democratic nature within parent states which have a longer pedigree of modern democratic institutions as opposed to those in the global South where sub-state entities have had to struggle with their claims to self-determination within States without strong democratic institutions. As will be evident from the chapter on the Global South, the ability and willingness of democratic institutions to engage with the sub state entity on its claims affect the trust that is key to internal self-determination providing workable solutions. But as will be seen from this chapter, in particular the study of Catalonia, this willingness on the part of the parent states cannot be taken as granted even from States in the Global North.

This chapter hence will explore lessons that can be learnt for internal self-determination from the Global North. The chapter seeks to shed light on how important recognitional issues are for sub-state actors and as to whether acknowledgment on the part of the parent state of the uniqueness / self-determining character of the sub-state entity contributes to an environment that provides the opportunity for internal self-determination to work. Secondly it seeks to engage with the question of whether the character of the State with

regard to being unitary or federal or otherwise contributes to the workability of internal self-determination. And finally, it tries to shed light on how the demand for referendums as an expression of the 'will of the people' have emerged as useful tool available to sub-state entities to further legitimise the democratic nature of their demands and more importantly to apply pressure on the parent state to concede more in terms of self-government.

5.1 Catalonia's slide from internal to external self-determination

5.1.1 Introduction

Catalonia is an autonomous region of Spain whose claim to the right to self-government is historically grounded from the 14th century onwards. While Catalan was never a 'state' of its own in the modern sense of the word Catalans have long maintained that they have enjoyed a distinct status centred around the notions of divided sovereignty and pactism.[1] Catalan Nationalism in fact for long eschewed separatism.[2] The main Catalan party, *Convergencia i Unio*, for a long time was a staunch supporter of non-separatist nationalism and pitched its policies around the idea of a plurinational state. Even the most separatist of the Catalan parties, the *Esquerra Republicana de Catalunya* (ERC), were not separatists in the classical sense of statehood in that they sought equality for Catalonia along with the rest of Spain in a larger Europe, or as Keating puts it, a post-sovereignist position within the larger European context.[3] As Keating summarises, the programmes of the main Catalan parties were centred around three preoccupations: a) symbolic recognition of their distinctiveness as a nation b) powers to preserve their language and culture

[1] 'Pactism' is the notion that rules are made by free agents entering into contracts of their own accord and that social life is based on bargaining and negotiation between them and not upon unilateral violence and imposition. The idea is considered central to Catalan public life. John Hargreaves, *Freedom for Catalonia: Catalan Nationalism, Spanish Identity and the Barcelona Olympic Games* (CUP 2000) 20.
[2] Michael Keating, *Plurinational Democracy*: *Stateless Nations in a Post-Sovereignty Era* (OUP 2001) 73
[3] ibid.

and c) the feeling that Catalonia is disadvantaged by having to contribute disproportionately for the upkeep of the Spanish state.[4]

But in the last decade or so these positions have transformed into a demand for full-fledged separate statehood. The aim of this part of the chapter on Catalonia is to explore why this transformation from a federalist / post-sovereignist position to separate statehood took place. In terms more directly relevant to this thesis, this section seeks to provide an understanding as to what factors contributed to Catalan's slide away from seeking self-determination internally within a Spanish state to seeking self-determination outside of the Spanish state.

5.1.2 Catalan's place within Spain's decentralised political system

The modern history of the Catalan struggle for self-determination begins with the restoration of the institutions of self-government that were banned and abolished under the dictatorship of Francis Franco through the new constitution of 1978. One of the most divisive questions in the constitution making process was the national question. The Constitution finally came up with an ambiguous formulation that is found in Article 2:

> The Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards, and recognises and guarantees the right to self-government of the nationalities and regions of which it is composed and solidarity amongst them all.[5]

The article provided for a delicate balance between the majority Castilians' claim that Spain alone should be identified as the nation and claims made by communities like Catalonia and Basque which demanded a co-equal nation status in the constitution but also desired a recognition of their distinct status from the other regions who did not put forward a national claim to self-

[4] ibid.
[5] *Constitución española de 1978, Article 2.*

government.[6] The word 'recognise' in Article 2 is acknowledged that the right to autonomy of Catalonia and Basque were pre-constitutional.[7] The compromise formula embodied in Article 2 identifies Spain as the 'nation', communities such as Catalans and Basques as 'nationalities' and the rest without a history of claim to self-government as 'regions'. The Catalans were willing to compromise and accepted this formula while the Basques were unwilling and disapproved of the 1978 constitution.[8]

The institutional design efforts at giving effect to this ambiguous formulation were also fraught with division. The Catalonians and the Basque were afraid that an explicitly federal constitution would ignore the asymmetries in the history and politics of the different regions.[9] They feared that a functional and efficiency-based justification for federalism would fail to acknowledge the difference between the historical autonomous nationalities and other regions.[10] The result was a very complex set of institutions and processes for autonomy. The substance of self-government in Spain as laid out in the constitution provides for three routes to autonomy which corresponds with the bifurcation of the constitutional status provided in Article 2 into nationalities and regions. The first fast track route[11] is for those autonomous communities that have by way of referendum already endorsed draft statutes of Autonomy. The three autonomous communities that were allowed to use this fast track route were Basque, Catalonia and Galicia. The second track or the so-called slow-track empowered regions without a history of autonomy to gain autonomy by proving that there is popular support for autonomy.[12] The autonomy thus granted is

[6] For a detailed treatment of the drafting history of Article 2 see: Sebastian Balfour and Alejandro Quiroga, *The Reinvention of Spain: Nation and Identity since Democracy* (OUP 2007), in particular Chapter 3
[7] ibid 8.
[8] Carlos Flores Juberias, 'The autonomy of catalonia: The unending search for a place within pluralist Spain' in Yash Ghai and Sophia Woodman (eds), *Practicing Self-Government: A Comparative Study of Autonomous Regions* (CUP 2013) 228-257 at 233.
[9] Arbo´s, Xavier. 2006. Doctrinas Constitucionales y Federalismo en Espan˜a. Working Paper 245, ICPS, Barcelona, Spain as quoted by Gemma Sala, 'Federalism without Adjectives' in Spain' (2013) 44 (1) Publius: The Journal of Federalism 109-134 at 113.
[10] Basque politicians who were willing to find a solution within a united Spain 'argued that devolution was not simply a question of subsidiarity but should be based on historic and cultural factors, economic needs, and social structure. Thus, they envisaged an asymmetric model that would give the Basques the highest possible degree of self-government, including control over public order in their region'. Balfour and Quiroga, (n 6) 57.
[11] Transitory Provision 2 of the Spanish Constitution.
[12] Article 143, Spanish Constitution.

also more limited in that there is a waiting period of five years before these communities can enjoy those powers that are granted for those in the fast track category. In a sense then, 'regions' had to demonstrate a desire/ political will for self-government before being given powers of self-government. The third route also known as the exceptional route provides a fast track within the slow route wherein through even more complicated forms of proving popular support for autonomy the regions in question were required to eliminate the need for waiting for five years to gain full autonomy.[13] Two autonomous communities enjoy asymmetrical powers far greater than any of the other communities owing to their unique historical status (Basque and Navarre[14]), leading to a hierarchy even within those communities treated as 'nationalities' in the Constitution. These communities have bilateral agreements with the Spanish state which regulate their autonomy. These historical communities have greater autonomy than those belonging to the fast track particularly in the area of fiscal arrangements. However, over the next two decades since the adoption of the Spanish Constitution the main parties at the centre sought to eliminate the asymmetry in the design of the autonomous communities particularly those between the fast track communities (nationalities) and the slow track communities (the regions). The slow track communities were allowed to join the fast track communities with much more ease. This was made possible because of an agreement between the two main parties to that effect and because these two parties which controlled the Spanish Congress and executive also had control of the legislatures of the autonomous communities.[15] As Ferran Requejo puts it 'a perspective of plurinationality' was lacking in these developments. [16] The parties at the centre were on a uniformising mission. Basque and Navarra however continued to enjoy their special fiscal status.

[13] Art 151, Spanish Constitution.
[14] Basque and Navarre enjoy special status owing to their status as 'chartered communities'. Navarre is adjacent to Basque but refused to join the Autonomous Community of Basque despite being historically linked to it. Both Basque and Navarre have a different fiscal regime which gives them autonomy to raises taxes and pay for any common services that they receive from Spain.
[15] Gemma, (n 9) 8.
[16] Ferran Requeio, 'Revealing the dark side of traditional democracies in plurinational societies: the case of Catalonia and the Spanish 'Estado de las Autonomias'' 16 (1) Nations and Nationalism 148-168 at 157

The self-governmental powers of the Autonomous communities include town and country planning, housing, promotion of economic development within the objectives set by the national economic policy, promotion of culture and language, tourism, education and health. Autonomous communities also have certain powers 'delegated' to them[17]. These are powers that Autonomous communities exercise under the direction of and with financial resources transferred from the central government. The Central legislature passed 'base laws' on a number of areas within the competence of the autonomies which were originally thought of as laying down legislative principles but in fact later took the form of hard regulations. Disputes relating to these base laws between the autonomies and the centre led to a judicialization of autonomous areas.[18] Carles Vivi P Sunyer, a former Judge of the Spanish Constitutional Court and a Catalonian Scholar, has criticised the arrangement as providing self-governing communities with 'administrative power rather than political power' wherein the 'Autonomous communities have the authority, in essence, to implement overarching central government policies rather than establish their own policies'.[19]

Fiscal relations between the centre and the autonomies have been one of the most important areas of friction in the relationship between the Spanish state and Catalonia. Catalonia is part of the common financing system, which provides the autonomies limited tax-raising competences and involves substantial revenue transfers from central government. This is unlike the Basque and Navarre region who raise most of their own taxes under a separate system of extensive fiscal autonomy (the Concierto Económico or Economic Agreement) wherein Basque and Navarre then pay from their revenues to the Spanish state for common amenities provided by the latter. Catalonia thus has very little power to raise revenue while being responsible for a considerable amount of spending. The vertical imbalance between the centre and the autonomous communities is complicated by the horizontal balances between the regions which the centre sought to rectify through

[17] Article 150.
[18] Requeio, (n 16) 156.
[19] Carles Vivi P Sunyer, *The Transition to a Decentralised Political System in Spain* (Forum of Federations, 2010) 13.

money that was raised through taxation from the wealthier regions. This turned out to be a major grievance for Catalonia – a wealthy autonomous community that despite contributing a major portion of Spain's tax revenue suffered from a major deficit. The deficit has been further aggravated by the financial crisis which saw Catalonia's deficit grow from 8% of the GDP to 25%. Catalonia also complains that the Spanish economic priorities are different from that of Catalonia's and hence that even the money that is directed back to Catalonia is directed to the wrong places. For example, Catalonians complain that the Spanish central state is heavily bent towards supporting state sponsored big corporations whereas Catalonia has prospered through small and medium enterprises.[20] The Spanish state's bailing out of state corporations during the recent financial crisis using tax revenue from the regions of which Catalonia is the largest contributor for example is said to be an important contributor to growing support for secession in Catalonia.

5.1.3 Catalonia's attempts at negotiating self-determination within Spain and the slide to secession

In September 2005 after more than 19 months of deliberation, the Catalan Generalitat[21] by an overwhelming majority passed a new Statute of Autonomy that sought to remedy some of the shortcomings in their exercise of self-government. As per the Spanish constitution the reform process of an autonomy statute had to be firstly passed by 2/3rds of members of the autonomous community legislature, then by a majority of the Spanish Parliament and a majority of the voters in the autonomous community.

The statute as passed by the Generalitat comprehensively sought to address symbolic and recognitional issues and corresponding functional issues. The statute described Catalan as a 'nation' as opposed to the 'nationality' tag

[20] Jon Henley, 'Catalonia independence for business lights is best economic option all around' *The Guardian* (22 November 2012) <https://www.theguardian.com/world/blog/2012/nov/22/catalonia-independence-business-economy-spain> accessed 15 December 2018

[21] The Catalan Generalitat is the legislature of Catalonia.

recognised in the 1978 Spanish Constitution.[22] This was in response to the fact that their status as a 'nationality' in the Spanish constitution, as mentioned previously, had eroded because of frequent central intrusion and the uniformisation of the 'nationalities' with the other 'regions'. Furthermore, the assertion of nationhood was intended to provide functional justification and remedy its recognitional standing in comparison to Basque and Navarra which had special asymmetrical status in the overall scheme of the Spanish constitution. The statute provided that Catalan will be the first language of the Catalan public administration and further provided for provisions that encouraged the Catalan population to study the language of Catalan. The assertion of Catalan as a nation and the new-found impetus to protect and promote the Catalan language in the new autonomy act are classic examples of the importance that communities seeking self-government give to the recognitional aspects of legal ordering. This is also seen in Canada where the status of Quebec as a 'nation' and the politics of giving pre-eminence to the French language in Quebec's public life have been equally important when compared with substantive issues of self-government in Canada's constitutional politics.[23]

The 2005 statute in addition to these recognitional aspects also contained two important functional reforms: a) a detailed statement of the powers of the Catalonian Generalitat, which it was hoped would juridically protect from scrutiny by the Constitutional Court the compatibility of Catalonian laws in a number of areas with the Spanish state's basic/organic laws and b) a system of finance which would establish a system of bilaterality similar to the one that Basque and Navarre enjoyed.

The 2005 statute when it reached the Spanish Parliament met with resistance. The Socialist Prime Minister Zapatero had earlier promised to accept that which emanated from the Generalitat but went back on his word. The assertion of nationhood met with resistance from all main stream parties in Madrid and

[22] Generelitat Catalonia, Full text of the Statute of Autonomy of Catalonia approved on 19 July 2006 <http://web.gencat.cat/en/generalitat/estatut/estatut2006/preambul/> accessed 15 December 2018

[23] Government of Quebec, Representation of Quebec in Canada, 'Recognition of the Quebec Nation', <https://www.sqrc.gouv.qc.ca/relations-canadiennes/institutions-constitution/statut-qc/reconnaisance-nation-en.asp> accessed 15 December 2018

finally was moved from the main text to the preamble where the Catalan's parliament desire of identifying Catalonia as a nation was noted and the Constitution's treatment of Catalonia as a nationality reinforced.[24] The main opposition party at that time, the Popular Party, opposed even this shift as conceding too much to the Catalan nationalists.

Financial reforms also met with similar resistance from all sides. The main Catalan party CiU struck a deal with Zapatero that provided for a short-term solution to Catalonia's financial deficit problem whereby Madrid would transfer an equivalent amount of money to that which Catalonia contributed to Madrid, for a period of seven years. Catalonia's share of personal income taxes collected from its region and certain other taxes was also increased (from 33% to 50%). But the proposal for a new Catalan Tax Agency was denied. The bilaterality which Catalonia sought was also denied. The agreement was that what was being conceded to Catalonia could also be extended to the other regions. The whittled down Statute of Autonomy passed in March 2006 with support from the CiU. The ERC voted against the act arguing that the changes made watered down the structural reforms that the Catalonian version of the Statute had sought. The statute was endorsed by the Catalan people at a low turn-out referendum and came into effect in 2006.

However, in 2010 a ruling of the Spanish Constitutional Court[25] rolled back on most of the key provisions of the 2006 statute, 4 years after it came into effect. The court ruled that the preambular provision on Catalan's status as a 'Nation' was without legal consequences and merely declaratory.[26] The Court also read down the principle of bilateralism saying that it cannot be interpreted to mean that Catalonia and the Spanish state were co-equal. The Spanish State was

[24] The relevant preamble reads as follows: "In reflection of the feelings and the wishes of the citizens of Catalonia, the Parliament of Catalonia has defined Catalonia as a nation by an ample majority. The Spanish Constitution, in its Article 2, recognizes the national reality of Catalonia as a nationality" (n22)

[25] Constitutional Court of Spain, Ruling 31/2010 (28 June 2010) (Unofficial Translation posted on the Tribunal Constitucional's website) <https://www.tribunalconstitucional.es/ResolucionesTraducidas/31-2010,%20of%20June%2028.pdf> accessed 15 December 2018

[26] ibid, 'the mention of the national reality of Catalonia and the declaration of the Parliament of Catalonia on the Catalan nation must be held as removed from the scope of any legal interpretation' para 13 of the judgment.

superior the court concluded.[27] It ruled that the provisions relating to Catalan language could not displace the citizens foremost duty to learn Castilian, the language of the majority of Spain.[28] The court invalidated sections of the Statute that attempted to limit and narrow the encroachment of the Spanish legislature on matters of shared competences.[29] It also invalidated the creation of a new body with devolved judicial power. It also declared the provision relating to fiscal equalisation as not obligatory on the Spanish State. The Court ruling led to a massive demonstration on 11 September 2012 (The National Day of Catalonia) on the streets of Barcelona with the slogan: *Som una nació. Nosaltres decidim (We are a nation; we decide).*

With growing concerns about financial failure Catalonia attempted to engage Spain in bilateral talks for a new fiscal deal in 2012. The attempts were turned down by the Spanish Government on the grounds that such bilateralism was unconstitutional[30]. Both major political parties at the centre were normatively against further sharing of powers while also being concerned about the prospects of the accommodation of Catalonian demands leading to similar demands from other autonomous communities and the eventual disintegration of Spain. The knock-on effect of the Constitutional Court's ruling of 2010, coupled with the refusal by the Spanish Government to explore alternative avenues, led to a spike in the popularity of the demand for a referendum in which Catalans could decide their political future.

Following the failed attempts by the Catalan President to broker a new fiscal deal and following massive demonstrations on 11 September 2014 snap elections were called for. The coalition Government in Catalonia (between CiU

[27] ibid, The court noted that bilateralism 'cannot be understood as an expression of the relationship between political entities that are equal, capable of negotiating on that basis because, as this Court has stated beginning in its first decisions, the State is always in a position of superiority over the Autonomous Communities' para 13 of the judgment

[28] ibid, The court held that, 'the Statute of Autonomy would be unconstitutional and null if its intention was to impose a duty to know Catalan equivalent in meaning to the constitutional duty to know Spanish.' Para 14 of the judgment. Furthermore the court held that Catalan could not be given preferential treatment over and above Castilian in public administration either.

[29] Article 110 of the Constitution

[30] Raphael Minder, 'Spain's Leader Fails to Reach Deal with Catalonia' *The New York Times* (20 September 2012) <http://www.nytimes.com/2012/09/21/world/europe/spains-prime-minister-fails-to-reach-revenue-deal-with-catalonia.html> accessed 15 December 2018

and ERC) formed subsequent to the elections of December 2012 resolved to further an independentist agenda.

In 2012 the Catalan Parliament passed a resolution[31] asserting the Catalan's right to decide. A key passage of the resolution articulated the shift from seeking a place for the Catalan self-governmental aspirations within a united State to outside of the Spanish State:

> The Parliament of Catalonia considers that over the last thirty years a large proportion of the supporters of Catalan nationalism have made a firm commitment to transforming the Spanish State in order to allow Catalonia to fit into it without compromising its legitimate national aspirations, its desire for self- government and its continuity as a nation. However, the attempts to fit Catalonia into the Spanish State and the latter's repeated refusals have brought the situation to a dead end. Catalonia must commence a new era based on the right to decide.[32]

The resolution articulated 'the imprescriptible and inalienable right of Catalonia to self-determination as a democratic expression of its sovereignty as a nation'.[33]

In 2013 the Catalan parliament passed a 'declaration of sovereignty'[34] in which the parliament asserted inter alia that 'the people of Catalonia, throughout its history, has democratically expressed its commitment to self-government, in order to strive for more progress, welfare and equal opportunities for all its citizens, and to reinforce its own culture and its own collective identity', that it was a 'sovereign political and legal subject' and that in accordance with 'the will democratically expressed by the majority of the people of Catalonia, the Parliament of Catalonia agrees to initiate the process to exercise the right to decide so that the citizens of Catalonia may decide their collective political future'. In March 2014 the Constitutional Court of Spain ruled that the 2013

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[31] Resolution 742/IX of the Parliament of Catalonia, *on the general political orientation of the Government of Catalonia* (passed on 27 September 2012) <https://www.parlament.cat/document/intrade/6026> accessed on 15 December 2018

[32] Ibid, Para I. 2 of the Resolution.

[33] Ibid, Para II.2 of the resolution.

[34] Resolution 5/X of the Parliament of Catalonia, adopting *the Declaration of sovereignty and right to decide of the people of Catalonia* on 23 January 2013 https://www.parlament.cat/document/intrade/7176 accessed 15 December 2018

resolution's assertion of Catalonia being 'sovereign' was unconstitutional but declared that as long as the 'right to decide' was envisaged as part of the constitutional reform process that it was not unconstitutional.[35] In other words the court ruled that any consultation must follow the rules laid out in the Spanish constitution as with regard to constitutional reform and could not lay outside of it.

Meanwhile in January 2014 the Catalan Parliament submitted to the Spanish Congress a motion demanding that the Spanish Congress delegate to the Catalonian Generalitat 'the power to authorize, call and hold a referendum allowing the Catalans to express their opinion on the collective political future of Catalonia'.[36] The Parliament was clear that the request to hold a referendum was a procedural right of the Catalan people to be consulted and that in itself did not mean that there would be legal outcomes. Rather, the Catalan Parliament argued such a result should open the doors for negotiations including that of a constitutional reform process.[37] In April 2014 the Spanish Congress emphatically voted to deny this motion.[38] The justification given by Madrid to turn down the request was because only the Spanish people as a whole and not a part of it were entitled to vote on a referendum.[39] The Catalan Parliament responded by passing legislation for a 'consultation' on the future of Catalonia,[40] but the Constitutional Court issued an injunction against the process. The Catalan Parliament resolved to rename the referendum initiative as a 'citizen participation process on the political future of Catalonia' against

[35] Constitutional Court of Spain, Ruling 42/2014 (25 March 2014) (Unofficial Translation posted on the website of the Court): <https://www.tribunalconstitucional.es/ResolucionesTraducidas/STC%2042-2014E(2)%20%20DECLARACION%20SOBERANISTA%20%20SIN%20ANTECEDENTES.pdf> accessed 15 December 2018

[36] Resolution 479/X of the Parliament of Catalonia by which it was agreed to submit to the Presiding Board of Congress the draft organic act delegating to the Generalitat of Catalonia power to authorize, call and hold a referendum on the political future of Catalonia (16 January 2014) <http://www.parlament.cat/document/intrade/23112> accessed 15 December 2018

[37] Ibid, Para III of the Resolution

[38] Only Catalan and Basque members of congress voted for the resolution. BBC News, 'Spanish Parliament rejects independence vote' (April 9, 2014) <http://www.bbc.com/news/world-europe-26949794> accessed 15 December 2018

[39] BBC News, 'Spain PM says Catalan independence referendum 'illegal'' (25 February 2014) <http://www.bbc.com/news/world-europe 26341833> accessed 15 December 2018

[40] Law of Non-Referendum Popular Consultations and Citizen Participation Act 10/2014, of 26 September 2014.

which the Constitutional Court again issued an injunction.[41] The Catalonian authorities however went ahead and organised the consultation on 09 November 2014.[42] The questions put to those who participated in the consultation read as follows: "Do you want Catalonia to become a State?" and if yes "Do you want this State to be independent?". Less than 40% are reported to have taken part in the vote. But 90% of those who voted, answered yes to the first question, with 80% of those who voted answering the second question also in the affirmative. Following the vote elections were held again in Catalonia in which the independentist parties were returned to power but without a clear majority. The new parliament set in motion a process for a binding referendum. In November 2015 the Catalan Parliament passed a resolution wherein it declared the start of the process to create an independent Catalan state in the form of a republic. The resolution was promptly suspended by the Constitutional Court and later quashed in its final judgment. The Catalonian authorities went ahead with the referendum on 01 October 2017. The Spanish authorities cracked down on the holding of the referendum including through the use of force. The turnout was low but again in favour of independence. Following the vote, the Catalan President suspended the declaration of independence to allow space for dialogue. Key civil society leaders have been arrested for sedition and the President of Catalonia is now in self-imposed exile. The Spanish Government imposed direct rule under Article 155 of the Spanish constitution.[43] The Catalan Parliament was dissolved but the independentist parties were returned to power. The Spanish authorities however have charged one by one all those who have been nominated by the winning coalition to be the new Catalan President for

[41] The final judgment of the Constitutional Court ruled that the non-referendum consultation was in effect a referendum and hence not within the competence of Catalonia. Constitutional Court of Spain, STC 31/2015, Judgment dated 25 February 2015.
[42] The questions put to those who participated in the consultation read as follows: "Do you want Catalonia to become a State?" and if yes "Do you want this State to be independent?".
[43] Sam Jones, Stephen Burgen and Emma Graham-Harrison, *The Guardian* (Barcelona, 28 October 2017) 'Spain dissolves Catalan Parliament and calls fresh elections' <https://www.theguardian.com/world/2017/oct/27/spanish-pm-mariano-rajoy-asks-senate-powers-dismiss-catalonia-president> accessed 15 December 2018

rebellion against the state or sedition.[44] The deadlock continues at the time of writing this chapter.

5.1.4 What explains the slide from internal to external self-determination?

Catalonian officials have offered two reasons for Catalonia's right to unilaterally decide their collective future[45]. First, it is argued that after 40 years of dictatorship under President Franco's Spain and 40 years since then as a Republic, Catalans have had the space to think about their claims in a democratic context and that this space has allowed them to carefully think about Catalan's place in the world. Catalan's historic claim to nationhood is invoked, as is the cultural memory of the loss of sovereignty on September 11, 1714 when the Spanish King defeated Catalonian forces. The right to decide their collective future, it is argued, is the main ingredient of the demand to hold a referendum. Further Catalonia's strong affiliation as a European nation and the democratic ethos of the European Union has arguably provided the context for Catalonia's quest to become an independent partner within larger Europe. Catalonia, unlike Scotland (as we shall see later), has continuously invoked the right of self-determination under international law in its articulations.

Second, Spain's intransigence towards Catalonia's demand for reform of their self-governmental powers within a larger Spain (i.e., expansion of the right to internal self-determination) and the refusal to constitutionally recognise Catalonia's inherent self-governmental powers.[46] Catalans claim that since their repeated efforts to reform the Spanish system for almost a decade failed, they are now entitled to hold a referendum to decide their political future. The following paragraph from a Catalan Government document is a good example

[44] Sam Jones, 'Spanish court remands Catalan presidential candidate in custody' *The Guardian* (Madrid, 23 March 2018)
[45] See generally (n 30)
[46] For detailed exposition on these matters: Government of Catalonia, 'White Paper on the National Transition of Catalonia: Synthesis' available here: (2014) http://economia.gencat.cat/web/.content/70_economia_catalana/Subinici/Llistes/nou-estat/catalonia-new-state-europe/national-transition-catalonia.pdf 17, 21.

of how the Catalans feel that they are permanent minority within the Spanish democratic system through which no reform effort is likely to produce results:

> The process of statutory reform and the ruling of the Constitutional Court are irrefutable proof that Catalonia has failed in its attempt to gain recognition and a high degree of self-government in a truly multinational state. They also show that, as a group with their own territorial aspirations, the citizens of Catalonia have the status of a permanent minority in Spain and cannot hope to obtain suitable political and legal guarantees within the Spanish State. Using effectively democratic mechanisms (in the strict sense of voting within the various branches of government of the Spanish State), the majority can at any time modify and reduce the powers of the Generalitat to the extent that they become insignificant.[47]

The reluctance of the Spanish authorities to engage or accommodate the aspirations of the Catalan political class may be owing to fears of triggering similar demands from other regions. Accommodating Catalonia within the flora group of communities (with full fiscal autonomy) would also in all probability mean that the Spanish Central State's financial base would significantly erode. Hence accommodating Catalonia's demands would require a fundamental overhaul of the foundations on which the 1979 Constitution was founded. In other words, a new Spanish Constitutional order would be required to address Catalonian demands. But Spain has been reluctant if not outright adamant in rejecting the need for such an overhaul. Rather the counter from the parent state has come in ideological terms as will be seen below.

The clash of constitutional vision between the Spanish State and the Catalonian officials finds very clear expression in the Spanish Constitutional Courts determination[48] on the constitutionality of the November 2015

[47] Government of Catalonia, *Internationalization of the poll and the self-determination process of Catalonia* (October 2014) page 21 <http://presidencia.gencat.cat/web/.content/ambits_actuacio/consells_assessors/catn/informes/inf_4_angles.pdf> accessed 15 December 2018

[48] Constitutional Court of Spain, Judgment 259/2015, (02 December 2015) (Unofficial translation posted on the Court's website) <https://www.tribunalconstitucional.es/ResolucionesTraducidas/STC%20259%20-%202015%20%209N%20(English).pdf> accessed on 15 December 2018

resolution[49]. In the November 2015 Resolution previously referred to the Catalan Parliament directly invokes the language of 'constituent power' of the Catalans.[50] It describes the process as a process to 'democratically uncouple' Catalonia from Spain. It further argues that given that the process initiated is a constituent process, the Spanish institutions including the Constitutional Court have no legitimacy to comment on its constitutionality:

> The Parliament of Catalonia, as the depositary of sovereignty and the expression of the constituent power, reiterates that this Chamber and the process of democratic uncoupling from the Spanish State shall not be subject to the decisions of the institutions of the Spanish State, in particular the Constitutional Court, which it considers devoid of legitimacy and jurisdiction following its Judgment of June 2010 on the Statute of Autonomy of Catalonia, previously voted on by the people in a referendum, among other Rulings.[51]

It is noteworthy that the argument for ousting the Constitutional Court's legitimacy to rule on its resolution is founded on the decision by the Constitutional Court to invalidate significant portions of the Catalan Special Autonomy Law which was arrived at through a constitutional process of negotiation with the Spanish State. Hence Catalonia is, as argued above, relying on asserting its constituent, inherent, sovereign, democratic powers to uncouple itself from larger Spain while also at the same time pointing to the refusal by Spanish institutions to respond to its legitimate demands for enhancing self-government within the larger Spanish State. In other words, Catalonia argues in the resolution that their turn to external self-determination mostly flows from the Spanish institutions failure (in particular that of the

[49] Resolution 1/XI adopted by the Parliament of Catalonia, of 9 November 2015, 'On the beginning of the political process in Catalonia arising from the election results of 27 September 2015' available here https://www.parlament.cat/document/intrade/153127 accessed on 15 December 2018

[50] Ibid, Para 2: 'The Parliament of Catalonia hereby solemnly declares the beginning of the process to create an independent Catalan State in the form of a republic'; Paragraph 3 of the Resolution, 'The Parliament of Catalonia proclaims the opening of a citizen-led, participative, open, inclusive, and active constituent process to lay the foundations for the future Catalan constitution'.

[51] Ibid, Para 6 of the Resolution.

Constitutional Court) to uphold the agreement arrived at through a process of negotiation to empower the internal self-determinatory capacity of Catalonia.

The Spanish Government's response in the Constitutional Court deliberations over the constitutionality of the Catalan Parliament's resolution found Catalan's invocation of 'constituent power' as an attack on the 'rule of law' and democracy as understood in the Spanish Constitution. The Resolution, it was argued by the representative of the Spanish Government in court,

> 'aim(s) to break up the framework of constitutional coexistence in that the Parliament of Catalonia is attributing to itself the condition of a constituent Chamber, changing the system of representative democracy which is the source of its legitimacy into a kind of plebiscitary system, calling upon the people and the Government of Catalonia to disobey the shared rules of coexistence and, ultimately, dispensing with the legitimate constitutional channels to amend these shared rules, encouraging others to a unilateral break. Spanish constitution'.[52]

The court agreed with the Spanish Government and went on to make the claim that the constitution was the only repository of political legitimacy, 'If one does not obey the Constitution, one cannot claim any legitimacy whatsoever. In a democratic conception of power, there is no other legitimacy than that established in the Constitution'.[53] Leaving no room for doubt it argued for a very narrow unitary conception of the demos:

> 'The sovereign people, conceived as the ideal entity for attributing constituent power, confirmed, by referendum, the text that had been previously agreed on by their political representatives. The Constitution's unconditional supremacy also safeguards the principle of democracy, so guaranteeing the entirety of the Constitution must, in turn, be seen as preserving due respect for the will of the people, as expressed through the constituent power, which is the source of all legal and political legitimacy.'[54]

[52] as reproduced in the Court's judgment (n 48) p. 6
[53] (n48) para 5 page 23.
[54]ibid

The court however noted that Spain was not a militant democracy and advocacy for a new constitutional order was a legitimate act. However, the court argued that this advocacy should follow the form and procedure laid by the Spanish Constitution. Drawing from its previous judgment on the Catalan Autonomy Statute of 2006 the court argued that the recognition of Catalan as a legal entity meant the affirmation of the Constitution of Spain which emphasises the indivisible unity of the people. It identified the Spanish Constitution's vesting in the whole of the Spanish people as the sole repository of sovereignty and ruled that no other expression of sovereign will is legal or legitimate unless it involves the entirety of the Spanish people.

The problem with this line of argument is that it holds Catalonian desires for self-determination hostage to a constitutional reform process which Catalonia considers unfair. The Spanish constitution requires a 2/3rds majority in both chambers of the Spanish Congress and approval by a majority of self-governing autonomous communities for any constitutional reform. The Spanish Government and Constitutional Court's position that the only legitimate constituent power is the Spanish people defined as a whole is at the heart of the crisis. The problem which the Spanish authorities refuse to engage with is that the Catalonian authorities see the framing of the process for constitutional change within a larger Spain as being majoritarian-conditioned within which the Catalans have no real say. The refusal to imagine a democratic process in legal terms outside of the existing constitution's framing of the *demos* led to the hardening of its position on the part of Catalonia and to a constitutional and political crisis that seems intractable.

The Constitutional Court's approach underscores the limited resources that liberal constitutional ideas provide in responding to constitutional issues in deeply divided societies. The Spanish Constitutional Court is emblematic of many institutions of State in liberal democratic countries who by their refusal to see the more foundational challenge being brought by sub-state societies to the very idea of how the State is conceived risk creating the foundation for a breakup of the state.

The current crisis in Catalonia hence strengthens the thesis advanced in this study that internal self-determination is unlikely to succeed if the state and its people are conceived as forming one unified whole. The reference to a unitary state here does not necessarily refer to a functional unitary state but to a unitary conception of the state in terms of its identification of the demos and the location of sovereignty. The Spanish example then is a reminder that even a fairly decentralised system of government is insufficient to respond to claims of self-government if the ideological conception of the state as a unitary state remains intact.

5.1.5 The International/ European Response to the Catalan crisis

The unanimous response of both European States and others to the Catalonian Referendum vote was to back the Spanish Central Government.[55] The European Commission issued a statement stating that the matter 'is an internal matter for Spain that has to be dealt with in line with the constitutional order of Spain'.[56] It further went on to state that 'We call on all relevant players to now move very swiftly from confrontation to dialogue. Violence can never be an instrument in politics. We trust the leadership of Prime Minister Mariano Rajoy to manage this difficult process in full respect of the Spanish Constitution and of the fundamental rights of citizens enshrined therein. Beyond purely legal aspects, the Commission believes that these are times for unity and stability, not divisiveness and fragmentation'. Germany stated that 'the sovereignty and territorial integrity of Spain are and always will be inviolable' and that it will not recognise the Declaration, while calling for dialogue between the parties. The United States noted that 'Catalonia is an integral part of Spain, and the United States supports the Spanish government's constitutional measures to keep Spain strong and united' seemingly endorsing Spain's crackdown on Catalonian officials and activists who were behind the referendum. Canada for its part noted that it 'recognises one united Spain and

[55] Al Jazeera, 'World reacts to Catalonia calls for independence' *Al Jazeera* (28 October 2017) <https://www.aljazeera.com/news/2017/10/world-reacts-catalonia-calls-independence-171027221353642.html> accessed 15 December 2018

[56] European Commission, 'Statement on Events in Catalonia' Statement /17/3626 (02 October 2017) <http://europa.eu/rapid/press-release_STATEMENT-17-3626_en.htm> accessed 15 December 2018

urged for talks to be held 'according to the rule of law, according to the Spanish constitution, according to the principles of international law'.

The response was anything but typical. Almost all states that responded, including the European Union, stuck to language of sovereignty and territorial integrity. However, some while emphasising the 'internal nature' of the problem also placed stress on the need for dialogue as well. This was as far states were willing to travel. International policy and law continues to provide very little guidance to States that face crisis like the one Spain did.

The Catalan experience with the EU also is suggestive that the EU is no different from nation-states in managing self-determination claims. It is another example of the EU not being willing to further the political contours of its project beyond market integration. The reference to 'divisiveness and fragmentation' in the European Commission statement is suggestive of a hangover from the Brexit experience while it was more than clear that the Catalan project was pro-European. The EU response to Catalonia, some scholars have argued, is evidence for the EU being more of an association of nation-states rather than citizens[57] and its unwillingness to move towards a federal mode of governance which may help resolve tensions such as the one in Catalonia by making nation-sate boundaries even more irrelevant. From this point of view then, the argument that Europe must embrace 'internal enlargement'[58] that is in line with the values of the European Community has found in effect its Waterloo in the Catalonian context.

Some scholars like Neil Walker[59] however emphasise that the EU in its current dispensation cannot be expected to do more than adopt a position of 'conservative neutrality' that is state deferential on questions of secession. He however argues that the mere presence of Europe which directly engages with

[57] Joan Costa, 'The Catalan independence movement is pro-EU but will the EU accept it?' (*LSE Blog*, 10 October 2017) <http://blogs.lse.ac.uk/europpblog/2017/10/10/the-catalan-independence-movement-is-pro-eu-but-will-the-eu-accept-it/> accessed 15 December 2018

[58] Jordi Matas, Alfonso Gonzalez, Jordi Jaria and Laura Roman, *The Internal Enlargement of the European Union: Analysis of the Legal and Political Consequences for the European Union in the Even of Secession or Dissolution of a Member State* (Centre Maurtis Coppieters 2010)

[59] Walker, Neil, 'Beyond Secession? Law in the Framing of the National Polity' in S. Tierney (ed) *Nationalism and Globalization* (Hart, 2015).

sub state nations (through for example the Committee of Regions which has increased stature under the Lisbon Treaty) helps it to shape these debates indirectly. The presence of Europe as an actor Walker argues has already reframed the debate:

> (S)elf-determination and secession have the status of liminal concepts within their respective legal fields. They necessarily operate at and around the threshold of legality, so to speak, located both within and outside the boundary of legal authority. This restricts the effectiveness of each, as well as the terms of their mutual engagement. However, once the EU enters the picture as a 'third player', a more fertile set of possibilities emerges. By dint of its very interposition of a new level of legally coded political community, it can do more than offer a third stream of regulatory principle. That is to say, as well as adding its own (very tentative) voice to constitutional law and international law as a regulator of the terms of political community within its territory, and so contributing to the appropriate legal conditions and procedures of state-making, recognition and dissolution, EU law is in addition constitutively involved in the basic 'framing' - or reframing - of legal community. For its very emergence as a legally constructed political entity alters the elementary calculus through which we attribute value - both instrumental and expressive - to forms of political life at, above and below the level of the state. And while the full consequences of this reframing exercise remain unsettled and unpredictable, they are already reshaping political expectations and aspirations in ways that alter our very sense of the relevance of 'secession' and associated statuses'

In essence Walker's argument could be interpreted to mean that Spain cannot ignore for long the continuous expression of Catalonian desire for a better constitutional framing owing to the status of Catalonia as a region in Europe and the character of Catalans as European Citizens. This is a marginal but positive influence that the European Union may have over self-determination conflicts within Europe.

5.2 The Scottish Referendum experience:

Scotland provides a countervailing example to Spain in that despite being a unitary state, the acknowledgement of the plurinational foundations of the United Kingdom may contribute in a long way to the successful accommodation of a sub-state nation's right to self-determination within a larger state.

Scotland enjoys a very high degree of powers of self-government compared with the rest of the other two sub-state nations of Wales and Northern Ireland. Devolved matters to Scotland include agriculture, forestry and fisheries, education and training, environment, health and social services, housing, law and order, local government, sport and the arts, tourism and economic development and many aspects of transport. Reserved matters include benefits and social security, immigration, defence, foreign policy, employment, broadcasting, trade and industry, nuclear energy, oil, coal, gas and electricity, consumer rights, data protection and the Constitution.[60] The Scotland Act of 2012 and 2016 have sought to remedy the fiscal imbalance between the UK and Scotland that existed at the initial stages of devolution. Prior to 2012 Scotland had less than 10% of control over taxation when compared with its expenditure powers. Following the 2012 and 2016 reforms this is expected to raise to 36%. Scotland has also complained over its lack of powers over benefits. The Scotland Act of 2016 has only attempted to devolve some minor powers over benefits.

5.2.1 The idea of a union state and its impact on the self-determination discourse in the UK

A curious feature of Scotland's exercise of self-government is its placement within a unitary state structure. Unitary states locate power at the centre and if there is any devolution it exists on the will of the centre. The term devolution itself is considered suspect by sub-state nations as it impliedly suggests that it

[60] Schedule 5 of the Scotland Act of 1998 as amended in 2012.

is granted at the will of the centre and not as a matter of right. Hence the creation of the Scottish Parliament in 1997 by an Act of the UK Parliament remains a unilateral act which the UK Parliament has competence/sovereignty to abolish at its will. This also means that the devolution settlement provided through the Scotland Acts can be rescinded by the UK parliament acting unilaterally. However, the 'Sewel Convention' assures the Scottish people that the UK Parliament will not normally legislate on matters that have been devolved to Scotland. The UK Government adopted 'Devolution Guidance Note 10' that provided for a legislative consent process in the Scottish Parliament before the UK Parliament could enact a piece of legislation on devolved matters. The newly enacted amendments to the Scotland Act in 2016, enacted as a consequence of the promises made by the 'No' campaign in the Scottish referendum of 2016, provide that the 'Scottish Parliament and Government are permanent institutions of the constitutional arrangements of the UK'[61] and that these institutions cannot be abolished 'except on the basis of a decision of the people of Scotland voting in a referendum'.[62] It also provided for a statutory provision on the Sewel convention. But it still remains that the UK Parliament can legally abolish the Scotland Act by a simple majority in Parliament irrespective of the new commitments. As Neil Walker has pointed out,

> "since, according to the pure theory of Parliamentary sovereignty, no Parliament can in law bind its successors, then the durability of new legislative rules, including any rule purporting to make a particular institution a permanent constitutional fixture, can never be guaranteed"[63]

The UK Government accepts this point. In response to a report by the Constitutional Committee of the House of Lords the UK Government stated

[61] 63(A) (1) of the Scotland Act of 2016
[62] 63 (A) (3) of the Scotland Act of 2016.
[63] Neil Walker, 'Written Submission to the Scottish Committee on Devolution (Further Powers)' in *New Powers for Scotland: Final Report on the Scotland Bill* (Scottish Parliament: 3rd Report; 2016: Session 4)

that the new section on the permanency of Scottish institutions will do nothing to alter the principle of Parliamentary Sovereignty.[64]

Some, however, consider these limitations to be only formal. The political commitments that cut across all mainstream political parties in England are considered to be far more important in guaranteeing the permanency of the Scottish institutions than legal guarantees. This points to the existence of a very different culture of the notion of a unitary state in the UK. The unitary conception of the state in the UK, as Diceyan accounts of public law confirm, is interlinked with the doctrine of parliamentary sovereignty, which is formally the 'top rule'[65] of the constitution. The 'rule of recognition'[66] in the UK constitutional order is the legal omnicompetence of the 'institutional complex' of the Queen in Parliament. It hence follows that the structural features of the constitutional order must be unitary in nature in which power is concentrated and centralised in a single authoritative institution. However, politically the concept of a unitary state has remained a flexible concept capable of accommodating a politically wide diversity of 'constitutional structures and visions'. One such flexible concept that has blunted the unitariness of the UK State is the idea of the UK as a union state. The concept of a Union, as Neil Walker explains, 'unlike "unit" which is the nominal term from which the notion of a "unitary state" is derived, implies the continued existence of the parties to the Union, albeit now joined in a settlement of permanent or at least indefinite duration'.[67] As Walker further explains the idea of a union state restrains the unitary character of the state largely due to the lack of coherent first principles that defines UK constitutionalism. The notion of parliamentary sovereignty in modern public law has also lost much of its original calibre as evidenced in

[64] Letter from the Parliamentary Under Secretary of State of HM Scotland Office addressed to the Chair of the Constitution Committee of the House of Lords dated 11 January 2016 available here <http://www.parliament.uk/documents/lords-committees/constitution/Scrutiny/Scotland-Bill-Government-response-110116.pdf> accessed on 15 December 2018

[65] H. W. R. Wade, 'The Basis of Legal Sovereignty' (1955) Cambridge Law Journal 172, 187-9.

[66] H. L. A. Hart, *The Concept of Law* (2nd Ed., OUP 1994): Chs.6, 10.

[67] Neil Walker, 'Scottish Nationalism for and Against the Union State' (2011) University of Edinburgh School of Law Working Paper No. 2011/25 available here <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1941668> accessed 15 December 2018

judgments like *Thoburn*[68] which presents the context for a plural reading of sovereignty in UK.

A particular manifestation of this relaxed sense towards unitariness is reflected in UK political attitudes towards Scotland's push for a referendum on secession. Unlike in Spain, the issue of whether Scotland is a nation or whether the Scottish Nation has a right to vote in a referendum was not contested by any of the major political parties. There was no claim from UK-wide parties that the constituent power rested with the people of the United Kingdom as a whole. The Claim to Right Document which is regarded as a fundamental document[69] that provides the political foundations of the Scottish Parliament declared that Scottish people had a sovereign right to choose the best form of Government. The expression of sovereignty as residing in the Scottish people and the articulation of that right as a right to choose the best form of Government is in accordance with the approach to right to self-determination espoused in this thesis. The Scottish National Party refused to take part in the process that led to the claim of right document because it did not explicitly identify independence as one such choice available to the Scottish people. But in 2012 the SNP brought the Claim to Right document to be voted in the Scottish Parliament the SNP explained that the document did not endorse the principle of independence, but it acknowledged the principle of deciding on independence. This approach to self-government is very much in line with the approach supported by this thesis that internal and external self-determination exist in a continuum and that the exercise of an internal self-determination cannot be understood as giving up of external self-determination.

What is most interesting about the UK is however that this assertion of the right to choose self-government by a sub state actor was not challenged by the host state. As early as 1954, when there were no autonomous institutions in

[68] *Thoburn v. Sunderland City Council* (2003) QB 151 *per* Laws LJ: *dicta* that suggests a hierarchy of legislation recognising 'constitutional statutes' which includes the devolution Acts, and which are not susceptible to the doctrine of implied repeal.

[69] See for example the debate in the House of Commons on the 'Claim of Right Document on 06 September 2016: 'The Claim of Right is not, or is no longer, a historical document. It is a concept, and indeed a fundamental principle, that underpins the democratic and constitutional framework of Scotland'. HC Deb 06 September 2016, vol 614column 64WH

Scotland, the Royal Commission on Scottish Affairs had acknowledged that "Scotland is a nation and voluntarily entered into union with England as a partner and not as a dependency". The Conservative Party which opposed devolution throughout took the position that Scotland had the right to become independent if it so wished but that it had no right to autonomy as long as it remained within the union – in effect arguing that self-determination only existed in its external variety and not internally. This is for example represented in former Conservative Prime Minister Margaret Thatcher's memoirs, who argued that "[a]s a nation, they [the Scots] have an undoubted right to national self-determination; thus far they have exercised that right by joining and remaining in the Union. Should they determine on independence no English party or politician would stand in their way".[70] However for Thatcher this "right to national self-determination" did not give Scotland the right to more autonomy within the UK in the form of a devolved Parliament, because Scotland "cannot claim devolution as a right of nationhood inside the Union", but it did mean that Scotland could unilaterally choose to become independent. Thatcher's successor, John Major, had also asserted that 'no nation could be held irrevocably in a Union against its will'.[71] The Conservative Party (in coalition with the Liberal Democrats) more recently in the lead up to the Scottish referendum has repeatedly described the UK as a "multi-national" or "multi-nation" state and acknowledged that it had been one ever since its foundation in 1707: "The Acts of Union of 1707 […] marked the beginning of a single multi-national state, which has become one of the most successful partnerships of nations in history.[72]"

5.2.2 UK's acceptance of Scotland's right to self-determination within the UK's constitutional apparatus.

In the inaugural report of its Scotland Analysis series published in 2013 and 2014, the then UK Government (a Conservative-Liberal Democrat coalition

[70] Margret Thatcher, *The Downing Street* Years (HarperCollins 1993) 624.
[71] UK House of Commons, *Scotland in the Union: A Partnership for* Good, 'Foreword by the Prime Minister' (Cm. 2225, March 1993) 5.
[72] HM Government, *Scotland analysis: Devolution and the implications of Scottish independence* (Cm. 8554, February 2013) para 1.2.

government) linked its acceptance of a Scottish independence referendum with what it described as the UK Governments' long-term acceptance of Scotland's right to independence. It explicitly noted that the UK Government has consistently taken the position that Scotland could be a viable independent state and Scotland has the right to choose that path.[73]

> recognis[ing] that Scotland has the right to leave the UK if a majority of people vote for it in the referendum in 2014: that choice rests with people in Scotland.

It went further to claim that successive UK Governments have said that, should a majority of people in any part of the multi-national UK express a clear desire to leave it through a fair and democratic process, the UK Government would not seek to prevent that happening.[74] Interestingly, in the same report, it shied away from saying that this amounted to Scotland having a primary right to secession or self-determination. On the contrary, it was noted that:

> 'Outside the colonial context, the principle of self-determination is controversial. The Canadian Supreme Court has held that "a right to secession only arises under the principle of self-determination of peoples at international law where 'a people' is governed as part of a colonial empire". In metropolitan territories such as Scotland, "peoples are expected to achieve self-determination within the framework of their existing state'.[75]

Hence there was political willingness that the Scots could decide their collective future and form of Government, including in the form of an independent state, but there was reluctance on the part of the UK to link this to the right of self-determination. In other words, the right to self-determination as a matter of domestic constitutional law (linked to the Act of Union of 1707) was recognised by the UK Government but there was reluctance to link this to the international law right of self-determination. There is very little literature as to why the UK Government has been reluctant to link the Scottish right to

[73] ibid, para 2.2.
[74] ibid para 2.1.
[75] ibid, p. 106.

independence to the broader international right of self-determination. One probable reason is because the UK Government, while acknowledging Scotland's right to decide their future, did not want to acknowledge it as an exercise in self-determination. But it is also likely that the UK saw the Scottish case as being *sui generis* to the particular constitutional context of the United Kingdom and of no import to the larger question of the right to self-determination in International Law, i.e its acknowledgement of Scots right to independence did not extend to similarly situated sub-state actors outside the UK. As shown elsewhere in this thesis (See Chapter 3), States have frequently argued that their endorsement of what would be otherwise be a classical self-determination situation was *sui generis* and not the acceptance of a general principle of international law. The use of *sui generis* arguments to argue for the inapplicability of the international law of self-determination is one reason why the state of the law remains in flux.

Interestingly Scottish pro-independence groups have also not made a strong claim for Scotland's right to self-determination under international law. At the time of the SNP's first electoral victory of May 2007, when the UK Government had not yet agreed to the holding of an independence referendum in Scotland, the first White Paper that was published by the nationalist Government noted that the Scottish people had always retained a right to "determine their own constitutional future". However, the SNP Government stuck to domestic constitutional law arguments to substantiate its claims:

> The Union between Scotland and the other nations of the UK did not remove from the people of Scotland their fundamental political right to determine their own constitutional future. The Republic of Ireland and the countries of the former British Empire chose to move to independence from similar constitutional arrangements. The people of Scotland remain sovereign and have the same right to choose the form of their own Government as the peoples of other nations that have secured independence after periods of union with, or in, other states.[76]

[76] *Choosing Scotland's Future – A National Conversation : Independence and Responsibility in the Modern World* (Scottish Government, August 2007) p. 19.

Only in the draft Scottish Independence Bill of June 2014 was the international law on self-determination resorted to:

> Self-determination developed during the 20th century and has been codified in the fundamental and universal documents of the international system, such as the Charter of the United Nations in 1945 and the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights of 1966. The referendum, and becoming an independent country, would be an act of self-determination by the people of Scotland. However, self-determination is permanent, and that principle would continue to be respected following independence by the on-going democratic nature of Government in Scotland.[77]

The sophisticated reference to self-determination as both a right to independence but also as a continuing right post-independence is noteworthy. But the reference to self-determination was not otherwise dealt with in any detail in the referendum campaign. However, it is not surprising that Scotland unlike Quebec and Catalonia did not have to resort to the international law of self-determination when such a right was not being denied. As Michael Keating has pointed out:

> A Scottish right of self-determination, implicit in the concept of union, has remained at least implicitly in all discussions about the constitution. The consequence is that the ethical questions about the right of self-determination that bedevil debates around secession in other states have hardly arisen in the Scottish case.[78]

The identification of Scotland and the Scottish people as the constituent people and the UK's decision to give the Scottish Parliament the power to define the exact manner in which the referendum would be meant that self-determination was not an issue:

> Because the issue of the right to self-determination had been resolved (at least on a temporary basis) by the Edinburgh Agreement, the

[77]Scottish Government, *The Scottish Independence Bill : A Consultation on an Interim Constitution for Scotland*, (June 2014) p. 28.
[78] Micheal Keating, *The Independence of Scotland: Self-government and the Shifting Politics of Union* (OUP 2009) 81.

> campaign focused on the social, economic and security implications of independence and union[79]

As Christine Bell notes UK's handling of 'who' has a right to decide has lessons for actors who find themselves in other similar contexts:

> The United Kingdom's accommodation of self-determination challenges could be understood to depend on historic notions of 'relevant political and national' communities that have their roots in the different processes of state formation by which the United Kingdom was formed out of constituent nations. This approach can usefully contribute to a better international understanding of 'who' exactly has a right to be heard, and how far they should be listened to and accommodated. The United Kingdom's answer to the question of 'who' has the right to be heard and 'to what end' is effectively that groups who have strong historical arguments that they should be included in first-order decisions of the state's political form should be responded to, to the extent that their ongoing consent is necessary to the state's on-going stability and legitimacy—something that depends on the resonance of their claim as regards the state's foundational political settlement[80]

The language of self-determination also saw a re-appearance in the Scottish political landscape following the Brexit referendum in which a majority of England voted to leave the European Union and a majority of Scotland voted to remain. The First Minister of Scotland, in response to the UK Prime Minister's claim that the vote for Brexit was an exercise of the right to national self-determination, countered saying,

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[79] Michael Keating, 'The Scottish Referendum and After' (2018) 27 'Revista d'Estudis Autonomics i Federals' Magazine of autonomic and federal studies 73-98 at 79.
[80] Christine Bell, 'International Law, the Independence Debate, and Political Settlement in the UK' in Aileen McHarg, Tom Mullen, Alan Page, and Neil Walker (eds), *The Scottish Independence Referendum: Constitutional and Political Implications* (OUP, 2016) 197 – 222 at 203.

> ‘For a prime minister who on Wednesday proclaimed Brexit as an exercise in self-determination to now seek to block Scotland’s own right to self-determination would be democratically indefensible’.[81]

The First Minister was responding to the UK Prime Minister’s remarks that she would block a second referendum, and to the lack of consultation on the part of the United Kingdom before triggering the process of exiting the European Union under Article 50 of the European Union.[82] The First Minister of Scotland’s argument in this context was a challenge to the notion that self-determination matters are settled in a particular moment, asserting the right of Scotland as a sub-state nation to self-determination, in a continuum.[83]

The mild use of self-determination language may be contrasted with that of its use in the Northern Ireland context. The Belfast Agreement explicitly identified the right of self-determination with a majority of the Northern Irish people. The Belfast Agreement provides that a majority of the Northern Irish people by vote could decide whether to remain with the Union State of the UK or to become part of larger Ireland. This was also provided for in the Northern Ireland Act of 1998 passed by the UK Parliament[84]. The Northern Irish problem had an international dimension in which the State of Ireland had an abiding interest and hence the resort to self-determination language could probably be explained by reference to the status of the conflict as being international. Furthermore, the status of Northern Ireland as a constituent community was contested in the Northern Ireland context whereas in the case of Scotland its status as an equal partner in the Union State was not contested at all. Two conclusions may be derived from this comparison. Firstly, that a more explicit

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[81] Nicola Sturgeon, ‘May cannot now preach to Scotland about self-determination’ *The Guardian* (29 March 2017) <https://www.theguardian.com/commentisfree/2017/mar/29/theresa-may-scotland-prime-minister-brexit> accessed?

[82] See for example, Nicola Sturgeon, Letter from the First Minister of Scotland to the UK Prime Minister (30 March 2017) <https://firstminister.gov.scot/first-minister-letter-delivered-to-prime-minister/> accessed 15 December 2018

[83] ibid (n 78).

[84] Section 1 of the Northern Ireland Act 1998 provides that “It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section”

reference to self-determination is resorted to by a sub-state actor where such right is contested in the domestic constitutional sphere and secondly that the host state cannot avoid reference to self-determination where the political contestation takes a violent form and/or attracts international/third party-state involvement.

5.2.3 Lessons from the Scottish experience:

I shall now turn to three issues of importance from the Scottish referendum debate that are critical to those matters on which this thesis has focussed.

a) During the campaign for referendum, the supporters of Scottish independence focussed on making the case for independence based on the notion of 'utilitarian nationalism' i.e that an independent Scotland was necessary to build a better Scotland. It was argued as an important and last block in the democratic process initiated with the devolution process. It was not built explicitly on the basis of an existentialist nationalist claim. Some members of the independence camp in fact completely divorced the campaign from nationalism. For them independence was a rational choice not a nationalist choice. The pro-independence campaign also sought to identify the pro-union campaigners with the neo-liberal policies of more austerity and increased cuts in public services particularly the National Health Service. The target here was not English nationalism per se but the neo-liberal economics of the Conservative Party and that of New Labour. In fact, the preference for neo liberal economics was increasingly identified as a characteristic of English politics which was contrasted with the welfarist ideology of Scottish politics. The continuation of a Scottish welfare state was thus linked to the creation of a separate state. The utilitarian argument however was vulnerable to policy arguments over whether an independent Scotland would best achieve a better Scotland or whether remaining in the UK would achieve this aim. However, as Aileen McHarg has argued this dichotomisation of the 'utilitarian' and 'existential' visions of nationalism is untenable. It is impossible to delink the argument for secession – the creation of an

independent political unit – without reference to some sort of distinctiveness. The utilitarian argument for an independent Scotland also has to make arguments for a Scotland as an independent political unit where democratic majorities would be formed:

> The key assumption which underpins the democratic deficit argument is that Scotland is a distinct political unit, and indeed the primary political unit in which democratic majorities are to be calculated. This is turn rests upon an assumption that Scotland is a nation with a right to political self-determination. In this basic sense, the instrumentalist case for independence is as much a nationalist position as the existentialist one.[85]

b) Another interesting aspect of the pro-independence campaign for the purposes of this thesis was the Scottish Government's decision to advocate a model of independence that showed appreciation with the idea of 'post-sovereignty'. This model put forward a Scottish state as a modern European state that was an active partner of the European Union and the shared vision for a larger political Europe. More particularly it stood for close ongoing ties with the rest of the UK on a transitional or more permanent basis. Proposals put forward by the Scottish Government included that of a currency union, a single energy market, a shared head of state, defence cooperation, shared financial regulation, a common travel area, reciprocal citizenship and voting rights, shared social security administration, coordinated transport networks, and shared scientific, technical, and research programmes with the UK. The pro-union campaigners came to ridicule this campaign for an independent state as 'independence lite' and more fundamentally as a mere tactic designed to reassure risk-averse voters that nothing much would change upon Scotland becoming independent. The UK

[85] Aileen Mcharg, 'The Constitutional Implications of Independence' in Aileen McHarg, Tom Mullen, Alan Page, and Neil Walker (eds), *The Scottish Independence Referendum: Constitutional and Political Implications* (OUP, 2016) 101-125 at 105

Government also responded arguing that the kind of interstate cooperation being suggested by Scotland had no parallels anywhere else in the world. But a more sympathetic assessment of this approach by the Scottish Government/SNP locates the approach as an attempt to come to terms with the conditions of 'post-sovereignty'. In other words, according to Aileen McHarg the Scottish Government had a far better understanding than their critics of the inevitable constraints upon the autonomy of states in an increasingly globalized world, and of the non-categorical nature of contemporary statehood[86]. What is most interesting for the current thesis is that the Scottish independence campaign suggests the blurring of lines between internal and external self-determination and the impossibilities of drawing a neat line between the internal and external variants of the right. The Scottish independence campaign was a reluctant campaign for external self-determination because it recognised the impossibilities of an absolute right to external self-determination. It valued the continuation of a unionist approach in the social, economic and cultural realms while preferring for the fullest possible autonomy in the political realm. The kind of institutional model that fits such an aspiration for self-determination needs more radical departures than what traditional internal self-determination models like federalism offers but those that are less pervasive than the notion of statehood known to international law. This is another reason why internal and external self-determination need to be seen as a continuum of rights rather than fixed categories. But it also emphasises the need to conceive self-determination as self-government, as this thesis has argued, which is adequate to deal with the diversity of claims and aspirations made in the name of the right to self-determination while also distinguishing the claim to right to self-determination from lesser forms of group rights like minority rights.

c) The independence campaign lost at the referendum but the Scottish question is not settled. The pro-union campaigners sought to portray it

[86] ibid 113.

as a ‘once in a life time of a nation’ referendum the results of which could not be revisited anytime in the near future. It pointed to the fact that the pro-independence campaign itself had taken such a position in its urging of the voters to take part in the referendum process and for a ‘Yes’ vote. The pro-union campaign, particularly the Prime Minister, was quick to point out that this was a historic decision that could not be revisited. However the SNP submitted differently and in its 2016 Scottish Parliament elections manifesto argued that there could be another referendum if there was a material change in the circumstances after the ‘no’ vote. Scotland’s overwhelming preference to stay within the European Union and England’s preference to leave is now being suggested as such a material change in circumstance and the SNP is now using this argument to not just explore the possibility of a second referendum but to use Brexit as an opportunity to enhance the powers of Holyrood and for a greater stake for the Scottish Government in participation in international affairs. Through the latter the Scottish Government is exploring the option of Scotland remaining within the European Union with the rest of the UK outside, while at the same time remaining within the UK. This would mean fundamentally altering Scotland’s constitutional relationship with the UK and may even satisfy the kind of ambitions that the SNP set itself for the 2014 referendum campaign, for political autonomy while continuing the social union. If these attempts fail the Scottish Government argues that it will be forced to consider the option of independent statehood again. These events point to the ever constantly negotiated nature of self-determination claims and the impossibility of exhausting self-determination claims through momentous events through which the exercise of the right is performed.

5.2.4 Key lessons for internal self-determination from the Global North.

This section seeks to tease out the key lessons to be learnt from the case studies above in relation to the four issues identified in the introduction.

1. **Recognitional aspects of self-determination in the context of internal self-determination**

Both case studies reveal that recognitional matters are important to sub state communities as much as the substance of self-government. Polls in Catalonia show that the demands for a referendum are much higher than the support for pro-independence. The refusal to accept the uniqueness of the Catalonian situation exacerbated by the constitutional court's ruling on the preambular paragraph on Catalonia's status as a 'nation' and the watering down of the provision for bilateralism in the Catalan Autonomy statute of 2006 is understood as a Castilian attempt at keeping the Catalonians inferior in the constitutional ordering of the Spanish state.

In contrast in Scotland the political acceptance of Scotland as a 'nation' is given. The willingness with which UK-wide parties conceded to a referendum by Scots, voted by Scots with regard to the future political status of Scotland was in stark contrast to the Spanish attempt at denying the right to make the will of the people heard. The rest of the UK's political and legal recognition of the distinctiveness of Scotland helps build trust among the different communities and keeps alive the possibility of self-governmental aspirations being fulfilled. The legalistic denial of recognition as evidenced in the Catalonia case creates an environment for distrust and may even push a sub-state population towards believing that a separate political existence outside of the parent state is the best option for exercising the right of self-determination.

Political-legal recognition of the pluri-nationality of the state can also aid in the development of the forms of self-government under consideration. It gives confidence that even though institutions established for sharing power may be inadequate at the present moment, the recognition that the sub state unit is unique and distinct would mean that through negotiations and dialogue those institutions can be incrementally improved over time. This trust building is

essential for an incrementalist approach. Some comparative constitutionalists like Hanna Lerner have articulated that constitution making in deeply divided societies has evolved successfully on an incremental basis by avoiding the settlement of foundational aspects of the state to future political institutions.[87] But as Tierney has suggested, recognition of the plurality of the demos and the state plays an important role that signals to sub-state actors that they will be treated as equals in the process of constitution making.[88] Hence a complete avoidance of the 'foundational aspects of the State' in constitution making may be counter-productive in that it may alienate communities further and create distrust in a constitutional scheme which otherwise is promising in substance.

2. The form of self-government and internal self-determination

Scotland shows that a very strong degree of self-government or internal self-determination is possible within a unitary state, while Catalonia is an example of a federal constitution being worked in practice like a quasi-unitary state. Hence the unitary vs federal debate might not be instructive towards the forms of self-government that will satisfactorily provide for a formula of internal self-determination. Scotland and Catalonia are however good examples of the fact that while sub-state actors emphasise their sovereignty and self-determination, they are not averse to different types of self-government less than separate statehood. Hence a progressive re-articulation of the foundational aspects of the state as pluri-demos coupled with genuine attempts at an ongoing conversation of bettering the arrangement for shared competences may provide the basics for a successful arrangement for internal self-determination.

[87] Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (OUP 2011)

[88] 'In many ways sub-state national societies consider the extent to which the host state accepts that the nature of the state is indeed pluri-national, and that the nations of the state is indeed pluri-national, and that nations of the state relate to one another *egal-a-egal*, is to be found in the states attitude to these questions. Such recognition by central organs of the state can also have practical and symbolic significance; it can set the normative framework for the constitution which can then inform constitutional process in a broad way' Stephen Tierney, *Constitutional Law and National Pluralism* (OUP 2004) 235.

3. Referendums as an emerging tool for strengthening self-determination claims

The Catalan case study shows that a denial of a referendum has legitimacy costs for the parent state. As previously stated in the Catalan case it was found that support for the right to hold a referendum need not necessarily translate into a pro-independence vote but the continuous denial of the right to vote may enlarge the pro-independence base. Given that referendums have become the common norm by which major constitutional questions are decided in Europe, it has become an enormous strategic tool in the hands of sub-state societies in Europe. This may strengthen the bargaining power of sub-state actors and may in fact help loosen up the intransigency of the parent state, paving the way for a better deal for self-determination within the parent state. On the other hand, referendums also have the potential of dichotomising the question of self-determination as being between choosing a separate state and the status quo. This is *contra* the more complex demands that sub state entities make which seek a redefinition of the manner in which nation-states currently work to more complex arrangements of sovereignty. The referendum process, because of its inherent nature of providing a choice between two binaries, holds the danger of simplifying the choice and options available to sub state entities.

4. The role of supra-state entities in self-determination disputes

Both in the Scottish and Catalonian contexts as previously referred to the European Union remained deferential to the parent states adopting a stance of conservative neutrality. But as referred to previously, Walker has argued that the presence of Europe had an influence on the debate in shaping the demands of the sub-state actor (with both Scotland and Catalonia declaring themselves wedded to the European project) and the host state acknowledging the need to engage in dialogue. While the ‘contextual presence’ of Europe in the debate may in the perspective of European sub-state nations be inadequate, compared to the Global South, the institution of Europe is an encouraging factor for sub-state nations who would otherwise

feel the pressure of a state-centric international order that treats them as outcasts. The broader point here is that the soft power of supra-state institutions does add value to navigating claims for self-determination in a relatively even-handed manner. The logical extension of this argument it is submitted would underline the argument made in this thesis that a better articulation of the content of the post-colonial right to self-determination will help resolve intractable conflicts that arise out of sub state entities' claim to self-government. While that articulation (of the post-colonial content of the right to self-determination) cannot be expected to be very precise and detailed, it can do better than the fundamental ambiguity from which it currently suffers.

CONCLUSION

1. Introduction:

Stephen Ratner in his most recent book[1] presents a lucid defence of a non-ideal theory of international law and provides different examples from international law for the approach that he defends. In relation to self-determination he states the following:

> Err too far on the side of peace, or order, and the result is the absence of an important remedy for the evils of colonialism or serious violations of human rights. Err too far on the side of individual or group preferences, whether driven by cosmopolitan or communitarian starting points, and the result is a serious threat of internal conflict and interstate wars. Indeed, in the case of self-determination, the thin justice to which its norms largely *do conform* may well be the only standard of justice to which its norms *should* conform. Unless the case can be made that (a) secessions can be undertaken peacefully; and (b) a world full of seceding states better protects the human rights of individuals compared to the status quo, an alternative rule, based on some thicker standard of justice, is likely to make things significantly worse. Ethnonationalism has tremendous costs to human welfare, and it remains for the defenders of a norm more tolerant of secession to demonstrate the advantages in the world that we have, with the institutions we have[2].

Leaving aside Ratner's non-ideal theoretical approach to international law, the problem in what Ratner says above is the unfair burden cast by Ratner on arguments such as those presented in this thesis, which argue that international law can do better in response to self-determination claims. The burden on us is not to prove that secessions can better protect the human rights of individuals or that secessions can be undertaken peacefully. To

[1] Stephen Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (OUP 2015)
[2] ibid 182-183

assume that secession is what self-determination movements seek is in itself, as this thesis has repeatedly pointed out, the fundamental mistake that Ratner makes. It is self-government that the claim for self-determination centres around. This is the core of the claim that nations make. And it is that must be the core of the principle of self-determination, not secession and it is this is what its internal dimension should capture. The claim of this thesis is that if one takes self-government seriously then there is no reason to fear secessions. What this thesis has shown then is that it is possible to thicken the norm of justice (in relation to self-determination) without rocking the secession boat and one that significantly furthers both individual and group rights.

The objective of this thesis as stated in the introduction was to explore the possibilities of deepening the normative content of internal self-determination in public international law. The thesis has identified the current status of the principle and right of self-determination in international law as it pertains to the subject, pointed to areas where the state of the law is indeterminate, suggested an approach to resolving the indeterminacy and hence has a certain amount of *lex ferende* character to it.

The thesis makes a general claim with regard to the essential meaning of self-determination in international law i.e. that it means self-government (Chapter 2). While this meaning is manifest in the manner in which the principle of self-determination has evolved within public international law (as demonstrated in Chapter 1), per *lex lata,* the claim that self-determination (in whatever its variations) is about self-government is best treated as a *lex ferende* claim. But Chapter 1 I hope shows that this claim of what constitutes the essential meaning of self-determination is not totally out of sync with the manner in which the principle has evolved over the years within public international law.

The application of self-determination as a measure of self-government (whether in its internal or external variant), the thesis has suggested is a question at the contested penumbra of the concept of self-determination in international law. It has been argued that understanding the penumbra of the principle of self-determination requires a study of how the principle has been applied in a particular context, and in the case of internal self-determination

the relevant context is the constitutional law of states that have deeply divided societies. The claims made by the thesis as to the possible meaning of internal self-determination are thus policy claims that I argue should inform our penumbral application of the right to self-determination in deeply divided states. Hence the claims are relevant to the application of international law today, not just *ferenda*. These policy claims may take more generally the form of the international law in the future and in this sense, it is a project in *lex ferenda*. That is to say the thesis has made the claim that the advances made in the constitutional law of some of these countries might prove valuable to other contexts and hence form part of a broader, more universal understanding of internal self-determination i.e. that such lessons may be useful for other countries where constitutional law has been reluctant to look beyond 'nation-state' constitutionalism. Thus, the thesis has sought to advance the argument that an enriched understanding of internal self-determination may help nudge a state towards becoming more plurinational. The use of the term 'nudge' here is advanced from not as much a liberal paternalistic view,[3] leading States towards adherence of better standards resulting in advancing the goal of peace, which is at the centre of the international law project,[4] but also as a broader debate of how one may strive to do better. This approach to reform in international law while prescriptive is non-hierarchical and stresses on the value of progressing by way of mutual learning.

2. The theory of internal self-determination advanced in this thesis.

The thesis advances a theory of internal self-determination which has ***four*** elements.

The study has demonstrated that the restrictive reading of internal self-determination as minority rights or participatory rights in governance is a mistake. This study has demonstrated that a necessary condition of self-determination is self-government, but that it has never been about a particular

[3] About liberal paternalism and policies of nudge see Richard H. Thaler and Cass Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness* (Penguin Books, 2009)
[4] Malcom Shaw, International Law (4th ed. CUP, 2005) 717.

institutional form of self-government, even in the colonial period i.e. a separate state. The study shows that in the post-decolonisation period there was a heightened, albeit mistaken interest in relegating the right of self-determination to a human right and hence the resultant reading of internal self-determination as being focused on minority rights or participatory rights within existing states. The collectivist articulation of internal self-determination for indigenous peoples has been consciously kept away from peoples who consider themselves stateless or sub-state nations. To-date the international law on self-determination outside the colonial and indigenous context is caught up in the restrictive narrow individual and democratic norm-based view of international law.

This study has pushed back on this narrow reading of internal self-determination and through an analysis of what stateless nations seek, has argued that it would be unproductive to read down their demands as relating to minority rights and participatory rights. **Claims to rights as minorities and the demand for participatory are different and distinct from claims to self-determination, it was argued. Claims to self-determination are different – they are about self-government. The study has attempted to draw attention to the importance of this distinction and to further clarify it.** The study importantly pointed out the need to recognise the temporal plurality in the nature of claims that groups can make over time in that it is possible for a group that self-conceives itself as a minority may depending on circumstances redefine its claim to self-determination *qua* self-government. It was stressed that it is very important that international law distinguishing between these claims in a much more clearer manner.

Building on the above the thesis is what I highlight as the second element of a theory of internal self-determination, that **internal self-determination is not a distinct principle as such and that it is part of the general principle of self-determination.** The thesis has argued that if the right to self-determination is a right to self-government, and if one accepts that peoples in post-colonial states also have that right, that the right should accrue to all stateless / sub-state nations as well. While separate statehood is undeniably the highest form of self-government, stateless nations, contrary to popular

belief, are not fixated on a separate state as the only institutional setting that will satisfy their self-determination claims. The study concludes that internal self-determination, i.e. self-governmental arrangements within the existing state, can satisfy self-determination claims.

However, the study argues **that both a separate state i.e. secession and autonomous self-government within an existing state have to be interpreted as part of the same continuum of the right to self-determination.** On the strength of this argument, the study has averred that the internal expression of self-determination does not mean the said people have lost their right to external self-determination. This is the third element of the theory of internal self-determination advanced through this thesis.

The fourth element of the theory of internal self-determination this thesis has tried to chalk out is to do with the question of when internal self-determination should give way to external self-determination. I argued that this must depend on an assessment of values that inform the different purposes of the rules of international law at clash in a given context relating to the question of the legitimacy of external self-determination. In Chapter 3, I argued that most often than not it is the rule of territorial integrity that that the principle of self-determination clashes with. If the value for upholding territorial integrity is stability, I argued that sometimes external self-determination may help achieve that value of stability, which the rule on territorial integrity just cannot, as it did in the case of Kosovo. I also argued that the value of stability and hence the rule of territorial integrity cannot be the only values that inform this debate but conceded that it would be impossible to elaborate this in an exhaustive manner. But as I have alluded to in Chapter 4 international law and policy must have tools to engage host nations that are intransigent. Throughout chapters 2, 3 and 4 I have argued that understanding external self-determination from such a principled approach to self-determination might be a better alternative to the remedial secessionist theories of external self-determination. More particularly I have argued that irretrievable break down of trust between the host-state and sub-state actor particularly in the context of protracted violence must be used as an approach to evaluating the demand for external self-determination.

3. Some salient aspects of internal self-determination

The study has also examined the question of what internal self-determination may constitute in practice. Kosovo, Sri Lanka, Indonesia (Aceh), Catalonia and Scotland were studied in trying to draw an answer to this question. While care has been taken to show a diversity of instances from which an answer to the question posed may be drawn, **the limitation of the case studies means that the conclusions derived from them must remain provisional, and open for further testing in future studies**.

The following conclusions are, however, discernible from the discussion of these case studies:

Firstly, internal self-determination requires that the host state is willing to restructure the state along pluri-national lines.

A common thread across chapters 3, 4 and 5 is that the political willingness of the host state to appreciate the distinctiveness of the stateless nation was critical to the success of any arrangement for autonomy / self-government within the host state. Where there was no such demonstrated willingness, internal self-determination has proved unworkable (Catalonia, Sri Lanka, Aceh). However, where such acknowledgment was forthcoming constitutional dialogue was still possible though not without difficulties (Scotland). Lack of constitutional recognition of the distinctiveness of the sub-state nation / stateless nation also could render an otherwise strong autonomy unattractive (Catalonia).

Secondly, while no particular model of self-government can be prescribed as satisfying or not satisfying internal self-determination, a unitary state in principle is inconsonant with the idea of internal self-determination.

No particular form of government can be argued as *ipso facto* satisfying internal self-determination. It would be impossible to come up with such

generalisation. However, given the very centralising nature of the idea of a unitary state, unless backed by a strong culture indicating otherwise (UK) a unitary state has proven to be largely unaccommodative of internal self-determination (Aceh, Sri Lanka). To the contrary the federal idea with its contractarian groundings seems apt to accommodate different forms of internal self-government within a larger state.

Thirdly, where there is a history of violent armed conflict, for internal self-determination to be considered a viable alternative there must be a significant amount of international / third-state under-writing for the peace agreement to be successful.

In Chapter 4, it was argued that in protracted social conflicts where there has been violence, a history of broken pacts and promises in the past and a political culture of extra-constitutionalism, internal self-determination, purely as a matter of constitutional law cannot provide adequate answers. The analysis of the case studies in chapter 4 shows that sub-state societies reach out to the international realm to provide the guarantee necessary for sustaining the gains made under a peace agreement. Sub-state societies are desirous of converting agreements reached on internal self-determination into international obligations that are binding on host states. Furthermore, sub-state societies also attempt to perpetuate their hard-won deals on internal self-determination by keeping the option of external self-determination open as part of the peace agreement. This is even more difficult than internationalising a peace agreement but not altogether impossible as the Bougainville case study shows.

Fourthly, where internal self-determination is impossible because the dominant nation of the host-state is systemically unwilling then external self-determination must be available as an option.

As has been argued above the willingness of the dominant nation in the host state is absolutely crucial. To take the requirement of the duty to negotiate in

good faith as articulated in the *Quebec Secession Reference* to its logical conclusion will mean that the *mala fides* of the dominant nation in this regard must give rise to the possibility of external self-determination. The contrary is also however true as well. If the stateless nation does not engage in negotiations in good faith any claims to external self-determination must be deemed illegitimate.

4. The contribution of the thesis.

The thesis broadly speaking contributes in the following manner:

Firstly, the attempt to specify the core meaning of the principle of self-determination in the post-colonial context as self-government and locate its internal variant within such conceptualisation, it is submitted, is an original contribution to the field. Academic commentary on internal self-determination has been engaged with and an alternative conceptualisation that draws from a diversity of sources - political theory, comparative constitutional law of deeply divided states and the praxis of sub-state nations/stateless nations - has been proposed.

Secondly, the thesis contributes to a better understanding of how one may distinguish between different group rights claims – particularly self-determination and minority rights. It has also discouraged a static and time-frozen understanding of the claims that groups make. The thesis has shown that the claims may evolve over time – what I have called in the thesis as temporal plurality – and that our responses must be commensurate to this reality.

Thirdly, the thesis contributes by way of understanding the right of self-determination in its internal and external variant as existing in a continuum and thus breaking down the artificiality that existed between the variants.

Fourthly, the thesis provides international actors engaged in peace building with conceptual tools and analysis in relation to the practice of internal self-determination such as the recognitional aspects of a political settlement, the form of government that may provide for a satisfactory level of self-government

and the desire for third party guarantees for the durability of an internal self-determination arrangement. With the aid of more in depth study of comparative constitutional law in this area, there is scope for further thickening our normative understanding of internal self-determination in the future.

Finally, the thesis developed on internal self-determination herein, it is submitted, can make a distinct contribution to international law and policy on peace building. A deeper appreciation of internal self-determination, similar to the one outlined in this thesis it is hoped would contribute to a better appreciation of internal self-determination as a viable path to the goal of self-government thus discouraging secessionist tendencies and encouraging the exploration and building of plurinational societies.

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