

# **Rethinking the Right to Secession: A Democratic Theory Account**

By

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To the best of my knowledge this thesis contains no materials previously written or published by any other person, except where it was so indicated. This thesis contains no material accepted for the award of any other degrees in any other institution.

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## Abstract

Existing theories of secession take three different paths regarding holders and justifications of the right to secession. The national self-determination theories and the plebiscitary theories both take secession to be a primary right, however identify different groups as holders of the right. According to the national self-determination theories nations are to be allotted the right to secede in virtue of them being a nation and according to plebiscitary theories the holders of the right should be territorially concentrated groups, the majority of members of which vote in favor of secession. On the other hand, the remedial right only theories take the right to secession to be a derivative right upon injustices the state inflicts on specific groups within its boundaries, e.g. gross human rights violations, unjust annexation and violation of intra-state autonomy agreements. All of these theories are faced with more or less damaging objections. While the national self-determination theories and the plebiscitary theories are too permissive and so could lead to limitless fragmentation, strategic bargaining and paralyzing of state functioning, the remedial right theories seem to involve a paradox; though they are designed in a way that would prevent violence, they seem to have a counter effect and promote violence. In addition to this, the former types of theories cannot be seen as good grounds for secession, since they conceive of it as a primary right, which the right to secession cannot be. The latter theories, on closer inspection, turn out to be too narrowly construed, and so only able to address a limited number of cases of justifiable secession.

The aim of this dissertation is to develop a new, comprehensive theory of secession, which is able to free itself from the objections raised against the existing theories and can adequately explain how secession is possible considering the claims states have against their people and against other states. It seeks to do so by setting up guidelines for a complete theory by looking into detail into the nature of the right to secession and point out theoretical misconceptions and puzzles of the existing theories. I develop the theory within the framework of democratic

theory. The key concept of this dissertation is the concept of legitimate boundaries. I claim that secession is not possible as long as the boundaries of a state are legitimate and *vice versa*. The state can be said to have legitimate boundaries as long as it has legitimate political authority and I take the best version of it to be democratic authority. Since authority cannot be limitless, I identify the main limits to democratic authority. On my account secession becomes justifiable when the state has lost legitimate authority on both the intrinsic/inherent and instrumental dimension. The notion of legitimate boundaries, in combination with the residual right argument, then explains that even though the state does not have legitimacy of boundaries anymore other states and the state's population cannot just divide the territory without further ado. However, I identify trumping circumstances that enable certain groups of the failed state to take a part of the territory and create their own state.

In addition to developing my own account I also show that secession is not a primary right, since that either entails that the state is seen as a voluntary association, which a state is not and cannot be, or it entails that secession is an instance of self-determination, however even if we can find arguments for understanding self-determination in its external sense, we can only do so in terms of appealing to some injustices thereby rendering it a derivative and not a primary right.

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## Introduction

In the aftermath of massive political reorganizations in the last decade of the previous century there has been a rapid proliferation of the theoretical literature on the problem of secession. If before the literature on the issue was rather scarce and not fully developed, then after many detailed and relatively strong theories in favor of political secession have been elaborated. The aim of all of them was to determine which groups under what circumstances have the right to sever themselves from the political obligations of their state and form a state of their own on the territory they were occupying within the 'old' state by showing that the groups have a legitimate claim to the territory they are attempting to take.

Three main paths have been taken. The first identifies nations as the right holders and attributes the right to secession to them in virtue of them being a nation, and desiring to be self-governing. The second takes the group that should be allotted the right to secession to be a territorially concentrated group that gets the right to secession by means of referenda in which the majority of them vote in favor of seceding. Both of these see secession as a primary right and ground the right in the fact that the groups cease to authorize the state as having legitimate political authority over them. The third, on the other hand, sees secession as a derivative right. Secession is allotted to groups that have suffered some kind of injustice from the state and are given the right to secession as a remedy for these injustices. In addition, secession is seen as a last resort option. Thus, the right to secession does not arise due to the group's belief that the state does not have legitimate authority over them, but rather the state by some action or other loses legitimate political authority over that group. These theories are referred to as remedial right only theories.

None of the three, however, are without its weak points and all have been more or less heavily criticized. The criticism was mostly directed at the possible outcomes these theories would have, had they been adopted as *modus operandi* in solving secessionist conflicts. The primary

right theories are objected to on the grounds of being too permissive and so making secession too easy to achieve. This can lead to all sorts of negative outcomes, most notably to the limitless fragmentation of states, to strategic bargaining used by the seceding groups and to harming the normal functioning of the state, since when exit is made too easy the parties are not that invested in taking part in deliberative processes.<sup>1</sup> On the other hand, the remedial right only theories, though they seem to be very well suited to ground secession, as they are rather stringent, can be seen as problematic since they allow secession in a very small number of cases and even then though secession is urgent from a moral point of view it is very hard to achieve.

This dissertation aims to develop a comprehensive theory of secession that can avoid the criticism brought against the existing theories of secession and can adequately explain how secession is possible considering the claims states have against the people living within them and other states. In addition to that it seeks to compile a set of guidelines that any theory of secession should consider and point out possible puzzles theories of secession due to the nature of the problem of secession can lead to. By means of these it points out not only the problems current theories of secession are faced with, in terms of the possible outcomes they would produce, but also identifies basic theoretical misconceptions on which these theories are based on. With this move it provides us with a more comprehensive understanding of the nature of the right to secession and explains how these connect to some of the negative outcomes that have been raised as objections against the existing theories. Furthermore, this dissertation attempts to seek the solution for all the shortcomings of the existing theories in a field that thus far has not said anything about the right to secession explicitly, i.e. democratic

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<sup>1</sup> This objection follows Albert O. Hirschman's objection made in connection with leaving organizations in 1970, *Exit, Voice, and Loyalty*, Cambridge, Mass.: Harvard University Press. This objection is further elaborated in subchapter 1.2 of this dissertation.

theory, though it is intimately connected to secession considering that secession is an instance of collective decision making.

More concretely, I argue that in order to have a complete theory of secession, the territorial component of the theory should not be limited to giving the argument for the legitimate claim to the territory, but in addition should look at it more broadly and address the issue of legitimate boundaries. On my account, secession is not justifiable as long as the state has legitimate boundaries, i.e. as long as the state can be said to possess sovereignty and territorial integrity. With this move, I am able to directly address the issue of how secession is possible in light of the state's claim to territorial integrity and sovereignty, and furthermore in detail address how the territory of the state, after it has lost legitimate boundaries, can be divided, and amongst whom it can be divided. Since the legitimacy of state boundaries is inseparably connected with the issue of legitimate political authority, my approach also makes it possible to directly address the issue of how, and under which circumstances, the seceding group can sever itself from the political obligations of the state, and point out the limits to legitimate political authority. I create my account within the framework of democratic theory, meaning that I argue that democratic authority is one of the best instances of legitimate political authority, and then single out possible limits to democratic authority, connecting the whole to secession through the employment of the discussion on legitimate boundaries. With this I create an account supporting the right to secession that takes the debate to a new sphere, since none of the theories of secession thus far dealt with the question of how secession would be possible as a derivative right from a democratic state that is not grossly violating human right or intra-state autonomy agreements.

Moreover, I argue that secession should not be treated as a case of self-determination, since the two, though they are connected, cannot be said to be the same, and so secession should not be seen as an instance of self-determination, but rather should be seen as a separate process,

that may to a certain degree include issues of self-determination. Even though self-determination in its external sense can be said to entail secession, I argue that none of the theories that employ the notion of self-determination as grounding secession provide us with an argument as to why self-determination should be understood in its external sense and more importantly how it could ground secession as a primary right.

I also attempt to show that secession cannot be seen as a primary right, but rather that it is a derivative right that derives upon certain violations of a well-functioning democracy, i.e. it derives from the violations of the principle of the public realization of equality. I argue against it being a primary right, because this either entails that the state is seen as a voluntary association, which a state is not, and moreover cannot be, or it entails that secession is an instance of self-determination. However, even if we can find arguments for understanding secession in its external sense, we can only do so in terms of appealing to some injustices thereby rendering it a derivative and not a primary right. Furthermore, when considering the two approaches that view secession as a derivative right, i.e. the remedial right theories only and my approach, it turns out that my approach includes all the justifications that the remedial right approach puts forth, yet is not limited to the justifications of the remedial right only theories. This makes the democratic theory approach, developed in this dissertation, broader in scope as so able to cope with the objection that it addresses only a small number of cases.

I begin Chapter 1 by setting the stage for general criteria any theory of secession should take into consideration, in order for it to be a complete theory of secession. I do that by first dealing with the concept of secession, explicating what exactly the concept includes and entails. I then turn to creating the guidelines of what every comprehensive theory of secession should include in order to give us a complete insight into the nature of the right to secession and its possible outcomes. The aim of this chapter is to make a general overview of the existing theories of secession, point out the strengths and the weaknesses of the existing

theories and make explicit the potential of a possible democratic theory of secession, considering the established guidelines for a complete theory of secession. The chapter examines the existing theories of secession. They are divided into two main conceptual categories, i.e. the primary right theories and the derivative right theories. It is shown that the primary right theories suffer from objections connected to the fact that they are too permissive, i.e. the limitless fragmentation objection, the strategic bargaining objection and the paralyzing of the normal functioning of the state objection. On the other hand, the remedial right theories suffer from the objection that even though they are supposed to be designed in a way that is a last resort option of oppressed groups, and are aimed at diminishing violence, they may just have violence as a consequence. It is furthermore shown that even though a democratic theory of secession does not exist yet, the elements of a possible one seem very promising.

Chapter 2 builds on the conclusions reached in the previous chapter. It asks the question of whether or not the remedial right theory should be the only one that grounds the right to secession, considering that the national self-determination theories and the choice theories are faced with very serious objections. The aim of this chapter is to look at possible ways to amend the existing theories of secession so that they are made stronger and by that are able to avoid the criticism raised against them in Chapter 1, and by this determine whether there are more theories suitable to ground secession. The intuition behind this is that it would seem wrong to deny the right to secession, if the decision for it was arrived at both collectively and democratically. I first look at the national self-determination theories and determine that they are ultimately unfit to ground secession, not only because it is not possible to amend them in a way, which would make them less permissive, but also due to the fact that they cannot provide us with a satisfactory explanation as to what makes nations morally more important than any other group. Then I consider choice theories and make some procedural amendments

to them, which make the theories much less permissive and so they seem to be a fit candidate to ground secession. That, however, leads me to conclude that it would seem that different theories of secession would apply to different situations, and so in cases where the situation is more relaxed and procedures readily available, choice theories of secession would be the proper ones to be used, and in situations where the stakes are high and moral situation deteriorated, the remedial right only theories would be the best pick. This, however, leads us to a puzzle. Where secession is most urgent from a moral point of view it is almost impossible to achieve in a justifiable manner, and where secession is not at all urgent, it is relatively easy to reach. This leads me to reconsider the conclusion that choice theories are a fit candidate for grounding secession by showing that it is mistaken to hold that secession is a primary right.

Chapter 3 is the most important chapter of this dissertation. It creates the background and the argument for the democratic theory of secession. The main thesis out of which the democratic theory of secession is developed is introduced at the beginning of this chapter. It states that as long as a state has legitimate boundaries, secession is not possible and *vice versa*. It continues by exploring when the state can be said to have legitimate boundaries and connects the notion of legitimate boundaries with the notion of legitimate political authority. I then give arguments for democratic authority being the best option of legitimate political authority. In order to connect these notions to secession I turn to identifying the limits to democratic authority, and by that creating the backbone for the argument for democratic theory of secession. I make the distinction between the inherent/intrinsic and the instrumental dimension of democratic authority and show that secession is only possible, if the state fails on both dimensions. In order to solve the problem of how to divide the territory, and who has the right to do so, I turn to the residual right argument and the notion of legitimate boundaries. Namely, even if the legitimacy of the boundaries is lost, this does not entail that the territory of that state is up for grabs. The residual right argument shows that other states don't have a

legitimate claim to the territory on the one hand, and on the other claims the residual right against the people of the failed state, preventing them from dividing the territory amongst them.<sup>2</sup> I show that while the first part of the argument is true, the second is not, since there are trumping circumstances that make it possible to divide the territory. I conclude the chapter by making the argument for the democratic theory of secession.

The last chapter of this dissertation, Chapter 4, brings together all the important findings of the dissertation. It starts by spelling out the democratic theory of secession, making it explicit, and pointing out its strengths and weakness, addressing the weaknesses as they present themselves. It also tests the democratic theory of secession against the guidelines for a complete theory of secession, and looks at how the democratic theory of secession fares in respect to the puzzle identified in Chapter 2.

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<sup>2</sup> The residual right argument has been put forth by Anna Stilz in 2011, “Nations, states and territory” in *Ethics*, Vol. 121, No. 3, pp. 572-601. It will be dealt with in detail in subchapters 3.4.2 and 3.4.2.1 of this dissertation.

## Chapter 1: The Concept, Guidelines and Existing Theories

Secession as a real political issue has been around for centuries and it does not seem likely to go away. Looking just at the period since the Second World War until now, there are approximately sixty secessionist conflicts, out of which half can be seen as ongoing or unresolved.<sup>1</sup> On the other hand, secession as a theoretical philosophical issue is many times said to have been neglected until the early nineties of the previous century, which however on a closer look is not entirely true. The issue has been, though not exclusively, dealt with as soon as in the 16th and 17th centuries by the natural law theorists, e.g. Hugo Grotius, Johannes Althusius and Francisco Suarez. Following the theoretical conventions of political theory in their age, they were analyzing the relations between the ruler and the ruled, and their contractual relations. Secession came to the forefront only as a special and extreme solution in terms of a justified resistance against the unlawful ruler or unlawful rule. Theories solely dealing with secession, however, only came into existence much later, namely with the debate between Harry Beran and Anthony Birch on what a liberal theory of secession should be, in the late eighties of the 20th century. Along with the massive reorganizations of political boundaries in Eastern Europe, with the break-ups of the Soviet Union and the Socialist Federal Republic of Yugoslavia, came a fast proliferation of the philosophical theories of secession. The theories took three different stances toward secession, treating it either as a right belonging to nations, a right of territorially connected people expressing their choice to secede in referendums and a remedial right, treating secession as a last resort option and a remedy for past injustices.

In this chapter I will present the main theories of secession and evaluate whether all of the theories can be seen as good grounds for justified secession. Before I will do that I will begin

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<sup>1</sup> Alexis Heraclides, 1997, "Ethnicity, secessionist conflict and the international society: towards normative paradigm shift," in *Nations and Nationalism* 3 (4), 493-520



by defining what is meant by the concept of secession, and juxtapose it with concepts, which are at the first sight very similar, yet are fundamentally different. In addition to that, I will take a look on some basic things every complete and sound theory of secession should consider, by means of closely looking at the nature of the right to secession.

### *1.1 Secession: The Concept*

The term secession is many times used in the context of self-determination, dissolution and devolution. Though these processes are in many ways connected, they are by no means synonymous and thus we must take caution not to use them interchangeably, since that might create confusion in the least or be downright wrong. Secession may be defined as follows:

Secession is the process by which a group seeks to separate itself from the state to which it belongs, and to create a new state on a part of the territory of that state. It is not a consensual process, and thus needs to be distinguished from the process by which a state confers independence on a particular territory by legislative or other means, a process which may be referred to as devolution or grant of independence. Secession is essentially a unilateral process.<sup>2</sup>

There are two very important aspects in this definition that need to be pointed out and emphasized. First, it is a **group** that is the holder of the right to secession. There are some theorists that believe that the right can be attributed to individuals.<sup>3</sup> However, it seems that such an idea is misconceived and results from omitting important features of secession from the consideration. Taking into consideration that by secession a new state on the territory of the old state is created, there are at least two problems for individual secession. Though it is surely true that with good skill and imagination a theory of a one-man state could be created, such a theory would still be implausible and unfeasible. For a state one needs a society (contractual association of men) and institutions. In a one-man state the first does not exist

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<sup>2</sup> James Crawford, 1997, "State Practice and International Law in Relation to Unilateral Secession." Acquired on April 7 2007. Retrieved from: [http://www.justice.gc.ca/en/news/nr/1997/factum/craw\\_pt1.html](http://www.justice.gc.ca/en/news/nr/1997/factum/craw_pt1.html).

<sup>3</sup> Robert W. McGee, 1994, "Secession Reconsidered" in *Journal of Libertarian Studies* 11:1 and Michael Otsuka, 2003, *Libertarianism without Inequality*, Oxford: Clarendon

and the second could exist, but would be redundant. The second aspect that is problematic in the case of an individual secession is the fact that by secession, the individual would take the territory with him/her. For that s/he would have to establish a rightful claim to the territory. The fact that a comprehensive theory of secession needs to include the rightful claim to the territory has rightly been put forward by Lea Brilmeyer<sup>4</sup> and later picked up by Allen Buchanan.<sup>5</sup> The importance lies in the fact that if one forgets about the territorial component, and takes secession as merely a group breaking away from a given state, the door is opened for bizarre cases. A group of people, who want to create their own state, could just move to any piece of land of their preference and secede from the state that piece of land used to belong to, taking the piece of land of their preference with them. Such a group could do that on any piece of land, not even necessarily belonging to the state they originated from. Thus, it would appear obvious, that a legitimate claim to the territory has to be a necessary condition for justified secession. Going back to the individual secession, it seems that it would be very hard to establish a strong claim to the territory. One could claim that one is the owner of the property and so has the right to it. While this is true, it is not a strong enough claim to establish the right to take that territory away from the state. One may be able to show that one is in legal possession of the house or the apartment, maybe even a plot of land, but one could not, without an additional argument take this to be enough to remove this territory from the state.

There is one very important qualification that needs to be made at this point, though it might seem evident from the above. The right to secession is deeply connected to the territorial component, in the sense that not all groups can have the right to secede- we need a territorially concentrated group. If the group is not territorially concentrated, then it obviously

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<sup>4</sup> Lea Brilmeyer, 1991, "Secession and Self-Determination: A Territorial Interpretation" *Faculty Scholarship Series*. Paper 2434. [http://digitalcommons.law.yale.edu/fss\\_papers/2434](http://digitalcommons.law.yale.edu/fss_papers/2434)

<sup>5</sup> Allen Buchanan first picked up this idea in 1991, "Toward a Theory of Secession" in *Ethics*, Vol. 101, No. 2 but it then reoccurs in most of his work on secession.

cannot secede, since it cannot take a part of the territory. What comes to mind are various cultural or sexual minority groups, who might have a good argument for secession otherwise, i.e. that their rights are being violated by the state, but whose members are dispersed all over the country or even beyond the boundaries of one country. Secession in such cases is not a valid option, since the group cannot present a valid claim to a specific part of territory, thus in such circumstances other solutions must be employed.

Apart from the territorial component, perhaps the most important feature of secession is the fact that establishing the voice, i.e. the wish of a group to secede, is executed by means of a collective decision making process. Since I believe that the collective decision making process plays an important role when it comes to secession, I also believe that it contributes to the fact that secession is to be seen rather as a group right than a right that can be exercised individually. Whereas it is only implicit in the definition at hand, in order for there to be secession there needs to be someone demanding it. It is not just conferred on random groups, because they have certain characteristics, or they fulfill certain requirements that would make secession justified. A group needs to voice that they are seeking secession. The question then is how they do it, and who can do it.<sup>6</sup> Whereas some groups have clear representatives, and they are obvious candidates for the ‘who can do it’, since they are either elected or in other ways agreed upon representatives of the group, others yet need to elect or agree on the representatives. One can imagine cases where there need not be any representatives, but the decision to secede still needs to be arrived at collectively. This fact seems almost self-evident. If there is no collective decision, and one need not give a proper voice when demanding secession, then we seem to be saying that if there is a group A and a random member of A (x) decides that he wishes to secede, then if x voices his wish, and happens to be successful, the whole group is effected and it is very possible that the majority of members of A did not wish

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<sup>6</sup> This idea was put forward by Allen Buchanan in 1991, “Toward a Theory of Secession” in *Ethics*, Vol. 101, No. 2 and 1991, *Secession : the morality of political divorce from Fort Sumter to Lithuania and Quebec*, Boulder : Westview Press

to secede. Such a result would be bad for many reasons, but mostly and most fundamentally it is wrong, because persons in this kind of situation are not being respected as autonomous individuals, nor are they being treated as equals. If we want to ensure that people are being treated as equals, then we need to ensure that everyone (every adult) gets an equal say on the matter, and that only the decision reached by the collective in such a way can be seen as authoritative.

Second, secession is a **unilateral** process. Unilaterality is the most basic feature of secession. When we speak about a group seceding from a given state, we are not speaking about situations in which there has been an established process or dialogue between the state and the separating unit, which resulted in a consensual decision that the separating part may leave. What we are speaking about are the cases where a group in the absence of dialog or consent, one sidedly proclaims independence and by this seeks to create a new state. Cases which cannot be seen as unilateral cannot be seen as instances of secession either. Hence a good, comprehensive definition of secession should stress that the process is unilateral to avoid the possibility that more cases might fall into it than should. A clear example of such incomplete definition is the one of Harry Beran: “Secession is the withdrawal of a part of an existing state from that state and its central government, consisting of citizens and territory they occupy. The seceding part lays no claims to the legal identity of the existing state and usually is the smaller part of it.”<sup>7</sup> The main problem with the definition at hand is that there are processes similar to secession, which lack the fundamental feature, i.e. they are not unilateral, and are thus to be differentiated from secession. Two of such similar processes are devolution and the granting of independence. Devolution is the process in which the central government of a state statutorily grants powers to a government at a sub-national level, i.e. regional, local, or state level. The powers devolved may be temporary and ultimately reside in central

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<sup>7</sup> Harry Beran, 1984, “A Liberal Theory of Secession,” in *Political Studies* XXXII: 21-31

government. It thus differs from secession, because in the case of devolution the state remains unitary, whereas in the case of secession it does not. Devolution can for instance be observed in Great Britain, where Scotland and Wales have their own parliaments and have strong autonomy, nonetheless are not separate units from Great Britain itself; at least not yet. The granting of independence, while it results in the separation of a state into different independent, sovereign units, still cannot be conflated with secession, precisely because of the fact that it is consensual. In some literature the separation of Norway and Sweden in 1905 is referred to as secession, whereas that is misleading and simply not right. The countries agreed to separate and create two different states, and so we cannot talk about secession, but ‘only’ of a consensual separation. Returning to the definition put forward by Beran, it can be observed that it cannot account for the difference between consensual and non-consensual cases and thus mistakenly stamps cases which are not instances of secession as such. Perhaps a little less important point but nonetheless worth mentioning is that if the process is not unilateral but consensual, then there is not much need for a normative theory since there is no problem. Separation of certain unites from existing states only becomes problematic, when the *status quo* is challenged by unilateral declarations of independence, which might have implications for the key concepts like sovereignty, territorial integrity, political authority, etc., which in light of such declarations might be reconsidered.

There are two other concepts worth dealing with in the context of secession. The first is a process which in fact is triggered by secession, but has an importantly different end-result. The process in question is dissolution. Dissolution may be triggered by secession or attempted secession of a part of the state. However, if the process “...involves a general withdrawal of all or most of the territories concerned, and no substantial central or federal component remains behind, it may be evident that the predecessor state as a whole ceased to exist...”<sup>8</sup>

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<sup>8</sup> James Crawford, 2005, *The Creation of States in International Law*, New York: Oxford University Press, p.391

This points us to one more basic feature of secession. When the process of secession is completed the newly created state forms a new legal political unit, whereas the state the part seceded from, i.e. the rump state retains its government, legal and political identity minus the withdrawn part. On the other hand, when we speak about dissolution no 'original' state is left. The state the units have withdrawn from ceases to exist. To use an example, after Slovenia, Croatia, Macedonia, Bosnia and Herzegovina have seceded from the Socialist Federal Republic of Yugoslavia (SFRY), there was no Yugoslavia left, i.e. there was no continuity of SFRY in any form or shape.

The second concept is self-determination. Self-determination is very often used in the context of secession. Secession is either referred to as a form of self-determination, like for instance national self-determination or political self-determination, or it is used as an argument for secession, i.e. the separatist unit claims that they have the right to secession because of their right to self-determination. Whereas there is a connection between these two concepts we should be careful not to conflate them, since they are not substitutable. First, the concept of self-determination has two separate components. It can either be understood as an internal or as an external principle. Historically this can be illustrated by the 18<sup>th</sup> century French, and the American revolutions. Whereas in the case of the French revolution the people demanded the right to choose their rulers within their existing territory, the American case was the fight for the right of the people to choose their own government separate from their colonial rulers.<sup>9</sup> Hence, self-determination is "a principle which encompasses the right of all segments of a population to influence the constitution and political structure of the system under which they live"<sup>10</sup> on the one hand and on the other it is "a principle whereby a group of people are entitled to pursue their political, cultural and economic wishes without interference or

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<sup>9</sup> Hurst Hannum, 2001, "International Law" in Alexander J. Motyl (ed.) *Encyclopedia of Nationalism*, San Diego, CA: Academic Press

<sup>10</sup> C.Lee Buchheit, 1978, *Secession. The Legitimacy of Self-Determination*, Yale University Press, p.14

coercion by outside states.”<sup>11</sup> If we rephrase the above into the language of rights, we can note that the first one refers to the right to internal autonomy and the second to the right of external independence.<sup>12</sup> From this it can be deduced how the usage of self-determination in the context of secession is not entirely misleading, since secession can be seen as an instance of external self-determination. Nonetheless, what seems problematic with the assumption that the right to secession is the right to external self-determination is that it might give people the impression that it is an inherent part of the concept of secession, which is not entirely true. While self-determination as a form of secession is one of the normative positions on secession, it would be wrong to claim it is a part of the definition of the concept itself, since there are other, perhaps even better normative positions. Thus, while secession can be an instance of external self-determination, it must not necessarily be so.

As has been seen in this section, there are several important features we need to keep in mind when we are talking about secession. First, we need to consider it as a group endeavor, since secession is best arrived at by means of a collective decision making process, and it not only entails that the group removes itself from a given state, but that it also takes the territory it inhabits with them. Thus, the group must show that it not only has legitimate reasons for secession, but also a valid claim to the territory. Second, it must be emphasized that the process is unilateral in order to really get to the bottom of the concept, and to be able to properly differentiate it from other similar processes. Third, we must be careful not to conflate the concepts of secession and of self-determination because that might mislead us to believe that self-determination is an inherent part of secession, while it is only one normative position on it among many others.

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<sup>11</sup> C.Lee Buchheit, 1978, *Secession. The Legitimacy of Self-Determination*, Yale University Press, p.14

<sup>12</sup> Ibid.

### *1.2 What theories of secession should consider*

Secessionist movements challenge some of the most fundamental aspects of the state. They challenge the states authority, sovereignty and territorial integrity. State authority is challenged, since the seceding group denies the authority of the state over the group, and by the process of secession the group severs itself from political obligations to that state. On the other hand, sovereignty and territorial integrity are challenged, since the group not only severs itself from political obligations, which they could have done for example by emigrating, but also attempt to take with them what used to be a part of the rump state's territory without the state's consent and so go directly against the state sovereignty and territorial integrity. Thus, a comprehensive theory of secession must address all of the issues above. It has to be shown, why the state does not have, or loses the authority over the part of population in question, and so why political obligations do not apply to the group anymore, while they still apply to the rest of the population. In addition, the group itself has to possess a valid claim to the territory it attempts to take, so that it does not unjustly violate the territorial integrity of the state. Moreover, it would seem that considering secession challenges territorial integrity and state sovereignty in such a grave way, a complete theory of secession should possess a comprehensive view about the territory. What is meant by this is that perhaps one should not only deal with the legitimate claims of groups to a certain part of the state's territory, but also look at the state's initial right to its territory and explore under which circumstances and by which instances such a right is limited and/or lost altogether.

A good theory of secession thus has to hold that the right to secession is not an unlimited right. If that were so, any such theory would be vulnerable to the anarchist objection and to strategic bargaining objection. The anarchist objection is that if secession were permitted, then there would be no end to. We would be facing limitless fragmentation and that would



lead to anarchy.<sup>13</sup> If secession is seen as an unlimited right, then this objection holds ground and is to the point. However, if we take into account that secession in fact is a limited right, where some reasons for seceding are morally decisive and others are not, then the objection does not carry much weight. Moreover, if we pose no limits to the right to secession, then secession can be used as a threat to gain a better bargaining position or simply to get what one wants, i.e. it can be used as strategic bargaining. For instance, we can imagine that there is a territorially concentrated group, the members of which are all rich. Since the state introduced a leveled tax policy, they have to give a big percentage of their income to the state. If we have no limits on secession, then this group can threaten the state that they are going to secede, if the state does not reconsider the tax policy, which gives them an unfair advantage in the bargaining. What is more, strategic bargaining may be used in a way that it prevents the majority's will to prevail, even in the event when it is in accordance with individual and state rights.<sup>14</sup> However, if secession is a limited right the strategic bargaining objection loses weight, though it is not completely defeated, since we still can imagine a situation in which secession is a limited right, but the conditions for secession are not very stringent, i.e. the exit is easy. In such situations the strategic bargaining objection is again a strong objection against secession.

Thus, it is not enough that secession be a limited right. A strong theory of secession should make the conditions for achieving secession rather stringent. If the conditions are too relaxed the anarchist objection, though not in its full form, gains some ground. If it is extremely easy to meet the criteria for justified secession, then the concern of limitless fragmentation is not too farfetched. Moreover, too easy exit also brings with itself a very destabilizing effect, in the sense that it can paralyze the normal functioning, not only of a state that faces secession, but also of the seceding unit, since it too might face further secession. This is also connected

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<sup>13</sup> Allen Buchanan, 1991, "Toward a Theory of Secession" in *Ethics*, Vol. 101, No. 2

<sup>14</sup> Ibid.

with the fact that easy exit gives strength to the strategic bargaining objection. This line of reasoning was already raised in a somewhat different context, i.e. the context of organizations. According to Alfred O. Hirschman, the too easy exit from organizations has the consequence that there are insufficient incentives for constructive criticism and dialogue within the organizations.<sup>15</sup> Allen Buchanan links this to secession and rightly argues that this has implications for secession. If a territorially concentrated minority can by means of referenda easily exit the state, then “it will be less rational for individuals to invest themselves in the practice of principled debate and deliberation.”<sup>16</sup> This is according to Buchanan harmful for democracies (and states in general), since a democracy needs citizens, who rather commit themselves to rational dialogue, appeal to reasons backed by principles etc., than using the option of strategic behavior, which is designed to achieve their ends without making an effort to reach consensus.<sup>17</sup> That is to say that if secession can be used as an ‘argument’, then it diminishes people’s readiness and even the purpose of deliberative democracies or any kind of deliberations. Thus, in order to avoid destabilization and strategic barraging, the conditions for a justified secession should not be extremely relaxed, but rather stringent.

It might be helpful to say a few words about the nature of the right to secession at this point. In most debates about secession the concept of the right to secession is used in such a way that it seems to conflate the right to the procedure with moral reasons upon which secession should be granted to a certain group within a certain state. The right to secession is a complex right, that indeed is composed of the procedural and the moral part. A complete theory of secession must thus address both components. Firstly, the right to secession does not arise from a moral vacuum. It arises from certain circumstances, which make it morally significant. One might say, for instance that nations can prosper best, if they have their own country and

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<sup>15</sup> Albert O. Hirschman, 1970, *Exit, Voice, and Loyalty*, Cambridge, Mass.: Harvard University Press

<sup>16</sup> Allen Buchanan, 1998, “Democracy and Secession,” in *Secession and National Self-Determination*, M. Moore (ed.), Oxford: Oxford University Press, p. 22

<sup>17</sup> Ibid.

this would make secession morally important for nations. A more obvious example is that some group's basic human rights might be grossly violated, so secession is of moral importance enabling this group to rid itself from its oppressors. The moral component lies on the basis. However, it is by itself not enough to establish the right to secession. It needs to be complemented by the procedural component. The role of this is to shed light on the whole picture, and point out the circumstances secession would create, and how these circumstances would affect the *status quo*. In some circumstances it may turn out that the moral component is by itself there, but the procedural circumstances may be extremely detrimental, and so may point us into the direction of not taking such cases as legitimate cases of the right to secession. This will mostly be the case where the moral component in itself is not particularly strong. Thus, while trying to establish a right to secession, its complexity should be taken into account.

A further issue that needs to be addressed by a theory of secession is the issue of establishing what kind of right is the right to secession. A normative theory of secession mostly seeks to establish that there is a moral right to secession, but may also deal with the question whether secession should be morally recognized by international law. According to Buchanan, there is no moral right to secession, if it is not plausible that it ought to be an enforceable right in international law.<sup>18</sup> On the other hand, David Copp points out that the question whether there is a moral right to secession is prior to the questions related to the international law and secession.<sup>19</sup>

This debate proves rather similar to the debate in the realm of human rights. The traditional account of human rights holds that humans have (human) rights by virtue of some basic characteristics of them being human, and the rights are there to either make sure these basic characteristics are safeguarded, or are just seen as the consequence of the basic characteristics

<sup>18</sup> Allen Buchanan, 1997, "Theories of Secession," in *Philosophy and Public Affairs*, 26, pp. 31-32

<sup>19</sup> David Copp, 1998, "International Law and Morality in the Theory of Secession," in *The Journal of Ethics*, Vol. 2, No. 3

themselves. For instance, James Griffin asserts that human rights are the safeguards of our personhood<sup>20</sup>, and Alan Gewirth believes that humans have a right, by definition being a human right, which derives from the fact that there are certain objects that are the proximate necessary conditions of human action.<sup>21</sup> Joseph Raz criticizes the traditional account, saying that it fails to either criticize or illuminate the existing human right practice, and that moral rights cannot only be established by reference to other moral rights. Rather, rights are established by arguments about the value of having them, and their existence depends on there being interests whose existence warrants holding others subject to duties to protect and promote them.<sup>22</sup> According to Raz, the problem is that if the proponents of the traditional account do not provide a convincing argument for why exactly the human rights practice should conform to their theories, then he sees no point in them criticizing the current practice on the ground that it does not fit the traditional human rights ethical code.<sup>23</sup>

What is at the heart of this debate is the question of whether we can speak of human rights regardless of the function they have in an institutional setting. What Raz is saying basically amounts to the denial of the possibility of speaking and deriving human rights on a purely moral level, but asserts that because of their nature, human rights should be explored and understood in a practice oriented way. His own take on human rights is that they are the rights which set limits to the sovereignty of states, in that their actual or anticipated violation is a (defeasible) reason for taking action against the violator in the international arena.<sup>24</sup> If I now return to the right to secession, it would seem, in light of the human rights debate, that if we want to speak about it, we should not only inquire into the existence of a moral right to

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<sup>20</sup> James Griffin, 2008, *On human rights*, New York: Oxford University Press

<sup>21</sup> Alan Gewirth, 1982, *Human Rights: Essays of Justification and Applications*, Chicago University Press

<sup>22</sup> Joseph Raz, 2007, "Human Rights Without Foundations", *Oxford Legal Studies Research Paper No. 14/2007*. Acquired on February 1 2012. Available at SSRN: <http://ssrn.com/abstract=999874>

<sup>23</sup> Ibid.

<sup>24</sup> Ibid., p. 11

secession, but construe the right in such a way that we also have something to say about the current practice concerning the issue of secession.

Are these two debates really comparable? The correct answer seems to be yes. The right to secession is not something that we want to assume in a fashion that would have nothing to do with the real world. Secession by default is a real-world problem, and the right to secession should be such that it can adequately address this problem. Furthermore, secession, if exercised, creates a lot of turmoil in the international arena due to the fact that the international law has very little to say about it.<sup>25</sup>

Moreover, the right to secession is the kind of right that sets limits to the sovereignty of states and as such falls into the category of functional rights. If by establishing the right to secession we remain silent on current practices, we cannot criticize them for not adopting to our limited consideration of the right. As I see it, the right to secession is similar to the right to euthanasia. While we can find very good and sound reasons for why we believe the right to euthanize is of extreme moral value, we can also see that establishing the moral right is not enough. This is so because we did not consider the practical implication, i.e. that one needs to consider thresholds of when a person is to be considered in such a deteriorated state that s/he should be euthanized, and that without these thresholds, or even with them, we face problems

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<sup>25</sup> Secession is neither legal nor illegal according to international law. It is considered to be legally neutral, i.e. its success depends on international recognition of secessionist regions, which is based on the grounds of legitimacy of the act. A discussion on this can be found in James Crawford, 2005, *The Creation of States in International Law*, New York: Oxford University Press, p.390.

Nonetheless, it can be said that rules on secession have been a bit more clarified recently, through the secessions of Kosovo and Montenegro, for instance. The International Court of Justice in the case of Kosovo opined that its secession does not violate international law, and further stated that that international law does not have general prohibitions to independence declarations, and it seems that these are lawful insofar as they are made following democratic and pacific means. These opinions can be found in the ICJ's Advisory Opinion of 22 July 2010 §81 and §84: <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=4>.

Furthermore, there has been some debate on the issue of secession, and the consequences thereof for the EU membership. The Scottish National Party has argued that were Scotland to secede from Great Britain, their EU membership would be uninterrupted. This position has been termed "EU's internal enlargement process" and has been dealt with amongst other in Photini, Pazartzis, 2006, "Secession and international law: the European dimension" in *Secession. International Law Perspectives*, ed. Marcelo G. Kohen. New York: Cambridge University Press. Pp. 355-373. The position of the SNP is, however, opposed by European states and some legal advisors of the European Commission, who maintain that newly created states would have to re-apply for membership.

of abuse that may be so considerable that the moral right may lose its strength in the face of these additional considerations.

Thus, I side with Buchanan in the above mentioned debate. By this I am by no means saying that it is not important to establish the moral right to secession. All that I am saying with it is that moral rights cannot exist in a vacuum, but that they are inseparably connected with the question of whether they are institutionally enforceable or not. The question of whether there is a moral right to secede is thus not prior to the questions concerning international law, rather it is conditioned by the answer to those questions.

To conclude, secession is not an unlimited right but a limited one, i.e. some reasons for seceding are morally decisive, while others are not. However, it is not enough that the right to secession is limited. The conditions for justified secession also should not be too relaxed. If we make the exit too easy, then we risk creating a very destabilizing effect and paralyzing normal deliberative processes of the state. Moreover, we leave the door wide open for strategic bargaining. Thus, secession should not only be a limited right, but a right limited by rather stringent conditions. The right to secession is complex in its nature. It consists both of a moral, and a procedural component and if we want to understand the right correctly, we need to take this complexity into account. Lastly, I believe that the right to secession is a moral right, but can only be such, if it is plausible that it ought to be incorporated into international law, i.e. the right to secession is functionalist in nature.

### ***1.3 Theories of secession***

The first theoretical mention of secession traces back to the 16<sup>th</sup> and 17<sup>th</sup> century natural law theorists. As the basic political conventions were very different in that time, attributing the final source of political legitimacy to a divine ordination, and disobedience and resistance all were rather exceptional solutions to situations beyond the normative conditions, they were basically analyzing the relationship between the ruler and the ruled, and their contractual

relations. Secession was only seen as an extreme measure, as a special type of justified resistance against an unlawful ruler or an unlawful rule. It is also important to mention that they did not use the term 'secession', but were only describing situations under which a part of the state may leave the unity. Even though Johannes Althusius held that sovereignty is the essential attribute of the state,<sup>26</sup> he also believed that a part of a state, e.g. a province, may abandon the state to which it belonged and choose for itself a new ruler or a new form of commonwealth "...when the public and manifest welfare of this entire part altogether requires it, or when fundamental laws of the country are not observed by the magistrate but are obstinately and outrageously violated..."<sup>27</sup> In other words, he believed that there is a right of resistance to the state, the right to secession, when the laws of the state are violated by the rulers. It can thus be said that for the natural law theorists' secession was a derivative right. It was only justified in extreme situations, like massive violations of rights.

Modern theories of secession can roughly be divided into primary right theories and derivative right theories. Primary right theories take secession to be a right either of nations or territorially concentrated groups, which by means of voting choose to secede. Whereas the derivative right theories take secession to be justified only as a consequence of some prior mistreatment of the group by the state, e.g. mass and permanent violation of basic human rights, unlawful incorporation into the state, violation of the intra-state autonomy agreements, and violation of the public realization of equality in democratic states.

### 1.3.1 Primary right theories

Primary right theories are divided into national self-determination theories on the one hand and choice or plebiscitary theories on the other. There are also some theories which can be referred to as hybrid theories, having features of both of the above mentioned theories.

<sup>26</sup> Otto von Gierke, 1934, *Natural Law and the Theory of Society*, Cambridge University Press

<sup>27</sup> Johannes Althusius, 1614, *Politica*, XXXVIII §76, in Friderick S. Carney (ed.), *Politica*, 1995, Indianapolis: Liberty Fund

### **1.3.1.1 National self-determination theories**

National self-determination theories, as the name suggests, hold that nations are the beneficiaries of the right to secession. They seek to show that mono-national states, because of their mono-nationality, function better than multi-national states. It is perhaps useful to mention at this point that these theories have rather little to do with the ‘negative’ nationalism. They do not hold that any nation is better than any other; they simply assert that a nation should be the basic unit of our concern. According to these theories any group that is a nation has the right to secession. It has this right in virtue of it being a nation. Thus, these theories are sometimes referred to as ascriptivist theories.

Theorists like John Stuart Mill claimed that in multi-national states, there can be no feeling of commonality. Only among co-nationals can there be a feeling of common sympathy, which makes them cooperate with each-other more willingly and desire to live under a common government separate from other nations. He also believed, that among people who spoke different languages, there can be no common public opinion and ergo no working representative government. Because of the lack of common fellow feeling, even the armies of multi-national countries cannot be strong, since the soldiers would owe obedience only to the flag, but their heart would not really be beating for a ‘foreign’ country. Because of all these Mill concludes that the boundaries of a state should be congruent with the boundaries of a nation.<sup>28</sup>

There are several problems with this view. Firstly, it is really hard to define what is meant by common nationality, common nation, or simply said nation. To begin with, there are two different understandings of the concept ‘nation’. It can either be understood in the civic way or in the ethnic way. If ‘nation’ is understood in the civic way, then the belief is that a nation is composed of the citizens of a certain state. For example, members of the American nation

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<sup>28</sup> John Stuart Mill, 1991 “On Nationality, as Connected with Representative Government” in *On Liberty and other essays*, John Gray (ed.), Oxford University Press



are all citizens of the USA, or the French nation is composed of all citizens of France, regardless of their ethnic origin. According to the civic understanding of ‘nation’, co-nationals needn’t be connected by ethnic ties, common origin or even common language for that matter. They are connected through common government and common citizenship.

On the other hand, there is the ethnic understanding of a nation. This presupposes that members of a nation share common ethnicity, i.e. the national community is defined by common ethnic origin, culture, language, history, and/or religion. Thus, people are either included or excluded from the national community on the basis of being from different origin.<sup>29</sup>

Commonly the term ‘nation’ denotes a group of people who believe themselves to be a distinct community, sharing a common national identity and generally believe to be entitled to be self-determining.<sup>30</sup> Considering the two understandings of nation above, it can be concluded that, when J.S.Mil speaks of ‘nation’, he does not seem to have the civic sense in mind. This is so because he obviously believes that common language is one of the important facts of a nation. Thus, it seems that his theory is faced with the problem, with which any theory adopting the ethnic understanding would be faced with, namely conflating ethnicity with nationhood. There are extremely many ethnic groups in the world, so if we grant the right to secession to all ethnic groups just in virtue of them being ethnic groups, we are facing limitless fragmentation, and paralysis of the normal functioning of states, since the strategic bargaining is made possible. Moreover, we are faced with the problem that since we rarely find neatly concentrated ethnic groups, the smaller ethnic groups, which will find themselves in newly created states might face expulsion or harsh assimilation.

<sup>29</sup> This distinction can be found in most of the literature dealing with the problem of nationalism, amongst other in Ronald Grigor Suny, 2001, “History” in *Encyclopedia of Nationalism Volume 1*, Academic Press, Liah Greenfeld, 2001, “Etymology, definitions, Types” in *Encyclopedia of Nationalism Volume 1*, Academic Press and Rogers Brubaker, 1994, *Citizenship and Nationhood in France and Germany*, Cambridge, Mass.: Harvard University Press

<sup>30</sup> This definition is conflating the definition by Ronald Grigor Suny in 2001, “History” in *Encyclopedia of Nationalism Volume 1*, Academic Press and David Miller in 1995, *On Nationality*, Oxford: Clarendon Press

Another, contemporary proponent of the national self-determination theories is David Miller. In his book *On Nationality* he asserts that national communities have a good claim to be self-determining, however acknowledges the fact that this good claim does not preclude the possibility that political self-determination sometimes cannot be met and so national communities must settle for something less than full fledged self-government. He believes that an independent state is most probably the best way for a nation to fulfill the claim to self-determination. He presents us with two arguments in favor of his view, i.e. the ‘from nation to state’ argument, which relies on showing that national identities are valuable, and the ‘from state to nation’ argument, which attempts to show that national sentiments have high utility in the well functioning of a state.

The ‘nation to state’ argument starts with a weak reason for why a nation should have its own state, which simply derives from the fact that nations see themselves as self-determining, and so giving them a state is simply giving them what they want. But this is too weak to actually generate self-determination. Stronger reasons for granting it are based on the concerns of social justice. Nations are seen as communities of obligations. Members recognize duties to one another, i.e. to meet the basic needs and protect the basic interests of the community. These duties, however, need to be assigned and enforced, and a national state is the one which can develop a set of institutions that can allocate rights and responsibilities to people. In this way obligations are given a definite content. Miller believes that even though such obligations can be assigned and enforced on both a sub-national and a supra-national level, there persists the problem of legitimizing the system of distributive justice in the eyes of the population. According to him, each community may feel that it is entitled to its own resources or the ones they have created.

The second reason that backs the argument is the protection of the national culture. A common culture not only gives the sense of belonging, but also a historical identity, which

can serve as a background against which more individual choices about how to live can be made.<sup>31</sup> He believes that if national culture is destroyed, this is very detrimental to the bearers of that culture as they have to adapt to a different culture, which is a difficult and painful process. The elements of the national culture are also seen as highly important as they play an essential role in the public dimension, most notably in the content of education. If the nation has its own state, then it obviously also has the power to protect its culture. Moreover, a national state is necessary to preserve the national culture since in multi-national states the dominant nation has strong incentives to try to assimilate the weaker nations into their culture. Final reason for the ‘nation to state argument’ is that national self-determination is an expression of collective autonomy. Here the supposition is that people have an interest in shaping the world associating with those they identify with.

The reasons which support the ‘state to nation’ argument are closely connected with the reasons supporting the ‘nation to state’ argument. The key concept for why the state would function better, were it a national state, is that presumably people of the same nation, because they have the same interests, would cooperate better because they would trust the state and each other more. What is at the core here is that voluntary cooperation of citizens in a multi-national state is tainted by the fact that each group would in the first place protect their own interests. People would not be confident that everyone is dealing fairly. However, as Miller believes the ties of the community due to the shared identity are an important source of trust between individuals. People who trust each other will then enable the state to better implement social justice as they will be more ready to cooperate. He concludes that all of the above reasons make a powerful case for asserting that national boundaries and political boundaries should coincide, if it is possible that is.

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<sup>31</sup> David Miller, 1995, *On Nationality*, Oxford: Clarendon Press, p.86

Secession on the principle of nationality focuses on conditions for securing national identities. National self-determination should be furthered wherever it is possible. According to this principle, the existing boundaries are only put into question where a nationality is currently denied self-determination.<sup>32</sup> Nationalities should not be equated with ethnic groups. It is possible that a state includes several ethnic groups but has a common national identity, like for instance United States. Thus, the principle of national self-determination on his account does not require that every cultural group be given its own state, but merely that the right be given to national groups who currently are incorporated in multi-national states with irreconcilable national identities. They may be so due to having different takes on religions that are constitutive of their identity or due to the fact that each group includes as a part of its historical self-understanding its separation from, and antagonism toward the other.<sup>33</sup> Secession is however not possible, if it results in another multi-national state on a smaller scale. This basically entails that secession can only be granted to those groups that are territorially concentrated, and do not have any minorities on their territory. In addition to that there are some procedural constraints, i.e. the newly created state needs to be viable, it may not leave the rump state severely weakened, the seceding territory may not include all the natural resources of a common state. In this last instance secession is still possible provided a redistribution scheme is agreed upon.<sup>34</sup>

In his later work David Miller wants to position his theory between two interpretations of national self-determination. On the one hand, a minority group within a state sees itself as a separate nation and thus seeks to secede from the majority nation by virtue of national self-

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<sup>32</sup> David Miller, 1995, *On Nationality*, Oxford: Clarendon Press, p. 112

<sup>33</sup> Ibid., p. 113

<sup>34</sup> Ibid.

determination. On the other hand, the nation is defined in the civic sense and thus the separation of no minorities is possible.<sup>35</sup> He defines the nation as

a group of people who recognize one another as belonging to the same community, who acknowledge special obligations to one another, and who aspire to political autonomy-this by virtue of characteristics that they believe they share, typically a common history, attachment to a geographical place, and a public culture that differentiates them from their neighbors.<sup>36</sup>

He also introduces territorial criteria, meaning that he acknowledges the fact that the groups separating from a state will take a part of the territory with them and thus need to have a valid claim to this territory. This claim is established on the grounds that the inhabitants of a certain territory form a political community. As such they create laws, establish property rights, etc. The territory also has a symbolic significance for them, since they bury the dead on it, establish monuments, etc. All this gives them “an attachment to the land that cannot be matched by any rival claimants.”<sup>37</sup> This then also serves as the justification for the claim to “exercise the continuing political authority over that territory.”<sup>38</sup> So there are two criteria a group needs to meet in order to have the right to secede. It has to have a clearly different identity from the identity of the nation it wants to separate from, and it has to have a valid claim to the territory that it inhabits, and by secession will take with them.

Up until now, his theory is rather similar to the one he established in *On Nationality*, with the addition of the legitimate claim to the territory condition. He further expands his theory here by acknowledging the problem of the newly created minorities within the newly created states, and so secession should only be granted to those seceding units that will likely implement the minority protection for the newly created minorities. As another solution to this problem, he sees the voluntary transfer of population. Comparing this view with the

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<sup>35</sup> David Miller, 1998, “Secession and the Principle of Nationality” in Margaret Moore (ed.) *National self-determination and secession*, Oxford University Press

<sup>36</sup> Ibid., p. 65

<sup>37</sup> Ibid., p. 68

<sup>38</sup> Ibidem.

theory put forth earlier, it can be interpreted in two ways. It can either be seen it as an expansion, meaning that he now believes the right to secession can be given to nations, which by creating a state of their own, will still be small scale multi-national states, but will accommodate the problem in an appropriate way. If we take it to mean that, then Miller would sort of defeat his purpose, since then it can be claimed that if the rights are protected in the original state there is no good reason for secession in the first place. Thus, it seems more plausible to read this addition as an expansion, but meaning that minority groups, not themselves being nations, so not entitled to the national self-determination principle, should be accommodated in some way and the way this should be done is what he proposes. The aspect that reoccurs is the economic component of secession, i.e. by secession the rump state should not be made too worse-off and on the other hand the seceding unit should also be in the position to create an economically viable state.

Miller's position is much less permissive, and better developed than Mill's. Nonetheless, his position is by no means without problems. Considering one of his main premises, namely that there is a greater degree of trust between co-nationals, and thus there is a better cooperation between them than there would be between members of different nations, we are left a bit unsatisfied. Basically what this implies is that me being Slovenian, I should feel more ready or even more morally obligated to help another Slovenian in need, than someone who does not share my nationality. While I can concede that there are some relational ties, which would perhaps make us feel more morally obligated to help certain persons above others, these are very limited in scope. One could imagine this to be the case, when we talk about families, or close friends. To extend this to the national level, however, seems a bit far stretched. The premise Miller puts at the core of his argument is an empirical one, and he does not give us good reasons to take it as true. Moreover, it would seem much more plausible to say that people perhaps do cooperate better with people with whom they share and have a history of

sharing a political community, regardless of whether this community is national or multi-national.

Miller also tries to make an important distinction between national groups and ethnic groups in his theory. By pointing out that they are not to be confused, and that not all ethnic groups have the right to national self-determination, he seems to limit the scope of his theory. He is absolutely right in pointing out that there are some states the population of which is multi-ethnic, but the state itself is mono-national, e.g. United States. The problem with his vague differentiation, however, is that if we speak about states, which adopt the civic understanding of the nation, he is absolutely correct. But, if we speak about countries where they employ the ethno-cultural understanding of the nation, we have not solved anything. Where the civic understanding is in place, talking about secession on the principle of national self-determination is a non-starter. Where the understanding is ethnic on the other hand, the differentiation does not really put stringent constraints on the right to secession. The fact remains that there are many ethno-nations and so the theory is still vulnerable to the limitless fragmentation objection. The fatality of this objection is somewhat diminished by the practical considerations, and the non-creation of minorities conditions; however, these are not unproblematic either. Economic viability is a very vague condition. It can either mean that a state needs to be able to sustain itself by itself, but it can also imply that the state needs to be able to sustain itself; even if that means that they rely on the help of the international institutions. Furthermore, there needs to be a threshold set, which defines what exactly needs to happen, so that it can be said that a state has been made too severely bad off. Without such a threshold, it can always be argued that while the rump state may have been left worse off with a portion of it seceding, it has not been left too bad off. Thus, it would seem that his theory is also vulnerable to the strategic barraging objection, since the exit is still made too easy considering that there still are quite some groups that could fulfill these criteria.

Lastly, Miller's statement that secession is only possible where there are irreconcilable differences between two or more nations living in a common state, like for instance concerning the question of religion, or where there are antagonistic sentiments between them, needs to be considered. This restriction makes a lot of sense. It can be easily imagined that there is a state, where different groups living in it may disagree on some important issues, and cannot find a common language. But such an occasion still does not show that there is the right to national self-determination. If a group within a democratic state, for instance, has irreconcilably different views on several things apart from the majorities view, they either can be accommodated by some sort of self-government within the state, or if they are permanently a minority, might even have the right to secede. This right, however, does not stem from the fact that they are a national group, but rather that they have almost always been outvoted and as such cannot be seen to be treated as equals.

#### **1.3.1.2 Choice theories**

Choice or plebiscitary theories are different from the national self-determination theories in two crucial aspects. First, the group attempting secession does not have to be a nation, though that is not excluded. Rather, it needs to be a territorial concentrated group, regardless of the characteristics members of the group possess. Second, the group needs to show their will to secede by means of voting, where most of the members of the group must be in favor of secession for the group to have the right to secession. Plainly said, secession is a matter of majority rule.<sup>39</sup> These theories present the right to secession as being in accordance with the

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<sup>39</sup> Such a theory is supported also by Susanna Mancini in 2008, "Rethinking the boundaries of democratic secession: Liberalism, nationalism, and the right of minorities to self-determination", *International Journal of Constitutional Law*, 6, no.3-4 (July-October 2008): 553-584, where she argues that the right to secession should not be seen as a remedial right only, but that clear democratic procedures, like holding of referenda, should justify secession. I do not deal with her theory in this subchapter though, since she focuses on the present situation in international law and not so much on the normative issues I deal with in this dissertation.



basic liberal principles and principles of democracy<sup>40</sup>, e.g. freedom of association, autonomy. They are sometimes referred to as no-fault secession.

Harry Beran, one of the first theorists to have written on secession, is a proponent of these kinds of theories. His theory is based on the consent of the people to be a part of a political unit, which must rely on the voluntary association of its members. According to his conception, the state is the agent of the people, and this agency relationship is not irrevocable. That means that if the majority of a part of the population no longer wishes to a part of the state, it can do so. His argument for the just withdrawal from the existing state goes as follows:

- (1) The state cannot be the ultimate right holder in the realm of liberal democratic theory.
- (2) The liberal state is the agent of the people.
- (3) The agency relationship between the state and the people can be revoked.
- (4) Therefore, all the rights that are held by the state must be derived from the people whose agent it is.
- (5) Therefore, if a substantial part of the state no longer wishes the state to be their agent, they may terminate the agency relationship and withdraw themselves from the state with the territory.<sup>41</sup>

According to Beran the smallest unit that can be allotted the right to secession are territorial communities, which are “a social group that has a common habitat, consists of numerous families (i.e., is larger and more complex than a family), and is capable of self-perpetuation through time as a distinct entity.”<sup>42</sup> In order for the territorial community to exercise the right, it needs to satisfy two further conditions, namely that it is a politically and economically viable entity. Under political viability Beran understands the communities’ ability to govern itself permanently. Economic viability, on the other hand, is understood as the communities’

<sup>40</sup> Many of the choice theorists refer to their theories as democratic, e.g. Beran refers to his theory as a “Democratic theory of political self-determination”, however, these theories differ crucially from the democratic theory of secession I am establishing in this dissertation. Whereas the choice theories refer to the democratic principles that apparently back their intuitions, I am referring to democratic theory, which is the framework within which my theory is established.

<sup>41</sup> Harry Beran, 1998, “A democratic theory of political self-determination for a new world order” in Percy B. Lehning (ed.) *Theories of Secession*, London: Routledge, p. 35

<sup>42</sup> Ibid., p. 36

ability to “meet at least the basic needs of its members or has a reasonable prospect of doing so with appropriate economic development aid from other states, i.e. if it will not need handouts from other communities forever.”<sup>43</sup> Beran’s theory has another provision, namely the provision of recursive secession. According to him, a state that has seceded, and still encompasses several small units that could be eligible for secession, has to grant the right to secession to all of them, following the same line of argument that allowed them to secede, i.e. revocability of the agency relationship.

While it is easy to see why someone would be sympathetic to the idea that secession is a matter of a collective decision, it still seems that Beran’s theory has more problems than advantages. First, it should be noted that the theory is, though it includes some additional provisions, very permissive. It basically is a very simple form of a choice theory. As soon as the majority votes for secession, the right to secession is established, limited only by allowing the same right to potential secessionist in their midst, and showing that they are politically and economically viable. These conditions are very easily met, since most secessionist regions are well politically organized, have representatives, and are capable of holding referenda. The requirement for economic viability is also very probable for many wannabe secessionists, since they can still rely on international help to prove they are viable at the time of secession. The restriction that this should not be the case forever strengthens the theory somewhat, since it decreases the number of groups eligible for secession, however, it does not do so considerably, since presumably there are still many groups who could rely on international help for a considerable time, but not forever. Thus, this theory is extremely vulnerable to the limitless fragmentation, especially keeping in mind that it envisages recursive secession. Moreover, it is also vulnerable to the strategic bargaining objection. While it seeks to show that secession understood in this way is in accordance with and supported by the same

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<sup>43</sup> Harry Beran, 1998, “A democratic theory of political self-determination for a new world order” in Percy B. Lehning (ed.) *Theories of Secession*, London: Routledge, pp., 37-38

principles as liberal democracy, it can be objected that given its permissibility, it may be potentially dangerous for democracies, given that it may paralyze the normal deliberation.<sup>44</sup>

Another very important problem for Beran's theory lies in the fact that it would seem, that he grounds his theory on faulty foundations. He takes it that political obligations are based in our consent to the state, and thus his theory proves unfeasible as soon as we show that the consent theory is flawed. Without going into too much detail at this point, let me just point out that consent theory seems to be ill-conceived, since explicit consent is almost never given and tacit consent is highly problematic. As it will be shown later in this dissertation, consent theories, and by that Beran's theory are unfeasible.

Another choice theorist is David Philpott. His approach to secession is the least permissive among the choice theories of secession. He grounds the right to secession in the right to self-determination. He believes that even though the principle of self-determination has assumed a bad reputation after its employment following the First World War, it should not be dismissed as an important principle. The principle is important and highly valuable, since it is was not only invented by liberal democrats, but it is also an integral part of a democracy. What makes self-determination of vital importance for him is the fact that it is rooted in moral autonomy, which incidentally also lies at the core of democracy. What he has in mind, when speaking about autonomy is the Kantian conception thereof, i.e. moral individuals are free, ones who do not act on the basis of unreflective desires or force and persuasion of someone else, but according to their own free will, pursuing ends that they set for themselves. Furthermore, autonomy has three implications for political institutions, namely that the law should protect freedom, autonomous people take part in shaping politics through participation and representation, thus the implication is the democratic institutions, and lastly autonomy implies

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<sup>44</sup> This objection follows Albert O. Hirschman's objection made in connection to leaving organizations in 1970, *Exit, Voice, and Loyalty*, Cambridge, Mass.: Harvard University Press. This objection is further elaborated in subchapter 1.2 of this dissertation.

distributive justice, i.e. being autonomous reflects in the society's distribution of wealth, opportunities, and other goods. Out of these there implications, it is the second that implies self-determination.

Self-determination is seen as unique in the sense that it “promotes democracy for a group whose members’ first claim to share an identity for political purposes, and second seek a separate government, as opposed to a larger portion of representatives in their current state’s government.”<sup>45</sup> It should be noted that people sharing political identity, does not entail that that is their only identity. In fact, people sharing a political identity can be very diverse in religion, race, etc. Moreover, people seeking self-determination share a common territory, meaning that they are not scattered across a state, but are a territorially concentrated group. Ideally, when borders of a state are reshaped, the new state is comprised only of the people who share the same political identity. The basic claim of the theory is that “any group of a particular identity that desires a separate government is entitled to a *prima facie* right to self-determination.”<sup>46</sup>

In Philpott’s view, the group does not have to show any prior grievances in order to establish the claim to the territory it is taking. The right to the territory is established by the fact that people of a common government live on it. Thus, when people secede and create a new common government on the part of territory of the previous state, they thereby establish the right to the territory in question.

However, there are limiting and even trumping circumstances that qualify the right to self-determination. Firstly, since it is autonomy, which lies at the core of self-determinations, no one’s autonomy should take the blast. If secession would cause the curtailment of autonomy of the members of the rump state drastically, then it is not to be permitted.<sup>47</sup> Furthermore,

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<sup>45</sup> Daniel Philpott, 1995, “In Defense of Self-Determination” in *Ethics*, Vol. 105, No. 2, p. 358

<sup>46</sup> *Ibid.*, p. 361

<sup>47</sup> There is another choice theory of secession that can be said to take the position between Beran's and Philpott's theory. Namely, David Gauthier in his theory, which can be found in 1994, “Breaking up: An Essay on

secession is qualified by the injustices it may inflict on the rump state, for instance direct assaults like the right to travel or work, or injustice deriving from the theory of just distribution. The newly created state should also not be an unjust state in the sense that it violates basic human rights from its very beginning. Where there is doubt that basic rights may be violated, these rights should be safeguarded through outside enforcement.

The principle upon which it is to be decided whether a group can separate, is the majoritarian principle employed in plebiscites. Furthermore, if there are any concentrated minorities in the newly created state they too are given the same right to self-determination. If the minorities are dispersed, then minority rights should be put in place. Philpott is not blind to the bad consequences secession might have, e.g. bloodshed and violence, strategic bargaining, etc. Thus, he argues that when deciding on whether to permit secession or not, we should be guided by the same principle that applies to just war, i.e. if the evil outweighs the good, then the action should be avoided. One should also opt against secession, when it is used as a blackmailing tool within an otherwise well functioning state.<sup>48</sup>

Philpott's theory, though it is very stringent still has a deeply rooted problem. There is something deeply problematic with his view on what establishes the claim to the territory. Namely, he claims that the right to the territory is established by the people of a common government that live on it. But that in fact either tells us nothing, or it is self-defeating. If the right to the territory is in fact established by the people of common government that live on it, then the people of the whole state have the right to the states territory in common, and the seceding group does not have the right to the territory they are about to take, at least not the full right. If that is so, then they don't have the right to secession, as they cannot establish the

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Secession" in *Canadian Journal of Philosophy*, Vol.24, No.3, pp. 357-371, holds the right to secession to be connected to the right of association (we can associate with those we want to associate with, provided they want to associate with us, and disassociate from those we don't want to be associated with, even though they want to associate with us), and limits secession in cases where by seceding you are making yourself better, while making others worse off. I will not deal with this theory in detail, since it is too similar to the above mentioned two.

<sup>48</sup> Daniel Philpott, 1995, "In Defense of Self-Determination" in *Ethics*, Vol. 105, No. 2

legitimate claim to the territory. But such a reading would make Philpott's claim self-defeating, as he is trying to say that there is a right to secession. Now, if we presume that the state has the right, but loses it to the people who created a new government on a part of its territory, then this restriction tells us absolutely nothing morally relevant about the right to the territory. Moreover, such a reading would seem to allow for any given group of people to move into a state and then create their own government, and by default have right to that territory. This, however, would be the perfect script for chaos. Thus, it seems that Philpott ultimately fails to give us a viable account of why the seceding group has a legitimate claim to the territory and so by consequence it cannot be seen as a complete and sound theory of secession.

Whereas Philpott's account is the most stringent, Wellman's account can be said to be the most optimistic, as he amongst other believes that even if we grant a primary right to secession, we will not be faced with many actual secessions. But this prediction is not the most important point of his theory. He develops what he calls the functionalist theory of secession. According to him, any group has the moral right to secede as long as secession leaves both the remainder state, and the newly created state, in a position to perform the requisite political functions. He believes that it is not contradictory to value legitimate states, and at the same time permit the division thereof. He derives this belief from the recognition that political states are valuable because of their functions that only states can perform, e.g. providing security etc. Since this is so, the boundaries can be redrawn as long as the redrawing does not handicap either state's function. This reasoning follows from his argument that political legitimacy rests on very similar grounds as samaritanism. In his words "citizens have no claim-right to be free from political coercion when this will leave others in a condition of political instability."<sup>49</sup> Moreover, he sees the political society as the only means

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<sup>49</sup> Christopher Heath Wellman, 2005, *A Theory of Secession: The Case for Political Self-Determination*, Cambridge University Press, p.13

by which people can escape the risks and dangers of the state of nature. Furthermore, the territorial component is also intimately connected to his conception of political legitimacy. Since states can only perform their functions, if they have a designated territory, territorial states are a necessity. What follows from this view is that boundaries can nonetheless be redrawn as long as the functionality of all the units, new and old, is upheld. Wellman's view on political legitimacy is the one that sets him apart from other choice theorists of secession, since he does not ground his theory in freedom of association, autonomy or consent, but in the functional features of the states. An additional element in his view is that he takes the right to secession to be conditional on the value of self-determination. He believes that even though we can show that the freedom of association or consent theory should for one reason or another be set aside or rejected, the value of self-determination remains intact and self-determination should be enforced as long as the functionalist condition is met.

Wellman also deals with some concrete issues in his theory of secession. He believes that the peoples who have the right to secede are those, who define themselves as peoples. While nations may have the right to political self-determination, this right is not limited to them. Moreover, if a group wants to secede they should do so by holding a plebiscite, since one can obviously determine the will of the people from plebiscites. Nonetheless, he believes that only a plain majority needs to be in favor. According to him the super-majority requirement makes it possible that a minority holds the majority hostage, and that should not be allowed.<sup>50</sup>

What makes Wellman's theory special among the choice theories is the fact that he is the only one who takes the statist position. He does not believe, unlike Beran and Philpott, that the state is a voluntary association of people, the coercion of which can only be justified by means of some voluntary consent of the citizens. The coercion is justified by the fact that the state is the one that provides political stability, and as such has the right to coerce people,

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<sup>50</sup> Christopher Heath Wellman, 2005, *A Theory of Secession: The Case for Political Self-Determination*, Cambridge University Press

since they would otherwise be in a perilous condition of political instability. Whether this account of political legitimacy is sound is by no means unconditionally true, but it is outside of the scope of this dissertation. The problem that is at the core of this account is the value that it attaches to the principle of self-determination. While I have no problem conceding that the principle of self-determination is very valuable, I nonetheless do not think that its value quite extends to secession. Until people are in the position of exercising self-determination in the sense that they can choose their own governments and decide by some procedure or other on issues that concern them directly, the principle can be said to be valued. But I do not see how my valuing self-determination should mean that I also have to uphold that self-determination entails the right to secession, without a further argument. Thus, though the theory is at first sight attractive, I believe that it ultimately fails for the lack of a good and strong argument of why self-determination entails secession.

#### **1.3.1.3 Hybrid theories**

Hybrid theories of secession combine elements from different types of theories. Mostly they take the position between national self-determination and choice theories. This basically means that the provision that nations have the right to secession is joined by the provision that it is not enough that the group is a nation, but that in addition to that they need to vote on the matter of secession, and the majority needs to be in favor of it, in order for them to have the right to secession.

Margret Moore for instance holds that secession should be in accordance with the democratic principle, i.e. that the group should decide about secession by means of referenda. In addition to that, it must be decided which territorial group should be the one that should decide to secede by means of referenda. She believes that taking administrative units as those holding the right to secession is misconceived. This is so, because the internal boundaries were not



always drawn in accordance with ethnic composition, but served different purposes, and what is more the national principle should prevail:

In cases where there is a dominant national majority which can control the new state, the administrative boundaries principle does not have the moral force, the legitimating force, to persuade those people whose aspirations are denied by this conception.<sup>51</sup>

Moreover, she believes that any territorially concentrated national group, i.e. people who identify themselves as belonging to a separate nation, have the right to national self-determination, and so by democratic principle can choose to secede, and create a state of their own. She does concede that some nations live in territories, in which two or more nations are intermingled. In these kinds of situations the nations still have the right to self-determination, but not to secession.

These theory does seem to be better fit to ground secession as the national self-determination theories, as it treats secession as a form of collective decision making, nonetheless it is still much too permissive. Thus, it is still vulnerable to the strategic bargaining objection, but not to the limitless fragmentation as it does block secession of nations that are intermingled with other nations.

Another hybrid theory has been put forth by Avishai Margalit and Joseph Raz. While they do not speak about nations, but about encompassing groups, it still seems fair to say that their theory is like Moore's between national self-determination theories and choice theories, since it seems that an encompassing group may also be a nation. An encompassing group must have the following characteristics that are relevant for self-determination; group must have common characteristic and common culture that covers varied and important aspects of their lives; acquiring a group culture (group culture has a profound effect on the individuals raised in the culture); membership in the group is a matter of mutual recognition; membership in the group is one of the primary self-identifications; membership is a matter of belonging and not

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<sup>51</sup> Margit Moore, 1998, "The Territorial Dimension of Self-Determination" in Margaret Moore (ed.) *National self-determination and secession*, Oxford University Press, p. 140

achievement; the groups are anonymous in the sense that they are not as small so that anyone would know each other, but recognition is ensured by possessing general characteristics.<sup>52</sup> However, encompassing groups only have the right to secession, if they meet five more conditions, namely an overwhelming majority has to be in favor of secession, not a simple one; the creation of the new state should not create a large scale minority problem in the new state; prosperity and self-respect of the group should be taken into consideration; the rights of all inhabitants of the new state need to be respected; and lastly one should avoid or minimize the damage to the interests of the inhabitants of other countries.<sup>53</sup>

This theory is among the more restrictive theories and seems to be able to accommodate the concerns of limitless fragmentation and strategic bargaining. It also cannot be said that it would paralyze the functioning of the state. However, it does seem to have at least one big problem. It seems that taking encompassing groups as the right holders is a too narrow a venture. Why would only the groups that possess the above listed six characteristics be the holders of the right to secession, and other groups that possess only a couple or a complete set of different characteristics not? What makes those six characteristics normatively prior to any other characteristics? It can easily be imagined that there is a group the members of which speak a common language, have shared history and live by certain rules only they live by, and they are important for the group. According to Margalit and Raz such a group for the lack of other characteristics, or better said, for the lack of all six above characteristics would not be seen as eligible as the holder of the right to secession. There seems to be something missing from their theory, which would explain or show that their six conditions make a moral, normative difference. As it stands now, any other conditions can be easily listed or any other groups identified as holders of the right to secession, and it can be just assumed that it is the group of our choosing that should be the holder of the right to secession.

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<sup>52</sup> Avishai Margalit and Joseph Raz, 1995, "National self-determination" in *Journal of Philosophy*, Vol. 87

<sup>53</sup> Ibid.

This theory concludes the primary right theories.

### **1.3.2 Derivative right theories**

The derivative right theories treat secession as a right that only becomes one after for instance the state has violated basic human rights of the group; the group was in the position of a constant minority, etc. We can divide these theories into remedial right only theories, and the democratic theory of secession. These are the most restrictive theories of secession, since they conceive of secession as the last resort option.

#### **1.3.2.1 Remedial right only theories**

The remedial right only theories take secession to be the remedy for past injustices committed by the state against the group. One of the first such theories was put forth by Anthony Birch as a reply to Beran. Contrary to Beran's beliefs, Birch claimed that liberal democracy does not entail secession. Liberal and democratic principles in democracies are provided by liberal democracies by means of fair procedures for reaching collective decisions about government policies.<sup>54</sup> Thus, according to him secession is only justifiable in the case of the following events: forceful annexation of a region; government failed to protect rights and security of people in some region both drastically and permanently; legitimate political and economic interests of a region were not safeguarded, either out of bias or ignorance; government ignored agreements made with sections about their essential interests, that might easily find themselves to be outvoted by the majority.<sup>55</sup> These conditions make Birch's theory a remedial right only theory, however he does include a provision that the majority of the people need to vote in favor of secession, which makes it a hybrid between remedial right only and choice theories. It seems that precisely this move renders the otherwise good theory unfeasible. Considering that he takes secession to be a remedial right for the injustices like gross violation

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<sup>54</sup> Anthony H. Birch, 1984, "Another Liberal Theory of Secession," in *Political Studies* XXXII: 596-602

<sup>55</sup> Ibid.

of human rights, forceful annexation of territory, plotting against a group to outvote it, it seems that a group in such a state is found in a situation where it cannot really organize referenda in which they would decide whether to secede or not. They are in a situation where, from a moral point of view, it is urgent for them to get out, but with implausible provisions like voting in favor of secession never could.<sup>56</sup> Thus, Birch's theory must be rejected as unfeasible.

Allen Buchanan, on the other hand, holds that secession is a remedial right only, and it is only the last resort option for groups, whose basic human rights are permanently violated, territories that have been illegally annexed to the state, and groups whose intra-state autonomy agreements have been violated. His main idea is that individuals are morally justified in defending themselves against violations of their most basic human rights. When the last resort for stopping these injustices is secession, then, he believes, it is morally permissible for them to secede.<sup>57</sup> Even though states have sovereignty over their territory, in such cases secession is a legitimate act, since the basis of the state's claim to territory is the provision of justice, understood primarily as the protection of human rights. So secession for Buchanan is the last-resort remedy against these injustices. In the case of the illegal incorporating of a territory into a state, the state did not have legitimate authority over the territory in question in the first place, so secession is justified and restores legitimate authority of the territory. Considering the intra-state autonomy agreements, he believes the usual path is that they are the response of governments to the pressures of minority groups to have more independence. When such agreements are broken this leads the groups to demand secession and the latter is then violently suppressed. Thus, it should be internationally monitored in

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<sup>56</sup> This however does not mean that voting is not an integral part of secession. Voting on secession would make sense, if it were required after the group has already reached the stage, where it is no longer bound by political obligations of the state. Then the group should hold a referendum in order to by means of collective decision determine whether the creation of an independent state enjoys the majority support of the group's members.

<sup>57</sup> Allen Buchanan, 2004, *Justice, Legitimacy and Self-determination*, Oxford University Press

ordered to determine the fault and be able to determine whether there is a justified claim to secession.<sup>58</sup>

His theory is the most restrictive theory of secession so far. Thus, it is by no means vulnerable to the common objections like limitless fragmentation, strategic bargaining and destabilization. However, this kind of theory seems to involve a puzzle. The puzzle is connected to one of the main premises, i.e. that secession is a last resort to remedy gross injustices. Basically, the proponents of these theories argue that other arrangements short of secession should be made first, in order to prevent instability and violence. But in the cases where secession is a result of injustice, it seems that it is more likely that it will come to violence or even war. Moreover, if a state uses force against secessionist movements, which are not fully justified, this might result in adding legitimacy to secessionist claims, since it can be asserted that rights were violated. This problem arises because of the combination of two normative arguments of different kinds, i.e. deontological argument (requirements of justice) and consequentialist considerations concerning stability and security, which can point to different solutions.<sup>59</sup>

### **1.3.2.2 Democratic theory**

Democratic theories of secession so far do not exist. There has been no theory spelled out, though there have been side remarks given within general democratic theories, when they were discussing it as an extreme solution to the failure of democratic functioning. Nonetheless, a general idea on how such a theory could be derived from the existing democratic theories can be described at this point. Within the democratic theory secession would be seen as a derivative right. It would be derivative on the violation of the basic democratic principle, i.e. the principle of equal say.

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<sup>58</sup> Allen Buchanan, 2004, *Justice, Legitimacy and Self-determination*, Oxford University Press

<sup>59</sup> This objection was made by Josep Costa in 2003, "On Theories of Secession: Minorities, Majorities and the Multinational State," in *Critical Review of International Social and Political Philosophy* 6/2: 63-90

According to Thomas Christiano, legitimate boundaries are the boundaries of a state with legitimate authority. The state has legitimate authority, if it is just in some sense, and a democracy is the best example of a just state with legitimate authority. It is a scheme of collective decision making that gives each adult member an equal say at a crucial stage of the decision making. Its decisions are binding on the members of the group for which the decision is made provided public equality is realized. Public equality means that everyone's interests in society are being treated as equal, and that this person can see that s/he is being treated as equal. Public realization is of utmost importance, because through it one can see that his/her interests matter, and that they matter equally, and furthermore, these interests do not conflict with other fundamental interests, e.g. liberty, security, material wellbeing. What needs to be taken into account in democracies is that there is always disagreement, mainly because in every society there is diversity of interest, cognitive bias, fallibility and disagreement on what justice and common good require. Thus, public equality is important since it corrects the cognitive bias of others – not others chose principles for me, I chose as well. The only principle of collective decision making process that can guarantee that each can see that s/he is treated as an equal under the conditions of cognitive bias, fallibility, etc. is the principle that each person ought to have an equal say in the process of decision making, taking into consideration that people also need to have almost equal stakes in the decision. Democracy is the realization of public equality in collective decision making. This is what gives democratic decision making strong authority. Limits are grounded in public equality - when it violates public equality it shakes or loses authority. In other words, when the population or a part thereof is being treated as inferior, then the government loses authority over the population or the part of it. This is where secession comes in. Secession was so far either treated as an

instance of self-determination or remedy for gross violations of human rights. On this reading secession would derive from a democratic principle, i.e. from the principle of ‘equal say’.<sup>60</sup>

This theory would be restrictive enough not to be vulnerable to the common objections of limitless fragmentation, strategic bargaining etc. However, since the democratic theory of secession has not been spelled out so far, I cannot say concrete things about it at this point. What can be said, however, is that it at the first glance seems very promising, especially since it connects legitimate boundaries with legitimate political authority, but it nonetheless does not limit the right to secession only with gross violations of human rights.

#### ***1.4 Conclusions***

Secession is a unilateral process by which a group seeks to separate itself from an existing state, and creates a new state on the territory it inhabited, with a separate legal identity from the previous state. Since the process is unilateral it needs to be separated from other similar processes like devolution, granting of independence, and dissolution. It should also not be conflated with self-determination, since self-determination is just one possible normative approach to secession, amongst others. It is important to note that the group that seeks secession has to voice its wish, and thus it must be seen as an instance of a collective decision. Further, secession not only means that a group severs itself from political obligations of a state, but also that they take a part of the territory of a state. Thus, the group needs to establish a rightful claim to the territory it intends to take. Moreover, a good theory of secession should take a broader look on the territory, and also deal with the state’s initial right to the territory and under which circumstances it can lose this right.

Furthermore, secession is not an unlimited right, but should be limited by stringent requirements, since otherwise it could lead to limitless fragmentation, strategic bargaining, or

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<sup>60</sup> The potentials of the democratic theory of secession were extracted from and following Thomas Christiano, 2006, “A Democratic Theory of Territory and Some Puzzles about Global Democracy,” in *Journal of Social Philosophy*, Vol. 37, No. 1: 81-107

paralyze the normal functioning of states. Also, the nature of the right to secession is such that it is not enough to simply establish the moral right to secession, but one must also deal with the institutional acceptability of the right to secession. That is to say, the right to secession should be such that it would be plausible that it ought to be an enforceable right in international law.

Existing theories of secession can be divided into primary right theories, and derivative right theories. Primary right theories, especially the national self-determination theories, but also some plebiscitary theories are too permissive, since they make secession too easy and thus vulnerable to the above mentioned objections. Remedial right only theories, on the other hand, face the objection that they involve a puzzle. Even though they seem to restrict secession by making it the last resort out of an unjust, potentially violent situation, it seems that some restrictions would have a counter effect and would welcome violence in order to get the right to secession. On the other hand, democratic theory of secession seems very promising, however, needs to be spelled out so it can be determined, whether this promise can evolve into something valuable.



## Chapter 2: Revision and the puzzle

All theories of secession that have been examined in Chapter 1 seem to be faced with some more or less damaging objections. However, taking their basic features, and combining them with my guidelines for a good and comprehensive theory of secession, remedial right theories and democratic theories of secession appear to be the most adequate to ground secession. They appear to be such, since both of these theories treat the right to secession in a very restrictive fashion, and thus do not make it too easy of an option, and so seem best to preserve the well-functioning of states (those that do in fact function well). In addition to that, they seem to prevent strategic bargaining, and the objection that secession is made too easy. On the other hand, the question remains, if this means that all of the other theories are just ultimately inadequate to ground secession, or if there is a possible way to amend them so that they can avoid the objections, which make them seem doomed. While it is true that the remedial theories and the ‘democratic’ theories seem best, one cannot but ask oneself why they should be the only way one should think about secession. Why should, for instance, those processes where the majority decides, and so clearly voices that they want to secede from a state, be ignored? Intuitively, it would seem wrong to deny a right to secession in such cases, considering the decision was arrived at both collectively and democratically. However, it may well be that even though the decision on secession has been both collective and democratic, there are other core features of the theories that make the commendable process by which the decision was arrived at, lose its importance. In order to be able to determine that, it is necessary to revisit the theories dealt with in the previous chapter and see if and how they could be amended to back the above mentioned intuition. Also a closer look should be taken at the remedial right theories and see if they are always fit to ground secession at all.

In this chapter, I shall first revisit the theories put forth in the previous chapter, and determine whether some of those theories have been affirmed or dismissed prematurely. I shall take a

closer look on the implications these theories would have for secession, and determine which of them, if any count as a good and comprehensive theory that is in position to bring a solution to the problem of secession. I shall then point out the puzzle connected to the idea that both choice theories, and remedial right theories can ground secession. Lastly, I return to the core foundations of the existing theories, i.e. to the way in which they see the right to secession, and discuss whether the right to secession can be a primary right at all, in order to be able to determine, whether the theories fail not due to their implications, but due to their rotten foundations.

## ***2.1 Theories of secession revisited***

Primary right theories face many objections, which seem to decisively make them less fit to ground secession, amongst other they are vulnerable to the limitless fragmentation, strategic bargaining and too easy exit objections. However, in order to determine whether any of them could, with some amendments, be considered as an adequate theory of secession, national self-determination theories, and choice theories should not be treated as a package, since they are obviously, and fundamentally different, thus in what follows they will be dealt with in turn.

### **2.1.1 Fundamental failure of national self-determination theories**

The three most powerful general objections to the national self-determination theories were identified as the limitless fragmentation, strategic bargaining, and the paralysis of normal functioning of the state objections. These three objections, though they might seem powerful in the cases of theories presented in chapter 1<sup>1</sup>, nonetheless, may not inflict the lethal blow to the theories of this kind in general, as one may be able to think of ways to restrict the theories,

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<sup>1</sup> Referring to theories summarized from John Stuart Mill, 1991 “On Nationality, as Connected with Representative Government” in *On Liberty and other essays*, John Gray (ed.), Oxford University Press, David Miller, 1995, *On Nationality*, Oxford: Clarendon Press and David Miller, 1998, “Secession and the Principle of Nationality” in Margaret Moore (ed.) *National self-determination and secession*, Oxford University Press

to make them more stringent. Namely, all three objections stem from the fact that the theories, as they stand now, are much too permissive.

Since the theories stipulate an ascriptive right to secession, i.e. the right is ascribed to groups which are nations; they open the door of secession too wide. Considering that extremely many groups are in fact nations (or at least could be seen as nations following one of the definitions of what a nation is), a theory that does not put any more restrictions on the right to secession can in fact be seen as one that could lead to limitless fragmentation of states. In addition to that, if each nation were in fact in possession of such a right, they could use it as strategic bargaining to achieve their ends without engaging in productive deliberation on issues in a given state, and by means of that paralyze the normal functioning of that state. One, however, could try to think of ways to avoid these problems.

The first problem identified is that there are extremely many groups that can be seen as being nations. Thus, it would seem that if the limitless fragmentation objection is to be avoided, one needs to find a way to reduce the number of groups that could count as nations. In order to be able to do that, a look needs to be taken at how 'nation' is being defined in the national self-determination theories. When it comes to the definition of a nation, it can be seen that though much theoretic writing was devoted to it, there still is no straightforward, definitive definition thereof. According to Hugh Seton-Watson there is no objective characteristic that would define a nation. What does define it is rather a subjective conviction:

What is the nation? Many people have tried to find a definition. But it seems to me, after a good deal of thought, that all we can say is that a nation exists when an active and fairly numerous section of its members is convinced that it exists. Not external objective characteristics, but subjective conviction is the decisive factor.<sup>2</sup>

This 'subjective conviction' seems to be an adequate description of how a nation is defined.

David Miller defines the nation as a group of people, who recognize each other as members of

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<sup>2</sup> Viva Ona Bartkus, 1999, *The Dynamic of Secession*, Cambridge: Cambridge University Press, p.14

the same nation (same community), and who believe that they share certain characteristics, i.e. common history, attachment to a geographical place, and public culture that differentiate them from the other peoples surrounding them.<sup>3</sup> According to J.S. Mill, a nation is constituted by a mutual feeling of sympathy and connectedness of a certain group.<sup>4</sup> Margaret Moore also speaks of nations as of ‘people who identify themselves as belonging to a separate nation’.<sup>5</sup> Employing these definitions immediately makes obvious that they are too broad, at least for the purposes of making national self-determination theories less likely to lead to limitless fragmentation. According to these definitions, it is perfectly possible to imagine that there are countless nations in the world, and that new ones keep emerging. Thus, it would seem that, if the national self-determination theories are to be made more plausible, the definition of the nation employed, should not rely on a subjective conviction, but rather it should be based on some external characteristics by which one can objectively judge whether a group does, or does not constitute a nation, and so whether a group does, or does not have the right to secede. Mill later in his text ‘On Representative Government’ adds that things that contribute to the national feeling are common language, common religion, and common national history.<sup>6</sup> In addition to these characteristics, Miller puts forth common culture that differs from the one of the groups’ neighbors and the attachment of the group to a geographical place.<sup>7</sup> These characteristics are more objective, but nonetheless, some of them are simply not good enough to limit the number of groups counting as nations, and others do not only delineate a nation, but can be true of other groups as well. I will deal with them more thoroughly in turn.

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<sup>3</sup> David Miller, 1998, “Secession and the Principle of Nationality” in Margaret Moore (ed.) *National self-determination and secession*, Oxford University Press

<sup>4</sup> John Stuart Mill, 1991 “On Nationality, as Connected with Representative Government” in *On Liberty and other essays*, John Gray (ed.), Oxford University Press

<sup>5</sup> Margit Moore, 1998, “The Territorial Dimension of Self-Determination” in Margaret Moore (ed.) *National self-determination and secession*, Oxford University Press

<sup>6</sup> John Stuart Mill, 1991 “On Nationality, as Connected with Representative Government” in *On Liberty and other essays*, John Gray (ed.), Oxford University Press

<sup>7</sup> David Miller, 1998, “Secession and the Principle of Nationality” in Margaret Moore (ed.) *National self-determination and secession*, Oxford University Press and 1995, *On Nationality*, Oxford: Clarendon Press

First, I will deal with the characteristics of a common language, and common religion. They can be indeed looked at as objective characteristics, since they are both concrete enough so that it can be determined whether someone speaks the same language or not, or whether a group has a distinct religion. The question however is, whether by resorting to these characteristics, the definition of a nation can be made narrow enough, so that not too many groups can be seen as the holders of the right to secession, and more importantly, whether they can in fact be helpful for identifying nations or not.

The first fact that can be noted is that there are much fewer languages than there are nations in the world. There are many groups, which would be denoted as separate nations; nonetheless they have a common language, e.g. Austrians, Germans, and a part of the Swiss, all speak a common language, namely German, but are not all seen as a common German nation. Thus, it seems quite obvious that solely relying on the common language as a characteristic that can help us objectively identify a nation is not enough, since languages many times spill over the boundaries of what would be seen as a separate nation.

Perhaps then we should turn to the common religion as the answer to the question at hand. But in this case it can, without a complex argument, be seen that it is faced with a similar problem as common language. There are even fewer religions than there are languages, so the spillover effect is even more pronounced. Hence, we are forced to abandon common religion as a helpful tool to objectively identify a nation.

Thus far, we have taken the above characteristics separately and found that if we go about the question in this manner, it seems that we have undertaken a futile task. There is, however, one more possibility I haven't explored and that is to take both of the characteristics together in order to objectively identify a nation. This approach, on the first sight, seems more fruitful. There are peoples who, for instance, indeed speak the same languages, but can be told apart due to their religion. The perfect example of this claim are Serbs, Croats, and Bosniacs in

Bosnia and Herzegovina, who can objectively be told apart in the sense that though they speak the same language, they practice different religions, i.e. Orthodoxy, Catholicism and Islam. Nonetheless, not all cases are so conveniently delineated. All nations in Latin America, for instance, share a common religion, namely Catholicism, and moreover, most of them also share the same language, i.e. Spanish. Not only do they share the same language and religion amongst themselves, but also share it with Spain and Portugal respectively. Thus, if we relied on the combination of the two objective characteristics we still would not be able to objectively tell one nation apart from the other. We might be able to make the number of nations smaller, however, this would simply be due to the misconceptions the employment of the common language, and the common religion brings with it. The point is that the categories of language and religion are too broad and not specific enough at the same time. Thus, we are best served, if we abandon them as helpful in my quest to define ‘nation’ in an objective manner. With this however I have not reached the end of the road when it comes to the objective identification. Namely, there are still three characteristics left, which may turn the negative findings upside down.

First, I will deal with the common national history, which at first sight seems to be more promising than the characteristics dealt with above. Even though presumably different peoples share the language, and the religion, they can objectively be put apart by a different common national history. However, the fault of this characteristic lies in plain sight. Though common history can be seen as an objective characteristic, common national history, on the other hand, cannot. This is due to the fact that ‘national’ presupposes that the unit, amongst the members of which a common history is shared, has been determined and thus the nation cannot be determined by means of the common national history, because if that were the case, we would end up with a circular definition. So we cannot speak of a common national history, before we have given an independent objective definition of which group can count as a

nation. Due to this we cannot rely on this characteristic to bring us closer to the solution of the task at hand.

Hence, the only hope for national self-determination theories lies in the last two characteristics we can deal with, i.e. distinct common culture and the attachment of the group to a geographical place. We can reject the first one outright for the reason that it does not seem to be an objective characteristic. This is due to the fact that it is incredibly difficult to give an adequate and comprehensive definition of what is to be understood under the term. But even if we were in a position to define it, we still would not have anything objective to work with, since the whole process of claiming certain common distinct traditions (which for the sake of argument will serve as at the core of the term culture) relies on subjective identification with such traditions, and mostly it also has a spillover effect. For instance, taking gastronomic tradition, it can be concluded that though many peoples claim certain dishes and ways of preparations to be distinctive of their culture, many gastronomic traditions are shared in certain regions, so they are shared both within, and across nations. Similar things can be said of literary traditions and themes, and many other components of culture. Thus, a distinct common culture also fails to bring us closer to an objective definition of a nation.

Lastly, it seems that the attachment of a group to a geographical place does not save the day either. A group can be attached to a geographic place, but not be a unitary group, in the sense that different members of the group may identify with different ethnicities, or even nationalities. Moreover, there are many so called contested territories several groups claim as being theirs due to some sort of attachment to it. Taking Kosovo as an example, both Serbs and Kosovo Albanians are attached to that specific geographic place. But, it would be wrong to say that thus they belong to the same nation.

Going through all the above candidates of possibly objective characteristics, with the help of which the number of nations could be narrowed down, and by consequence also the number

of the holders of the right to secession as a right stemming from national self-determination, has so far led us to the conclusion that an objective definition of what is a nation is impossible. However, we cannot close this exploration before we deal with one more possibility that is left to us.

The last definition was put forth by A. Margalit and J. Raz. While they do not speak about the nation, but about an encompassing group, they can still be used as providing us with a definition for a nation, since a nation can be an encompassing group. Margalit and Raz also speak about self-identification as the one that is a factor of determination of membership, however, according to them an encompassing group needs to possess common characteristics, and common culture. In their words: "With national groups we expect to find national cuisines, distinctive architectural styles, a common language, distinctive literary and artistic traditions, national music, customs, dress, ceremonies and holidays, etc."<sup>8</sup>

Of all the above listed definitions, this one seems the most clear and gives us at least some tangible characteristics that can be used when trying to define whether a group counts as a nation or not. They also seem to be able to narrow down the amount of groups that can be seen as nations, and thus perhaps the limitless fragmentation would not be as limitless as in the cases of the theories listed above. However, the problem lies in the fact that though their definition is the most spelled-out, it is nothing less than a bundle of characteristics we have already dealt with and rejected. Thus, it can be concluded that the quest to find a definition of a nation on the basis of objective characteristics is futile.

Moreover, even if we would somehow manage to create the best possible definition of a nation, one that would be really down to the point, and would enable us to determine which groups constitute a nation on purely external, objective characteristics, national self-

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<sup>8</sup> Avishai Margalit and Joseph Raz, 1995, "National self-determination" in *Journal of Philosophy*, Vol. 87, p. 82



determination theories still could not be completely saved from another pair of objections, which hit them at their core.

Whatever the definition of a nation may be, a nation is always a group that excludes those who do not belong to it. Hence, if secession is to be the right of nations, the problem arises for those, who do not belong, and/or are trapped within this nations' new state. If history can teach us anything, then it is that nations are not neatly concentrated, and that when they gain statehood, they might be inclined to exclude those, who do not belong in one way or the other. This could be seen after the WWI when state boundaries were drawn following W. Wilsons points, basically stating that the boundaries of the state should be congruent with the boundaries of a nation. What followed were expulsions of non-titular nations or population transfers. To be fair, this objection is addressed by Miller, who in his theory stipulates that trapped minorities need to be protected by minority rights.<sup>9</sup>

However, even if this consequentialist objection is put aside, there is one question that national self-determination theories need to answer, yet seem unable to. They need to establish, why being a nation is as morally relevant that it gives them the right to secession. What makes them so special as to having a primary right to secede? It can be imagined that the answer would be something along the lines of 'they have special common culture that we need to protect', or 'they have such right in order to protect their language'. While I can without further ado agree that these are not unimportant considerations, they still do not establish a right to secession. One can protect the common culture and the common language only, if it is endangered. And for the right to secession to arise, it would need to be endangered by the state. However, if that were the case, then secession would be possible, but not because the group is a nation, but because their rights have been violated. Moreover,

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<sup>9</sup> David Miller, 1998, "Secession and the Principle of Nationality" in Margaret Moore (ed.) *National self-determination and secession*, Oxford University Press

cultural rights, and language rights, can be protected by other arrangements short of secession, like for instance giving the groups autonomy, or creating a set of regulations, which protect their culture and language. Hence, the most important challenge for national self-determination theories is to come up with an independent argument, which explains why being a nation is morally relevant for the question of secession, or at least show what makes a nation more morally relevant than any other group, for that matter.

Considering that national self-determination theories do not properly address the question of why it is nations that have the right to secession, and the fact that nations are very exclusionary and impossible to define in a relevant way, it is hard to believe that these theories could be amended in a way, which would make them adequate as grounding secession. Thus, they should be considered as fundamentally inapt to ground secession.

### **2.1.2 The promise of choice theories**

As has been shown in chapter 1, the three routes that different choice theories take, lead to different outcomes, when evaluating them as being good theories to ground secession. The least probable theory to be looked at as sound and comprehensive is Harry Beran's theory<sup>10</sup>. It has been established that his theory is vulnerable to the objections of limitless fragmentation, strategic bargaining and could possibly present a treat to the normal functioning of a democracy. All of these objections are the consequence of the fact that his version of the choice theory is by far not restrictive enough, i.e. secession is made too easy to perform. Considering that his theory stipulates that the holders of the right to secession are territorial groups, and that there are innumerable territorial groups, it can easily be seen how limitless fragmentation and strategic bargaining come to the surface as strong objections against his theory. Moreover, the constraints he puts on the right to secession, i.e. that the separating

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<sup>10</sup> Harry Beran, 1998, "A democratic theory of political self-determination for a new world order" in Percy B. Lehning (ed.) *Theories of Secession*, London: Routledge

group needs to be politically and economically viable, do not really diminish the number of groups, who would have the right to secession enough, though in all fairness to him they do exclude the poorest secessionist groups, since they should not rely on the financial help of the international community indefinitely, and it can be assumed that at least some of the poorest groups would have done so.

The question I am interested in at this point is, whether this theory can be amended in any such way, which would make it feasible as a good and comprehensive theory of secession. Unlike the path I took when thinking about strengthening the national self-determination theories, I cannot look to amend choice theories by amending or constraining the definition of a territorial group, since that is neither necessary, nor feasible in their context. In contrast with the national self-determination theories, territorial groups' having the right to secede is only a partial demand of choice theories. The more important aspect of the theories is that in order for the territorial groups to have the moral right to secede, they need to express this in a democratic way, by means of referenda on secession, and more than half of them need to vote in favor of it. Moreover, the definition of a territorial group as the unit of concern regarding secession is something that can be arrived at objectively, and without greater obstacles, which makes the possible narrowing down of the definition unfeasible. Thus, it would seem more fruitful to look at the second component of choice theories, i.e. that the will to secede must be expressed in referenda, and supported by a majority within the seceding group.

As this requirement stands now, it does not circumvent the above mentioned objections, since it is conceivable that where a homogeneous territorial group that seeks secession votes on it, presuming that the ratio is approximately 2/3 of A and 1/3 of B, and the A's are the ones who want to secede, it really is not too hard for the A's to get a simple majority to vote in favor of secession, whereby 50, 1% is considered as simple majority. Since it is relatively easy to imagine that most groups seeking secession are homogenous groups, within which a simple

majority can be formed in favor of secession, it can easily be seen how the simple majority requirement does not really diminish the number of potential secessions, and so limitless fragmentation, strategic bargaining, and possible paralysis of the normal functioning of the state still persist. However, it seems that this problem could be circumvented with a relatively straightforward procedural amendment. What is to be avoided is that the exit in the form of secession is made too easy, because this is the basis for all the objections against the choice theory at hand. Thus, it would seem to logically follow that, if secession is not to be a too easy option, then the conditions that need to be met in a referendum in order for a territorial group to justly secede from a given state need to be strengthened. In other words, the procedural constraints of the choice theories need to be made more stringent.

All theories mentioned in the previous chapter merely require that ‘a majority’ votes in favor of secession.<sup>11</sup> Since majority could, and in some cases specifically does, mean simple majority<sup>12</sup>, i.e. one more vote for than against, it can be seen that the procedural constraints are not stringent enough to circumvent the too easy exit objections. What is more, it is hard to justify the creation of a new state with possibly almost half of the population not wanting to be in that state, especially taking into consideration that Beran bases the right to secession on freedom of association.<sup>13</sup> Nonetheless, if the demand were that a qualified majority, i.e. at least three quarters of the population is to vote in favor of secession, and a high threshold on the attendance is set (for instance 51%), all of the objections this particular choice theory has been facing, seem to be avoided. If secession is really the agenda of most of the members of the group, then a qualified majority can be reached, thus it cannot be said that the conditions

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<sup>11</sup> Such a simple majority principle is found in Christopher Heath Wellman, 2005, *A Theory of Secession: The Case for Political Self-Determination*, Cambridge University Press, Daniel Philpott, 1995, “In Defense of Self-Determination” in *Ethics*, Vol. 105, No. 2 and Harry Beran, 1998, “A democratic theory of political self-determination for a new world order” in Percy B. Lehning (ed.) *Theories of Secession*, London: Routledge

<sup>12</sup> Wellman takes ‘the majority’ to always mean a simple majority. He is explicitly against the idea of qualified majority being needed when it comes to the vote on secession, as he believes that this would allow the minority to hold the majority hostage.

<sup>13</sup> Harry Beran, 1998, “A democratic theory of political self-determination for a new world order” in Percy B. Lehning (ed.) *Theories of Secession*, London: Routledge

are too stringent, i.e. not leaving any room to exercise the right to secession. Furthermore, since it is not as easy to reach the qualified majority, secession cannot be looked at as an easy option, and quite possibly would not lead to limitless fragmentation. The strategic bargaining would also be out of the way, since the stringent procedural constraints would eliminate the option of using secession as a joker to pull out of the sleeve, whenever one wanted to have easy gain. Moreover, most people of the seceding unit would be in favor of secession, so this would also eliminate the before mentioned problem of large amount of people finding themselves in a state they did not want to be a part of. Hence, it seems that, if stringent procedural constraints are imposed on Beran's version of the choice theories, it appears to be viable as theories of secession. But before any definitive remarks on choice theories can be made, the other two versions of choice theories dealt with in the previous chapter have to be dealt with here, since though they all have the component of choice, i.e. voting on secession in referenda in common, the objections they were facing were quite different and might point to some other major flaw within these kind of theories.

Philpott's theory is essentially similar to Beran's, since it also takes the state to be a voluntary association, however, it is much more restrictive, and thus it cannot be objected to it that it makes secession too easy. Contrary to Beran, Philpott<sup>14</sup> sees the right to secession as grounded in moral autonomy, i.e. since people are autonomous they can by virtue of that chose their own government extending this choice to people having the right to chose to separate from the existing state, and creating a new one. Nonetheless, his theory is not vulnerable to the limitless fragmentation, strategic bargaining, and the possible paralysis of the normal functioning of the state objections, since it presupposes that secession is only an option in cases where the autonomy of the remainder state's population is not too damaged, and excludes the secession of groups that resort to strategic bargaining. Put simply, when

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<sup>14</sup> Daniel Philpott, 1995, "In Defense of Self-Determination" in *Ethics*, Vol. 105, No. 2

secession brings more harm than good, it should not be an option. However, the flaw in this theory lies in how he conceives of the legitimate claim to the territory. Namely, he believes that a group has a legitimate claim to the territory by virtue of having a common government on that territory. This in turn is a somewhat convenient and empty conception, since the legitimate claim is established *post factum* and thus plays no decisive role in establishing whether a group has the right to secession. But, as has been pointed out in the previous chapter, any sound and complete theory of secession needs to establish the groups' legitimate claim to the territory in such a way that it is clear that this particular group has the right to that territory at the time of the secession, simply because one of the main characteristics of secession is not merely the separation of the group from the political obligations of the state, but also taking of a part of the territory of that state. Is there any way to amend this problem? While the objection is a solid one, there are nonetheless ways to establish a legitimate claim to the territory in a way that it is not problematic. For instance Philpott's formulation that a common government establishes a legitimate claim to the territory can be changed to a far more reasonable and feasible formulation, namely that the legitimate claim to the territory is established by living on that territory, making certain decisions about the territory on the local level, etc. In other words the legitimate claim to the territory stems from the communities long established attachment to the territory, and its previous (limited) government of it. By amending the assertion of what grounds the legitimate claim to the territory and with addition of the above mentioned more stringent procedural requirement of a qualified majority rule this theory also remains a candidate for a viable theory grounding the right to secession.

At this point, it would perhaps be useful to look at the common denominator between Beran's and Philpott's position. Both theorists seem to take the state to be a voluntary association of some kind. Beran does this quite explicitly by claiming that the state functions as the agent of the people, and that this agency relationship can be revoked at any time. Philpott, on the other

hand, holds the belief that in virtue of the fact that people are autonomous and as such take part in shaping politics through representation and participation, and that self-determination is a unique principle which is rooted in moral autonomy, people sharing some sort of political identity have the right to seek a separate government. Though it has been established in the discussions above that both theories can be saved from what seemed to be fatal objections, this conclusion should not be made so hastily. Almost all objections to the theories at hand can all be considered as practical objections, since they were referring to the practical implications these theories would have. Even though, such considerations are of utter importance when trying to find a good and complete theory of secession, focusing solely on them might lead us to overlook some more basic problems these theories face, and what lies at the basis of the above mentioned theories is indeed problematic.

The fatal flaw associated with these theories is that they take the state to be some kind of voluntary association. It is, however, very hard to show that a state is based on a voluntary basis. In order for Beran and Philpott to save their theories, they would have to present strong arguments for a theory of political authority, based in some voluntary action, like for instance consent. Beran does give it a try, but ultimately fails to persuade that consent theory is able to explain our political obligations, due to the fact that he fails to give a viable, and not too costly option of dissent. He believes that dissent is shown either by secession, emigration, or public denunciation.<sup>15</sup> Secession is problematic because you cannot show how you can withdraw consent before you show that there in fact is consent in its proper understanding. Emigration can easily be seen as something that comes at a great cost, since one leaves the familiar environment and often family and friends behind, and thus again the requirements for proper consent are not reached. The concept of public withdrawal of consent is also highly problematic, mainly because of its practical implications, which render it similarly costly as

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<sup>15</sup>Harry, Beran, 1977, "In Defense of the Consent Theory of Political Obligation and Authority" in *Ethics*, vol. 87, no. 3 (April 1977), pp. 260-271

emigration. Since they have not presented a separate and strong argument for why the state should be taken to be a voluntary association, and I personally do not believe that it is possible; their theories should be rejected as viable candidates to ground secession. This is, however, not to say that choice theories as a whole are a failed project, since one more version of it is yet to be dealt with, which does not succumb to the objection just raised, since it does not treat the state as a voluntary association.

Wellman<sup>16</sup> puts forth a choice theory of secession that is based on a statist position. This basically means that he does not believe that we owe the state political obligation, because we have freely consented to its authority. According to him, the state has authority based on the fact that it provides political stability, without which the people would find themselves in dangerous condition of political instability. This position not only sets him apart from other choice theories, it also secures him from the objection that his theory is grounded on a flawed understanding of the state as being a voluntary association. Furthermore, his theory also does not fall into the category of a very permissive theory, and so cannot be objected to as potentially leading to limitless fragmentation, strategic bargaining, or possible paralysis of the state, since it does not solely rely on the majority vote, but also presupposes that the seceding group leave the rump state in a functioning condition, in addition to itself being in the position of performing basic functions, e.g. providing security etc. This limiting condition can be looked at as stringent enough not to lead to a great proliferation of secession, if the right is to be given to groups that meet it.

However, his position faces one important problem. It relies on the fact that the value of self-determination is without any independent argument extended to include self-determination in its external sense. Namely, one could argue, without contradiction, that one values self-determination, but still think secession is not permissible at the same time. In any given well

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<sup>16</sup> Christopher Heath Wellman, 2005, *A Theory of Secession: The Case for Political Self-Determination*, Cambridge University Press



functioning democratic state, where democratic and political rights are upheld, one can be said to value self-determination in virtue of giving its people the right to determine who will rule in that state. The question that needs to be answered is, whether it can somehow be argued, even in a weak sense that self-determination is to be taken in its external meaning. The answer to this question is essentially the tipping point in my evaluation of choice theories. Let me then take a look at some considerations made so far and see if an argument in favor of external self-determination can be made. The seceding group needs to vote in favor of secession. While Wellman thinks that a simple majority vote is enough, let me for the reasons mentioned above in this section deny that it is enough, and assert that a qualified majority is necessary. How does this connect to self-determination? It can be imagined that the members of the secessionist group, really only wanting to rule themselves, are so apathetic to the questions of who rules in the state they reside in, and how that state is ruled that they largely omit going to general elections at all. However, when they are presented with the opportunity to vote on whether they get to rule themselves in their own state, almost all of the members of the group vote in favor of it. Now, it can be, for the sake of argument, said that since these people so clearly voiced their will they should have the right to self-determination, and in this example self-determination can only be seen in its external sense. This line of thought by no means constitutes a strong argument in favor of reading self-determination in its external sense. It does, however, show the line of thought that could be behind such a claim. At the beginning of this chapter it was mentioned that it would seem intuitively right to allot the right to secession to a group, which has arrived at the decision to secede both collectively and democratically. The way of thinking presented in this last paragraph, combined with stringent procedural constraints arrived at when considering other choice theories, seem to back this intuition. That being said, my claim here is not that choice theories have been saved beyond reasonable doubt from all that may be objected to them. The claim is

merely that considering the procedural amendments, and the statist position of this particular choice theory, it seems that choice theories can at least for now still be considered as viable candidates for grounding secession. It may well turn out later that they fail to be so, but at least for now they should not be set aside.

### **2.1.3 The strength of the remedial right theories and current incompleteness of the democratic theory**

Derivative right theories have initially shown much more promise as theories grounding secession, in comparison with the primary right theories. While the primary right theories have been plagued with objections deriving from the fact that they were either too permissive, or suffered from more basic theoretical problems, like not being able to provide a legitimate claim to the territory, or explain why self-determination should extend to its external sense, derivative right theories were not only restrictive enough to escape the objections connected to making secession a too easy exist, but also had a very solid theoretical background able to deal thoroughly with the question of the legitimate claim to the territory, and more importantly, they do not presuppose the state to be some sort of voluntary association. Nonetheless, remedial right theories faced a different kind of objection, namely that they seem to involve a paradox. On the other hand, the problem with the so called democratic theory of secession quite obviously lies in the fact that it is not yet developed, but at this stage merely implied, and thus in the absence of it being spelled out, at this point not much can be said about it. I shall first deal with the remedial right theories, and then only succinctly with the democratic theory, as I shall deal with it in length in the following chapters.

The remedial right theories, according to the examination in the previous chapter, seemed to not only be the best fit, but also the only ones fit to ground secession. Since the theories are very restrictive they are not vulnerable to the same objections as the national self-determination theories, and the choice theories, i.e. limitless fragmentation, strategic

bargaining, and destabilization. Moreover, since the theories assert that the state has the legitimate claim over the whole of its territory as long as it has not acquired the territory unjustly, and as long as they treat everyone within the territory justly, the question of the legitimate claim to the territory of the seceding group is well formulated, and cannot be as easily disputed as in some choice theories.

They are, however, by far not perfect. One of the major problems with them, put forth by Costa<sup>17</sup>, is that these kind of theories seem to involve a paradox, i.e. that the things that they seek to prevent, i.e. violence and violation of human rights, are made more likely by the theories themselves. The objection is directed at the idea of remedial right theories that asserts that secession should be the last resort option, i.e. it should only be an option when all other arrangements short of secession, for instance intrastate autonomy agreements, fail. Since the secessionists know that independence is only an option, if the state does not respect the autonomy agreements, they might provoke violence to which the state may react with violence, thus adding to the legitimacy of their claim to secession.

While this objection *prima facie* seems very strong, it nonetheless disregards a very important part of the remedial right theories. Remedial right theories in fact do propose that where possible arrangements short of secession should be made, and as an instance of such arrangements they propose intrastate autonomy agreements. However, these agreements are not left in a limbo, where the only people involved are the secessionists and the state. The theories clearly state that in addition to the intrastate autonomy agreements there needs to be international monitoring of these agreements.<sup>18</sup> The monitoring plays an important role as it is designed to determine the fault in case these agreements fail, and in turn determine, whether the claim of secession is justified or not.

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<sup>17</sup> Josep Costa in 2003, "On Theories of Secession: Minorities, Majorities and the Multinational State," in *Critical Review of International Social and Political Philosophy* 6/2: 63-90

<sup>18</sup> Allen Buchanan, 2004, *Justice, Legitimacy and Self-determination*, Oxford University Press, Ch. 9

Taking this international monitoring provision into consideration it can be seen that while Costa's objection is not out of place, it also loses its strength. Though it may be true that there can be provocations on the side of the secessionist, and the state reacts violently, this would not add to the legitimacy of the claim to secession by the secessionist, as the international monitoring would prevent them to get away with it. Thus, while it may be true that the combination of two normative arguments, the deontological on one side, and the consequentialist on the other, can point to different solutions, and there even might be a paradox within remedial right only theories, this is not always the case, at least not when the theories include the provision for international monitoring of the intrastate autonomy agreements. Hence, all things considered remedial right theories still seem to be fit for grounding secession.

Democratic theories, as mentioned in the previous chapter, cannot be seen as theories of secession as such, since they do not deal with secession *per se*, but are rather concerned with normative considerations on democracy in general. Secession enters the picture only as a side note, a consequence of the violation of basic democratic principles, for instance of equal say. The idea of secession is connected to the idea that legitimate boundaries are connected to the legitimate authority of the state. In short, secession would be a possibility only, if the state loses legitimate authority and it could happen only, if the state would in some important form violate the realization of public equality.<sup>19</sup> Since the limits to democratic authority and the gravity thereof needed to imply secession have not been spelled out yet, it is impossible to say at this point what the exact implications of democratic theory for secession are. Nonetheless, it is not inconceivable that the democratic theory, when attended to thoroughly, and developed to its full potential, could in fact be well fit to ground secession. As such a venture would take a lot of elaborate consideration and attention it is too large of a task to be performed in this

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<sup>19</sup> Thomas Christiano, 2006, "A Democratic Theory of Territory and Some Puzzles about Global Democracy," in *Journal of Social Philosophy*, Vol. 37, No. 1: 81-107

chapter. Let it suffice for now that the hope in democratic theories of secession is based on the characteristics these theories show, even at the rudimentary level, which I believe are vital for a comprehensive theory of secession. Namely, the right to secession is not a primary right, it is not easily obtainable, and it would seem that secession would be possible on the ground of something more and different from basic violations of human rights.

#### **2.1.4 Interim conclusions**

Having revisited theories of secession, several interim conclusions can be reached. While primary right theories seemed doomed in the previous chapter, it can be, after revision, concluded that not all of them are.

National self-determination theories not only cannot address the objections of the previous chapter, but are faced with more fundamental issues, i.e. they fail to show what makes the nation so special, as to make it the group for a primary right to secession, and they remain very exclusionary, which brings a whole new set of problems with it. Thus, it would seem that national self-determination theories are utterly unfit to ground secession, and they should be excluded from further consideration.

On the other hand, choice theories, when properly amended seem to be as good as any theory to ground secession. In their original form they are indeed too permissive. However, if they are amended to include strong procedural constraints (qualified majority) as a requirement, then they cannot be seen as too permissive anymore. In addition, this requirement brings these theories closer to their ideal, as in this way in fact most people end up living in the state of their choice. Moreover, finding a choice theory that does not base the legitimate authority of the state on some voluntary agreements makes these theories much more feasible, as it avoids having to perform what seems to be a futile task, namely give good arguments for how a state can be seen as a voluntary association.

Remedial right theories, though they seem to involve a paradox, on a closer read reveal that the paradox would have been a serious threat to them, were there not for the international monitoring provision.

Democratic theory, on the other hand, shows potential, but because it is so undeveloped at this point falls beyond the scope of this chapter, and will be dealt with in detail in the following one.

All in all, it can be concluded that after the re-evaluation of all existing theories of secession at least two viable candidates for grounding the right to secede are left, i.e. amended choice theories, and the remedial right only theories.

## ***2.2 The puzzle***

A comprehensive theory of secession should not make secession too easy an option, i.e. the conditions for secession should be rather stringent. When considering existing theories of secession, it has been determined that remedial right theories come with the most stringent conditions, and thus an interim conclusion has been reached that as such, they are the most viable as theories grounding secession. However, after re-evaluating all the theories, it has been shown that some forms of choice theories, if amended, also could ground secession, as the conditions would appear to be stringent enough not to make choice theories too easy of an option. Nonetheless, if both types of theories are to be adopted as suited to ground secession, the view that the application of the theories depends on the circumstances, in which the seceding groups find themselves in, has to be adopted as well. This seems to be the case, because first, both theories cannot apply to one and the same case and second, there are cases in which one of the theories is unfeasible. Moreover, under some circumstances relaxed conditions for secession could have a very destabilizing effect, as they with high probability would lead to violence. On the other hand, under certain circumstances very restrictive theories would appear out of place as they impose too stringent conditions and would make

secession virtually impossible, even though it could be performed by means of democratic procedures without great obstacles.

Considering first remedial right theories, it is obvious that there are certain circumstances that need to be true, in order for these theories to apply. What comes to mind are circumstances of either a dictatorship, tyranny, or any other kind of undemocratic state, where in addition to the states not being governed very transparently, or democratically, human rights are not valued, or being observed. Under such circumstances gross human right violations are possible against the citizens in general. However, in many cases they are directed to specific groups. Moreover, there might have been groups, which under previous regimes, or even the current one, enjoyed an autonomous status, but such status has been revoked unilaterally by the state. An example of such circumstances would be Kosovo, where the province during the time of the Socialist Federal Republic of Yugoslavia enjoyed the status of an autonomous province. However, this status has been revoked under the Slobodan Milošević government, and civil rights of the Albanian population of Kosovo have been grossly violated, e.g. people of Albanian ethnicity were unjustly fired from their jobs, Albanian schools and universities were shut down etc. Furthermore, their aspirations for independence have been violently repressed. Even though there has been a referendum on independence celebrated in Kosovo, i.e. in 1990, it was not followed by a dialogue with Serbia, but rather with violence, and continuous violations of human rights. Under these circumstances the requirements of the remedial right theories were almost met point by point. There have been gross human rights violations. There have been arrangements short of secession met before, i.e. intrastate autonomy, which have been unilaterally broken by the state. Thus, the stringent conditions for a legitimate secession have been met. Furthermore, the stringent conditions seem to have been necessary, since the situation was stained with excessive violence, and was very unstable. Remedial right theories in similar circumstances seem to be tailored to address such situations. It must be

noted that not all of the cases are as clear cut as the one presented above. Nonetheless, they could still fall under the remedial right theories by satisfying at least one of the conditions enshrined within the remedial right theories, i.e. that the members of the group were subdued to gross violation of their basic human rights, that the territory of the group has been illegally incorporated into the larger state, or that there have been violations of the intra-state autonomy agreements from the side of the state.

On the other hand, considering the above example choice theories are obviously out of place. Not only are they out of place, because they are less fit to address such circumstances, they are a non-starter under such circumstances, because a key characteristic is missing, i.e. for choice theories to even be possible there need to be procedural mechanisms in place, and these in turn need to be available to the groups seeking to secede. Under the circumstances, where there are gross human rights violations of a specific group, there is little hope that members of this group have the possibility to organize referenda and carry them out without (violent) opposition. Moreover, even in cases where referenda can be organized, it needs to be kept in mind that since the situation is very tense, such relaxed conditions for secession would with high probability lead to escalation of violence. Hence, it has to be conceded that the two types of theories that have been found viable as grounding secession address different kinds of circumstances.

Choice theories can hence be used only under circumstance much more relaxed than the ones described above. They would be appropriate to ground secession in states, in which there are no or at least no grand-scale human rights violations, and where procedural mechanisms are in place and are readily available to the group seeking secession. Such a group should be in the position to organize a referendum, and of course the state should be such that it does not violently suppress any (further) action the seceding group is to perform. Thus, it would seem that functioning democratic states can be said to be such a circumstance. Examples of such



secessionist movements are those of Catalans and Basques in Spain (though the Basque case is more complex and (was) largely discredited by terrorism), Scotland in the United Kingdom and Flanders in Belgium. Perhaps the best example that can be given is the attempted secession of Quebec in Canada. During long lasting aspirations for independence, a couple of referenda have been organized by the Quebecois. Following the most recent referendum in 1995, in which the result was very close, i.e. 50.5 % voting against and 49.42% voting for the independence of the respective Canadian province, the Canadian Supreme Court issued an important ruling with reference to Quebec's secession. The Court was asked to rule on three questions, i.e. "whether a unilateral declaration of independence by Quebec would offend the Canadian Constitution, whether it would be consistent with the rules of international law and, if the answers to the domestic and international law questions were inconsistent, which legal regime prevailed."<sup>20</sup> While in the Courts opinion, a unilateral declaration of independence would not be in accordance with the current Canadian Constitution, nor would it be consistent with the international law (at that time), and thus the third question was redundant, it in addition to this, ruled that there existed a constitutional duty to negotiate, if Quebec with a clear majority on an unambiguous question decided that they want to pursue secession. Under circumstances similar to the ones in Quebec it is clear that the choice theories are fitting to ground secession. The procedural mechanisms are in place, and the people have (unrestricted) access to them. In addition to that rule of law is in place in such countries and so secessionist conflicts are most likely to be solved by means of negotiations and dialogue, rather than by means of violence, and thus secession does not present the danger of destabilization of the state or the region. On the other hand, remedial right theories are ineffective in such circumstances, since the states are well functioning, and there is no gross human rights

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<sup>20</sup> David Schneidermann, 1999, *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession*, Toronto: James Lorimer & Company Ltd., p. 1

violations, and no violations of intrastate autonomy agreements, and such stringent conditions are not necessary for the reasons mentioned above.

It thus appears that the application of the theories and consequently the stringency of the conditions for justified secession depend on the circumstances. In cases where the situation is rather tense, and secession could, and most probably would lead to violence (where violence is not yet present) remedial right theories seem to be appropriate. In consequence, this means that in cases where the situation is tense, conditions for secession are, and should be very stringent. That is the case, because mostly mechanism for more relaxed conditions are not in place (it would be impossible to organize referenda) and more importantly, because even if such mechanisms were in place, given the tense situation in such states, holding of referenda, or as a consequence of positive referenda, there is a high probability of violent repression of the secessionist movements. On the other hand, it could be said that in situations where the situation is relaxed, the stringency of conditions can also be more relaxed. In relaxed situations secession could be carried out without the threat of violence, but would rather be handled by means of dialogue and negotiations. Moreover, under such circumstances the procedural mechanisms are in place, and there are no obstacles for the people to make use of them.

Thus, the situation is the following; where the circumstances are tenser and more deteriorated, and the stakes are relatively high, the stringency of conditions for justified secession is very high, and on the other hand, where the circumstances are more relaxed, and the stakes are relatively low, the stringency of conditions is more relaxed as well. The stringency of the conditions hence increases with the deterioration of the circumstances: with rising stakes and degrading procedures. While this situation seems to be the adequate conclusion from the above, it comes at a great cost. The problem that is involved with it is that it presents us with a puzzling consequence. In cases where secession is more urgent from the moral point of view

(gross human rights violations), it is very difficult to achieve. On the other hand, in cases that from a moral point of view are not urgent at all, secession is relatively easy to reach.

It is important to note at this point, that the puzzle arises out of the requirements applying to political collective decision making process. The point is that these requirements are harder to satisfy exactly when secession is needed the most from the moral point of view, and on the other hand, are relatively easy to satisfy, when secession is not all that urgent. This point follows from the discussion above. Namely, when the situation is deteriorated, and stakes are high, and thus secession is urgent from a moral point of view, it is almost impossible to carry out a successful collective decision making process. This is the case, because procedural mechanisms are not in place or readily available, and so holding of referenda, in their regular form, almost impossible. On the other hand, in situations, where stakes are low and situation normal, procedural mechanisms are readily available, and referenda can be held without bigger obstacles, so the collective decision making process can be carried out without a problem. Thus, the requirements for secession in both cases can be said to be the same, however they are much harder to meet in situations, in which secession is urgent from a moral point of view.

If I make a comparison rather popular with philosophers dealing with secession, namely the comparison with divorce, this puzzle becomes even more obvious. Many times it is much more difficult to file for divorce in cases where the wives are abused by their husbands (or the husbands by their wives) than in the cases where the couples just do not want to continue to be married. This is so, simply because the abused wives (husbands), for several reasons, with much more difficulties file for divorce. They may be prevented from doing so by force; the spouse does not let them, or they may not be able to do it due to the fear of retaliation, etc. Be it as it may, it is more difficult for them to make use of the procedure than it is for couples divorcing due to “unbridgeable differences”. Thus, an absurd conclusion that when secession

or divorce is needed the most, it is not really available, or extremely difficult to achieve, and where it is not so urgently needed, it can be achieved much more easily, follows from both cases. Thus, it would seem that secession is an elusive solution to an urgent problem.

In light of this puzzle, it seems that something must have gone wrong in the reasoning above. It might be that only one of the types of theories, i.e. remedial right only theories, or the choice theories should be the sole theory grounding secession. If only choice theories are adopted as grounding secession, the problem arises that while they may be perfectly suited in well functioning states, they have nothing to say in cases where the state is not functioning well, and so people cannot decide on secession, due to the lack of procedural mechanisms. On the contrary, remedial right theories would seem to address the issues in deteriorated states, but do not give us any satisfaction, when it comes to the question why people who clearly collectively want to secede and have all the mechanisms readily available, could not have such a right, unless their basic human rights are grossly violated. On the other hand, it is possible, that neither of these theories should ground secession. It can be claimed that the choice theories, even in their amended version, cannot ground secession, because there might be a fundamental flaw in how they conceive of secession. I will deal with this possibility in what follows. The remedial right theories, on the other hand, as the puzzle reveals, can be said to be too narrow and so incapable of addressing situations where secession is very much needed from a moral point of view, but is according to them not justified, since none of the conditions (fully) apply. I will deal with this in the following chapters.

### ***2.3 Primary vs. Derivative right***

As mentioned at the beginning of this chapter, there is something appealing in the intuition that, if people arrive at the decision to secede both collectively and democratically, then they should be given the right to secession. In addition, it has been shown that choice theories can be strengthened in such a manner that they are no longer vulnerable to the objections raised

against them in the first chapter of this dissertation. Nonetheless, it has already been pointed out that theories, which conceive of the state as a voluntary association, stand on faulty foundations. Moreover, I intend to show that the choice theories grounding secession on the principle of self-determination are also built on flawed grounds. I will deal with these claims in more detail here by concerning myself with the question of whether secession is, or rather should be a primary, or a derivative right.

When I started dealing with theories of secession, I have divided them into two groups. On the one side there are national self-determination theories, choice theories and some hybrid theories combining the elements of both, which take secession to be a primary right, meaning that the right to secession is a right *per se*, a direct, original right much like some basic human rights, e.g. the right to life. On the other side there are remedial right only theories and the democratic theory of secession, which do not take secession to be a right *per se*, but a right that derives from some prior injuries, like the constant violations of basic human rights, violations of territorial integrity, i.e. illegal integration into a state, violation of intrastate autonomy agreements, and lastly the violation of the realization of public equality.

When secession is considered a primary right it is based either on the fact that it is a right of a nation to have their own state, or that it is a primary right because it is based on freedom of association, moral autonomy, or the value of self-determination. While all these are not without importance, it nonetheless seems a bit premature to derive a primary right of secession from them. While nations might have certain primary rights, i.e. language rights, cultural rights etc. it seems a bit farfetched to allot them the right to their own state. Partially that is due to the problems that were discussed above, but moreover, it is hard to see how from the fact that one is a nation, one can reach the conclusion that nations have a direct right to their own state. In order for nations to have the right to their own state, one would have to show that there is something about nations, which gives them moral priority to other groups,

and in addition to that show that this special moral status of the nations necessarily can only be exercised, when they live in their own separate states. On the other hand, freedom of association and considerations of autonomy might get closer to being treated as primary rights, but even if I concede that they are, it does not directly follow that secession is. In part that is the case, because many things fall under the concepts. Freedom of association for instance covers a wide range, i.e. it can be understood to mean basic association between individuals, association with larger groups such as religious or political groups etc. It is not impossible to interpret freedom of association to include the association between the people and the state, however asserting that it entails that any part of the people can without further ado terminate the relationship might be true only, if we deal with it without taking conflicting rights and factors into consideration, e.g. state sovereignty and territorial integrity. Moreover, one would have to be in the position to show that the legitimate political authority of the states as such is based on some sort of voluntary association, e.g. consent of the people. Though it is probably not completely impossible to do so, at least so far none of such theories have been very successful, and thus the idea that states are voluntary associations does not appear to be very plausible. When it comes to autonomy and the rational that we have the right to choose in which state to live, since the principle of self-determination follows from the moral autonomy of the people, it again has to be said that it does not take conflicting factors into consideration. Even if these factors were to a certain degree taken into consideration, again the problem of how to justify the state as a voluntary association remains, and quite frankly the success of a theory that wants to assert both, i.e. that the state is a voluntary association and that secession is thus a primary right, ultimately depends on the success of presenting a good argument for the former.

There is but one primary right theory that does not take the state to be grounded on some voluntary action of its people. This theory asserts that it is a primary right in virtue of it being

seen as an instance of the self-determination of the people. However, even though it has been shown in the previous subchapter how one could rationalize that self-determination is to extend to its external sense, i.e. to secession, it seems that though the decision to secede has been arrived at both collectively and democratically is not enough to extend the principle of self-determination to secession. A more plausible consideration is that in cases in which it can be said that people had the right to choose their government and so they had exercised their basic rights, but they lost out on some issues, they do not automatically have a primary right to secession. Perhaps they may have the right to secession, but not as a primary right. The right may perhaps derive from something connected to the procedure or the outcomes of the procedure, but it just does not seem plausible to take it as a primary right of any peoples, for that matter. Since the choice theories take secession to be a primary right, it can be concluded that they cannot ground secession, since the theories are built on faulty foundations.

From all of the above it can be concluded that secession is a derivative right. The question that remains to be answered then is: What does the right to secession derive from? Remedial right theories offer us the answer that it derives from past and present injustices inflicted on a group; i.e. gross human rights violations, unjust taking of the groups' territory, and breaking of intrastate autonomy agreements. While all of these are very important it would nonetheless seem that they might be too narrow in scope. This can be due to the fact that, if it were only injustices of these kind that gave way for secession, nothing can be said about the cases where there are no (such) injustices, but where there may be a perfectly valid justification made in favor of secession. Upholding only remedial right theories would reserve secession only for a small number of cases, and even then secession would not really be a solution to the above mentioned problems, as it can be said that it would almost come too late, since the conditions would be too stringent.

On the other hand, we have the democratic theory of secession, which seems to derive the right to secession from the violation of the basic democratic principle, i.e. the realization of public equality. This seems very promising, but needs to be a lot more developed in order to determine, if it is truly valuable.

All in all, it can be concluded that while primary rights theories give us some valuable insights about secession, and also seem to back an intuition that when the decision on secession is arrived at both collectively and democratically, it should at least be strongly considered to give such groups the right to secession, they ultimately fail, because they are unable to establish secession as a primary right, which is perhaps simply due to the fact that secession is not a primary right, and for several reasons cannot be such. Most of these reasons are connected to the fact that states are not voluntary associations, but also contributing to it is the false reliance on the principle of self-determination. On the other hand, it seems logical that if secession is not a primary right that it is a derivative right (if it is any right at all that is), and that we yet have to determine what it derives from. As previous endeavors have shown, it does not seem right that it derives from past and present injustices only, since that would make the right to secession too narrowly construed. Further examination will show, if democratic theory of secession provides us with a better solution.

## ***2.4 Conclusions***

After re-evaluating existing theories of secession, it has been shown that national self-determination theories cannot be amended in any way to be made suitable for grounding secession. On the other hand, statist choice theories can be provisionally amended in a way that they are no longer vulnerable to the objections that have been raised against them in the previous chapter. That can be done by means of adding to them stringent procedural constraints, i.e. not only a majority needs to be in favor of secession, but a qualified majority, and attendance needs to reach a certain percentage. Furthermore, some reasons as to why the



principle of self-determination is to be viewed as extending its meaning to secession needs to be added to them.

I have further shown that the main objection raised against the remedial right only theories in the previous chapter, i.e. that the theories involve a paradox; while they seek to diminish violence by imposing arrangements short of secession, they encourage violence from the side of secessionists, so they would reach their goal of independence, though at first sight devastating, loses all power in the face of the fact that remedial right theories address this particular problem with the provision that there should be international monitoring of the intrastate autonomy agreements.

On the grounds of this re-evaluation, the conclusion was reached that both remedial right theories, and amended choice theories could be seen as viable to ground secession. However, their application, and consequently the stringency of conditions for secession, would depend on the circumstances. Remedial right theories, the more stringent of the pair, would be most fit to be used in cases where the situation is tenser and more deteriorated, whereas choice theories would be best fit in cases where the stakes are low, and thus conditions for secession can be more relaxed. Nevertheless, this brings us to a puzzle. The more urgent secession is from a moral point of view, the more difficult it is to achieve and *vice versa* the less urgent it is, the easier it is to achieve. Thus, secession would seem to be an elusive solution.

In light of that, it can be concluded that perhaps neither of the theories is the best choice to ground secession. That is so, because choice theories are built on faulty grounds. I have reached this conclusion upon considering the question whether secession should be seen as a primary right or a derivative right. I have found that, all things considered, secession is not a primary right, and it also does not seem very plausible to consider it as such. Furthermore, self-determination cannot be extended to include secession, unless it relies on some injustices, which renders the right to secession derivative and not primary. I have concluded that

secession is a derivative right, however it is yet to be determined, what it is derivative upon. Remedial right theories, on the other hand, are too narrow and so do not address the problem of secession adequately.

Up until this point in the dissertation at hand, all the existing theories of secession have been dealt with. After the close examination conducted in this chapter it has been determined that none of them seem to be a case of a good, comprehensive theory of secession. One more theory, however, remains - the democratic theory of secession. I have set it aside in this chapter due the embryonic state it is currently in. All that can be said about it at this point is that it seems to derive the right to secession from the violation of the realization of public equality. Nonetheless, this does not say much about the nature of the violations, and other possible limitations to legitimate political authority that may have secession as a consequence. In spite of this many shortcomings, I have exposed the potential positive features this theory shows, such as the fact that it treats secession as a derivative right and not a primary right, it is restrictive enough as not to make the right to secession easily obtainable and according to this theory the right to secession derives from a very important democratic principle. In light of all these positive features, and the potential I see in it, I am going to take a closer look at this theory in the following chapter, and show how a democratic theory of secession looks like.

### **Chapter 3: Towards a democratic theory of secession**

Democratic theory of secession seems to be the last one standing. However, technically, there is no democratic theory of secession. That is so, because democratic theory does not deal with secession explicitly. It rather deals with democratic processes, and within that realm mentions possible limits to democracy. Some theorists mention certain instances, which would seemingly imply the possibility of secession, i.e. the creation of permanent minorities, but as it will be shown in this chapter, it is not absolutely clear, what is meant by permanent minorities, nor what their existence entails. On the one hand, some materials suggest that the fact that permanent minorities exist in a democratic state is enough for them to be given the right to secession. On the other hand, it is suggested in other materials that persistent minorities, while they weaken the legitimacy of democratic states, they do not defeat it completely, and can be mitigated with the introduction of some additional processes.

Nonetheless, that does not mean that democratic theory cannot be a useful tool for constructing a theory of secession. As mentioned before, democratic theory shows potential. It is obvious that it would not make secession an easy way out option, since within democratic theory secession could not be a primary right of the sort of plebiscitary right. That is the case, because the state is not seen as a voluntary association of people from which a part of people can disassociate at will, by the expression of will through some democratic process or other. Democracy is rather seen as a system that best, and most justly, manages an involuntary association, which a state, by definition, is. It is seen as both inherently and instrumentally valuable. It is inherently valuable, since it embodies equality in the sense that it is a scheme of collective decision making, which gives every member an equal say. In addition to that, democratic states have a number of institutions, e.g. periodic elections, representative public officials accountable to the people, decisions by majority vote, transparent government, a free

press and the rule of law, which are instrumental for the well functioning of a state.<sup>1</sup> Thus, secession cannot be a primary right in the framework of democratic theory. It is not, however, *prima facie* precluded, since it can be a derivative right, deriving from the violation of certain democratic principles, for instance the principle of equal say, or even deriving from the failure of a state to provide some or all institutions necessary for the well functioning of states in general. The fact that within a democratic theory of secession, secession is a derivative right adds the strength to the potential of such a theory, since as I have concluded in the previous chapter, secession both should not and cannot be a primary right.

In this chapter I attempt to lay the grounds for a democratic theory of secession, i.e. I shall explore how such a theory could (should) look like. Since secession is inseparably connected to territory, I shall first establish how to conceive of legitimate boundaries in light of democratic theory. I shall then deal with two dimensions of democratic authority, which could give us a good basis for secession in the realm of democratic theory. On the one hand, there is the dimension of the limits to democratic authority, which relies on the intrinsic value of democracy. On the other hand, there is the dimension of the failure of some or all democratic institutions that are necessary for the well functioning of the state, appealing to the instrumental value of democracy. After dealing with both of the dimensions, I shall return to the question of legitimate boundaries, and through the residual right argument, show that even though a state loses legitimate boundaries, the territory is not up for grabs. I shall in addition to that show that while the residual right argument rightly precludes other states from grabbing the territory of the state that lost legitimate boundaries, it mistakenly precludes the remaining people to divide the territory between themselves, due to the fact that it does not

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<sup>1</sup> These examples can be found in Elizabeth Anderson, 2009, "Democracy: Instrumental vs. Non-Instrumental Value" in Thomas Christiano and John Christman (eds.) *Contemporary Debates in Political Philosophy*, Malden, MA: Wiley-Blackwell, pp. 213-229

take the complexity of the situation leading to the loss of legitimate boundaries into account. Having shown all that, I conclude this chapter by constructing an argument for the democratic theory of secession.

### ***3.1 Legitimate boundaries***

A comprehensive theory of secession not only needs to provide instances, which give rise to justified secession, but also needs to take into consideration legitimate claims to a certain territory. This fact obviously follows from the definition of secession, i.e. that we are talking about a process by which a group of people, together with a territory, separates from a given state, and creates a new independent political unit. Thus, the borders of the rump state are changed, and new borders created. Taking this territorial component into consideration, it seems evident that we cannot even begin to construct a theory of secession, before we deal with the question of the legitimate claim to the territory.

It is important to note that legitimate claims to the territory are twofold. On the one hand, the group seceding from a state needs to show that it has a legitimate claim to the territory it is taking from that state. On the other hand, any given state needs to show that its borders are legitimate. While most existing theories of secession predominantly gave showing that the parting group possess a legitimate claim to the territory priority, it would seem that perhaps starting with a broader view on what makes borders legitimate in general and go from there might be a more fruitful approach, as it would enable us to have a more complete understanding, and a more complete theory of secession. It seems that if one wants to show that secession is justifiable, one inevitably needs to start by dealing with the boundaries of the *status quo* state. A comprehensive theory of secession needs to explain how the seceding groups claim challenges the sovereignty, and the territorial integrity, of the state. It is not enough to show that a group has a legitimate claim to a portion of territory that it inhabits, but it also needs to be shown why the state, from which the group attempts to break, does not

have a legitimate claim to that part of its territory (anymore). A state that has legitimate boundaries also has a legitimate claim to the territory, but, on the other hand, a group having a legitimate claim to a part of a territory does not necessarily mean that they have the right to challenge the boundaries of the whole state, provided that these are legitimate. For instance, it is not difficult for someone to show that they have a legitimate claim to their house and their garden, but if they want to remove their legitimate possessions from the jurisdiction of their state, they need a separate and an extremely good argument for doing so. Therefore, a state can have legitimate boundaries, whilst a group within the state possesses a legitimate claim to a certain part of the territory on some accounts. But still, no secession can be justified as long as the boundaries of the whole state are legitimate. The question of when secession is morally justified should be understood as the question of when the boundaries of the state are legitimate. When the boundaries are legitimate, secession is not justified, and *vice versa*.

### 3.1.1 Existing theories and legitimate boundaries

National self-determination theories and plebiscitary theories of secession only offer us insight into what they conceive as giving the seceding group a legitimate claim to the territory they are taking. However, when it comes to the account of legitimate state boundaries, they don't put too much emphasis on it.

National self-determination theories take the nationalist theory view on territorial rights. According to this theory the state's right to the territory is derived from the prior collective right of the nation to the territory. Thus, the state has the right to the territory, if the nation represented by the state has a prior right to the territory in question, and the state is properly authorized by that nation.<sup>2</sup> According to national self-determination theories a nation can secede from a territory, if it has the rightful claim to that territory, and it in fact does not authorize the state they are currently a part of. Therefore, the boundaries of a certain state are

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<sup>2</sup> Anna Stilz, 2011, "Nations, states and territory" in *Ethics*, Vol. 121, No. 3, pp. 572-601

legitimate, on this view, as long as the state is authorized by the nation(s) within it, however, as soon as such authorization is revoked, the boundaries of the state as a whole stop being legitimate. Considering that it is the nation, who decides whether the state is authorized or not, it can be concluded that the national self-determination theories conceive of a state as it being a voluntary association.

This view is shared by most of the plebiscitary theories<sup>3</sup>. These theories presume that a state is the agent of the people, and that this agency relationship between the agent and the people can be revoked.<sup>4</sup> More generally, secession is justified, if the majority of people of the seceding group votes in favor of secession.<sup>5</sup> Thus, the major assumption behind these theories is that the state is a voluntary association, and that boundaries of a state are legitimate in so far as the citizens want to stay in the state, however, as soon as they by means of voting express that they want to leave the association, they not only have the right to go, but also the boundaries of the state lose their legitimacy.

The common denominator of the national self-determination theories and the plebiscitary theories of secession is where their fatal mistake lies. They see the state as a voluntary association, which the state simply is not, and moreover, could not be. The state is not a voluntary association, because it does not function as one. It is nothing like a debate club, for instance, the membership of which consists of people, who have chosen to be a part of it, and who can join and leave as they please. We, on the other hand, have not chosen to be members of a certain state; we were born into them. Others can join our state, or we theirs, but it is not

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<sup>3</sup> There are instances of plebiscitary theories of secession, which do not see states as voluntary associations. An example of such theories is the theory developed by Christopher H. Wellman in 2005, *A Theory of Secession: The Case for Political Self-Determination*, Cambridge University Press. Such theories fail for different reasons and were dealt with in Chapters 1 and 2 of this dissertation.

<sup>4</sup> Harry Beran, 1998, "A democratic theory of political self-determination for a new world order" in Percy B. Lehning (ed.) *Theories of Secession*, London: Routledge

<sup>5</sup> This idea is supported by several authors, i.e. Margit Moore, 1998, "The Territorial Dimension of Self-Determination" in Margaret Moore (ed.) *National self-determination and secession*, Oxford University Press, Harry Beran, 1998, "A democratic theory of political self-determination for a new world order" in Percy B. Lehning (ed.) *Theories of Secession*, London: Routledge, Avishai Margalit and Joseph Raz, 1995, "National self-determination" in *Journal of Philosophy*, Vol. 87, and Daniel Philpott, 1995, "In Defense of Self-Determination" in *Ethics*, Vol. 105, No. 2.

quite as simple as signing up. We can also leave our states, but again, it is absolutely incomparable with leaving the debate association. Furthermore, for the state to be a voluntary association, we would have to heavily rely on the consent theory of political obligations. The main belief would then be that states have legitimate authority, as long as they enjoy the consent of the governed. Since explicit consent is unfeasible, tacit consent would have to be relied on, i.e. that by omission of saying otherwise the citizens of a state consent to the government. However, this position suffers from a fatal objection, and that is that the consent theory proves too much. For the theory to work, dissent should be relatively reasonably easy to do, and a low cost option. But it simply is not such. The option for dissent is emigration, and emigration is neither easy to do, nor is it a low cost option.<sup>6</sup> Of course, secession can also be seen as an instance of dissent.<sup>7</sup> However, this option also fails. First of all, dissent should be individual, and secession is a team sport. But, even if we conceded that since people have taken part in election, this can be understood as them having tacitly consented to the newly created unit, a situation can still be imagined, in which a state is created by means of secession, which for the reason of being the smallest unit possible eligible for secession, cannot split anymore, in which there are large subgroups that do not wish to be members of that state, and so are again left with emigration as their only (bad) dissent option. For all these reasons, the idea that a state is a voluntary association should be rejected.

The remedial rights only theories, on the other hand, do not see states as voluntary associations, and furthermore also explicitly provide us with an account of legitimate state boundaries. Actually, the view taken by remedial right only theories is in conformity with the idea that secession is not an option, as long as the boundaries of the state are legitimate. According to these theories, the state has legitimate boundaries provided it is just, and respects basic human rights of its citizens. However, when the state grossly violates basic

<sup>6</sup> A.J. Simmons, 1979, *Moral Principles and Political Obligation*, Princeton, N.J.: Princeton University Press

<sup>7</sup> Harry, Beran, 1977, "In Defense of the Consent Theory of Political Obligation and Authority" in *Ethics*, vol. 87, no. 3 (April 1977), pp. 260-271



human rights of the citizens, it unjustly appropriates territory, or it violates intra-state autonomy agreements, it loses the legitimacy of the boundaries, and secession of a part of the population is justified. Though this position rightly starts with the legitimacy of the boundaries of the state, it is incomplete as grounding secession in general, as it is too narrowly construed. Though injustices, which ground secession in remedial right only theories, are obviously good and strong reasons for secession, these theories neglect some important aspects which could, and should, be seen as strong reasons for granting secession.<sup>8</sup>

It is important at this point to clarify the nature of legitimate boundaries as conceived of here. While the legitimate claim to the territory is directly connected to the territory, legitimate boundaries are not directly dealing with territory, but are rather concerned with the authority the state has over its territory, i.e. when speaking of a state as having legitimate boundaries, we mean that the state in question has sovereignty over its territory, and is in possession of territorial integrity. A state with legitimate boundaries can be exemplified by Michael Walzer's words: "The state is constituted by the union of people and government, and it is the state that claims against all other states the twin rights of territorial integrity and political sovereignty."<sup>9</sup>

In practice, this means that while states have legitimate boundaries they are seen as a good master and are safe from outside interference with their affairs. As an example, international community cannot justifiably interfere with any state that is in possession of full sovereignty, since it has legitimate boundaries, and is so legitimately in control of all internal affairs. However, when a state loses legitimacy over the boundaries, its sole right to control its

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<sup>8</sup> Democratic theory of secession developed in this dissertation can be grouped together with the remedial rights only theories as it in a way conceives of secession as a remedy for the violations of the democratic principle of the realization of public equality. It, however, does more than that. Secession is not seen solely as a remedy for past injustices from the side of the state, but also as a consequence of the failure of a democratic state to uphold the well-functioning of both the intrinsic and the instrumental dimension. In fact, when it comes to various injustices, the recommendation of the democratic theory is not secession, but merely resistance. Secession is only seen as a legitimate option when both dimensions of the state fail.

<sup>9</sup> Michael Walzer, 1980, "The Moral Standing of States: A Response to Four Critics" in *Philosophy and Public Affairs*, Vol. 9, No. 3 (Spring 1980), p. 212

internal affairs is lost. In such cases, international intervention is justified. Of course, international intervention comes in many forms, and is dependent on the degree to which a certain state is seen to have lost sovereignty over its territory. In less extreme cases, the intervention may be economic sanctions, and in the severe cases military intervention.<sup>10</sup> In this dissertation, I take the position that the legitimacy of state's boundaries is connected with the justness of the state. In other words, as long as the state is just, it has legitimate boundaries. This idea will be dealt with in depth in the following subchapter.

Legitimacy of boundaries is very important in the case of secession, as secession is a rather invasive process that questions the sovereignty, and the territorial integrity, of the state, i.e. the seceding group does not believe that the state has the right to govern over them. Thus, it inevitably follows that a good theory of secession has to be in the position to show that the state in fact does not possess legitimate boundaries, in addition to the purely territorial concern in the form of a legitimate claim to the territory.

Thus, it also follows from the above that the national self-determination theories and most of the plebiscitary theories cannot be seen as good theories of secession, since they take the right to secession to be a primary right, and as such either do not even tackle the question of legitimate boundaries, or deal with it in an inadequate way, since they start from a fallacious assumption that the state is a voluntary association.

### **3.1.2 Democratic theory and legitimate boundaries**

As I have shown above, secession is only possible, if the state boundaries are no longer legitimate. But before I can start spelling out the circumstances, under which secession is justified within the framework of democratic theory, I have to establish, where democratic theory stands regarding the question of legitimate boundaries. The question of legitimate

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<sup>10</sup> For a discussion on interventions see Charles R. Beitz, 1979, *Political Theory and International Relations*, Princeton, New Jersey: Princeton University Press, pp. 67-125

boundaries is intimately connected with the legitimate authority of the state. That is to say that as long as the state possesses legitimate authority, the boundaries of such a state are also legitimate. So, when does a state possess legitimate authority? The answer to this question is rather simple. The state possesses legitimate authority, when it is just in some sense. It can be claimed that democracy is the best example of a legitimate state. That is the case, because of the various special features of democracy. Firstly, democracy is a system, which manifests equality at its very core. Namely, it is at its core a decision making process, that gives each adult member an equal say at the crucial stage of the decision making.<sup>11</sup> Furthermore, its decisions are binding on the members of the group for which the decision is made, provided public equality is realized. Public equality means that everyone's interests in society are being treated as equal, and that this person can see that s/he is being treated as equal. Public realization is of utmost importance because it is one of the fundamental interests of a person, for the following reasons:

- (i) interests have a great intrinsic importance (my interests matter and they matter equally)
- (ii) these interests do not conflict with other fundamental interests (liberty, security, material wellbeing).<sup>12</sup>

However, there is always disagreement. In societies, there is diversity of interest, cognitive bias, fallibility, and disagreement on what justice and common good require. Thus, public equality is important, since it corrects for the cognitive bias of others – not others chose principles for me, I chose as well. The only principle of collective decision making process that can guarantee that each can see that s/he is treated as an equal under the conditions of cognitive bias, fallibility, etc. is the principle that each person ought to have an equal say in

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<sup>11</sup> Thomas Christiano, 2006, "A Democratic Theory of Territory and Some Puzzles about Global Democracy," in *Journal of Social Philosophy*, Vol. 37, No. 1: 81-107 and 2008, *The Constitution of Equality: Democratic Authority and its Limits*, New York: Oxford University Press, Ch 2

<sup>12</sup> Thomas Christiano, "A Democratic Theory of Territory and Some Puzzles about Global Democracy," in *Journal of Social Philosophy*, Vol. 37, No. 1: 81-107

the process of decision making. People also need to have almost equal stakes in the decision. Democracy is the realization of public equality in collective decision making. This is what gives democratic decision making strong authority.<sup>13</sup>

Thus, since democratic states have strong legitimate political authority, such states also possess legitimate boundaries. Hence, in order to be able to construct a democratic theory of secession, it has to be shown under which circumstances such strong democratic authority can be limited, or even lost. In order to be able to do so, I must first spend some time analyzing the thing itself, namely democratic authority, and once I have laid out its nature in detail, I can contemplate about the limits thereof.

### 3.2 *Democratic authority*

Let me start by stating two important facts. First, no one has authority over no one else by nature. John Locke famously stated that no man is born to rule, or be ruled.<sup>14</sup> In other words, natural authority of a person or group of persons over other persons is simply not justifiable. One may find good reasons why some people might be more capable of deciding certain matters than others, but the fact that they possess more knowledge or intelligence, without additional argument, does not vest in them the right to make decisions for others, in the name of others.

Of course, it is possible that someone does have *de facto* authority over us. There were and are places where a person or a group of people *de facto* exercise authority over people in a certain territory, but them having *de facto* authority, does not mean that they also have legitimate authority, and it is legitimate authority that we are concerned with here. Because no one naturally possesses authority, one cannot simply assume it, but one has to provide justification for it. In some literature, the divide between *de facto* authority and legitimate

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<sup>13</sup> Thomas Christiano, "A Democratic Theory of Territory and Some Puzzles about Global Democracy," in *Journal of Social Philosophy*, Vol. 37, No. 1: 81-107

<sup>14</sup> John Locke, 1960, *Two Treatises of Government*, Peter Laslett (ed.), Cambridge: Cambridge University Press

authority, I have in mind here, is referred to as the divide between descriptive authority and theoretical authority.<sup>15</sup> I am concerned purely with theoretical authority here.

Another fact is that there can be more than one form of authority that is justifiable. Democratic authority is just one form of authority amongst many others. Thus, in what follows the attempt is to show that democratic authority is one of the best options for a strong legitimate political authority.

### 3.2.1 Some approaches to political authority

Before turning to democratic authority, let me briefly take a look at some other approaches to political authority. The so called instrumentalist approach to authority, as conceived by Joseph Raz, is explained through what he calls the Normal Justification Thesis, which states that

the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.<sup>16</sup>

The basis behind his conception is that “authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive”<sup>17</sup> What he has in mind is that authority should be exercised in such a manner, that the directives, which the governments issue, are in accordance with things that we have reason to do already. For instance, we have reasons to make a contribution to the common good, but we may have considerations on how much to give, or to whom, or with whom we should share the scheme. Governments, by imposing tax laws on us, take care of these issues. They formalize the procedure of our contribution. This

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<sup>15</sup> Thomas Christiano, 2012, “Authority”, *The Stanford Encyclopedia of Philosophy* (Spring 2012 Edition), Edward N. Zalta (ed.), obtained from: <http://plato.stanford.edu/entries/authority/>

<sup>16</sup> Joseph Raz, 1986, *The Morality of Freedom*, Oxford: Clarendon Press, p.53

<sup>17</sup> Ibid., p.47

approach is instrumentalist, because as Thomas Christiano put it, there is nothing inherent in the authority that makes it legitimate, but it is such “...merely to the extent that obeying it brings about better compliance with reasons that are independent of the authority.”<sup>18</sup>

The most defeating difficulty the instrumentalist approach suffers from as being a good candidate for grounding legitimate political authority, is that it seems to separate the issue of the legitimacy of the authority from the justice of the authority. Because of this, it becomes very likely that in accordance with this account, legitimate authority is attributed to unjust regimes. This is the case, because unjust regimes can create circumstances in which it would seem that regular compliance with their demands would be better, morally speaking.<sup>19</sup> The example that explicates this is provided by Bernard Williams’ story of George, who is a scientist, and an opponent to the Nazi regime. He is asked to run a laboratory that produces chemical weapons, and he does not believe that Nazi’s should have any such weapons. Nonetheless, he realizes that there are many other scientists, who would be willing to produce such weapons for the regime, and thus believes that if he is in charge of the laboratory, he can at least slow down the efficiency of the laboratory, since he is not enthusiastic, and may not be as competent as someone else.<sup>20</sup> The problem that this example brings forward is that in the framework of the Normal Justification Thesis the relation between George and the state is one of legitimate authority, because George is better off in terms of what he has reason to do by simply following the directives given to him by the authority, and by not directly considering their rightness.<sup>21</sup> But it would be really uncanny, if we were to claim that the authority in the case described, is a legitimate political authority. It simply is not legitimate,

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<sup>18</sup> Thomas Christiano, 2008, *The Constitution of Equality: Democratic Authority and its Limits*, New York: Oxford University Press, p. 233

<sup>19</sup> Ibid., Ch 6

<sup>20</sup> This example has been used in both Thomas Christiano, 2008, *The Constitution of Equality: Democratic Authority and its Limits*, New York: Oxford University Press, Ch 6 and 2012, “Authority”, *The Stanford Encyclopedia of Philosophy* (Spring 2012 Edition), Edward N. Zalta (ed.), obtained from: <http://plato.stanford.edu/entries/authority/>

<sup>21</sup> Ibid.

for the simple reason that it is deeply unjust. Considering this difficulty that the instrumentalist approach faces, it can be concluded that it is not fit as a good candidate for legitimate political authority.<sup>22</sup>

Another prominent approach to political authority is provided by the consent theory. The consent theory asserts that voluntary consent of each individual to the government is a necessary condition for the government to be legitimate. To take a look at one of the proponents of this theory, John Locke has claimed that since everyone has the natural right to freedom, no one should be submitted to the will of anyone else, unless one consents to it.<sup>23</sup>

Others have proposed different reasons for why consent is necessary. For instance, according to John Simmons, consent is a necessary condition for a legitimate authority, because people should rather be free to act on the basis of personal reasons, as opposed to impersonal reasons.<sup>24</sup> In either case, individual, voluntary consent is necessary.

The first, and somewhat obvious problem, consent theory has as grounding authority is that it is not a very stable account of authority. People mostly disagree about what justice requires them to do, and consent theory does not really take this fact into account adequately. Since people mostly disagree, individuals who disagree with governmental directives could just withdraw their consent, and so remove themselves from the authority of the state.<sup>25</sup> Moreover, someone can withdraw the consent on this account, even if s/he knows that the directives are just and necessary, and agrees with them perfectly, but s/he simply refuses to comply with them.<sup>26</sup> Thus, it would seem that consent theory leaves too much to the individual, and is so

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<sup>22</sup> To be fair, this is one of the interpretations of the Normal Justification Thesis. The NJT can also be modified in such a way to include certain types of reasons applying to individuals only. For instance, we have justice-based reasons, and by following the directives of a just government, we better comply with these reasons than if we try to achieve justice individually.

<sup>23</sup> John Locke, 1960, *Two Treatises of Government*, Peter Laslett (ed.), Cambridge: Cambridge University Press

<sup>24</sup> A.J. Simmons, 2001, *Justification and Legitimacy: Essays on Rights and Obligations*, Cambridge: Cambridge University Press

<sup>25</sup> Thomas Christiano, 1999, "Justice and Disagreement at the Foundations of Political Authority" in *Ethics*, Vol. 110, No.1, pp. 165-187

<sup>26</sup> Thomas Christiano, 2004, "The Authority of Democracy" in *The Journal of Political Philosophy*, Vol. 12, No. 3, pp. 266-290

grossly affected by the constant and grand scale disagreement between individuals on what justice requires of them.

Furthermore, within the realm of this theory, the question of how consent is manifested remains to be answered. There are two options. Either one consents explicitly or tacitly. Explicit consent is very rare. In fact, the only citizens that can be said for certain to have explicitly consented to the government are naturalized citizens, who when they acquire citizenship give an oath. Other than that, most citizens never explicitly consented, and that would furthermore be extremely complicated. Thus, consent theory strongly relies on the tacit consent. The question of course is, how such consent is manifested, or better put, which omissions can be taken to be 'acts' of tacit consent. There has been much debate on this issue, but I will not get into it at this point. For my purposes it suffices to say, that one of the most obvious options for tacit consent is permanent residence in a certain state. By staying in a state, people tacitly agree to the rules that that state imposes on them. As mentioned previously in this chapter, one of the main objections to this view is that it imposes too much on a person, and thus can no longer be seen as a voluntary act. Since the execution and the costs of the only viable option of dissent, i.e. emigration, are too high, tacit consent seems less as a voluntary act, and staying a permanent resident of a certain state more a necessity to avoid harm than the expression of consent. For this reason, consent theories fail, since they cannot show that people voluntarily consent to the government, and so cannot meet the necessary condition they employ for legitimate authority. Hence, this approach is also futile as the basis for legitimate political authority.

These two approaches to legitimate political authority were not chosen by chance. They have been dealt with here, because their problems point into the direction of what a valid theory of political authority needs to include. The failure of the Normal Justification Thesis makes evident that one cannot speak about legitimate political authority, if one supposes that the



state needs to be just at least in some sense. On the other hand, consent theory fails, because it downright neglects the fact of disagreement. That is to say, it neglects the fact that in political societies, there is no general census on what justice is, or what it requires of us. Hence, it is necessary to take this into account, if we want to create a complete and sound theory of legitimate political authority. This brings us to democratic authority, which has been widely neglected as a theory of legitimate political authority<sup>27</sup>, and as will be seen from what follows, unjustly so.

### 3.2.2 The strengths of democratic authority

As partially explained in the previous section, there are certain instances, which when they obtain, can be said to show that a state has legitimate political authority. First, the state has to be reasonably just. Why do we say reasonably just and not simply that the state has to be just? The answer to this lies within the idea, brought forward by Ronald Dworkin, namely that justice is a matter of degree. He rightly points out that we cannot say of any state that it is perfectly just, but several reasonably well satisfy most of the conditions for justice, i.e. respect of political, legal, human rights, liberty, and equality.<sup>28</sup> It can be plainly said that the question of whether a state is just, is connected to the realization of equality. States need to treat each person with equal concern and respect, and they achieve justice to the extent they succeed.<sup>29</sup> This idea was dealt with more closely by Thomas Christiano. According to him, the most important principle is the principle of public equality. What he has in mind is that just societies need to advance the interests of all persons, and that these interests need to be advanced equally. This, for him, is the moral foundation of both democracy, and of liberal rights. Justice is thus grounded in the dignity of persons. However, it is not enough, that

<sup>27</sup> Thomas Christiano, 2012, "Authority", *The Stanford Encyclopedia of Philosophy* (Spring 2012 Edition), Edward N. Zalta (ed.), obtained from: <http://plato.stanford.edu/entries/authority/>

<sup>28</sup> Ronald Dworkin, 2011, *Justice for Hedgehogs*, Cambridge, MA: The Belknap Press of Harvard University Press, Ch 18

<sup>29</sup> Ibid.

everyone is being treated equally, one also needs to be able to see that one is treated equally. He calls this the weakly public principle. It is not enough that justice is being done; it has to be seen to be done. This is not to claim that one should in fact see that it is being done, but that persons with normal capacities could see it being done. What counts as the realization of public equality is the participation of each member of a society in the decision making processes.

Second, the state must respect different opinions of each citizen.<sup>30</sup> This point derives from the failure of the consent theory. A sound theory of legitimate political authority must take the fact of difference of opinion between citizens into account. It is implausible to assume that in political societies, of any size and shape, people will have uniform opinions on what justice requires them to do. This can be attributed to the facts of fallibility and cognitive bias. It is reasonable to assume that some people will be wrong about some issues at some point in time, and that people generally have cognitive bias in favor of their opinions.<sup>31</sup>

Third, in order for a state to be able to establish justice among persons, it must have a settled and just legal system.<sup>32</sup> This point is quite obvious. If there is no established legal system, the state lacks the tools to enforce its authority. Why the legal system is needed to establish justice amongst people is explicated by the fact that, if there is none, then either each person is the judge and such a system would be extremely unfair and unpredictable, or there could be one person who would rule on everything, and that could hardly be conceived as a just legal system.

Last, legitimate political authority should not be predicted by utopian agreement between citizens.<sup>33</sup> This point also derives out of the failure of the consent theory. The fact of the

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<sup>30</sup> Thomas Christiano, 2008, *The Constitution of Equality: Democratic Authority and its Limits*, New York: Oxford University Press, Ch 6

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

matter is that there is always disagreement between people, and this needs to be addressed adequately by any theory of legitimate political obligation. Disagreement is also of importance, because if we concede that there is always disagreement amongst citizens on important issues, then how can we say that decisions are binding on everyone, even though some might disagree with them. This is where the realization of public equality comes in. Considering that through the realization of public equality, i.e. each adult member of a society has an equal say in the decision making process, interests of each member of the society are taken into consideration equally, the decision reached by the decision making process is binding on all members, even though some do not agree with it. It is due to the fact that the process is intrinsically just, and the process itself helps correct for the fallibility and cognitive bias. No one chooses for me. I chose as well.<sup>34</sup>

To recap, the state can be said to have legitimate political authority, if it is reasonably just, it respects different opinions of each citizen, has an established just legal system, and is not predicted by utopian agreement between citizens.<sup>35</sup> Through the discussion of each point I have also outlined democratic authority, and shown that it meets all the instances for it to be a sound theory of legitimate political authority. Democracies can be seen as reasonably just, since they treat citizen with equal respect and concern. Moreover, they provide us with a system that is the realization of public equality, which not only strengthens the justice requirement, but also takes into consideration different opinions of each citizen. Furthermore, they not only acknowledge the fact that there is disagreement between citizens, but are also able to resolve the problem of how decisions are binding, even if disagreement persists. And lastly, democracies have established transparent institutions, which treat people as equal, and people can see that they are being treated as such.

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<sup>34</sup> Thomas Christiano, 2008, *The Constitution of Equality: Democratic Authority and its Limits*, New York: Oxford University Press, Ch 3

<sup>35</sup> *Ibid.*, Ch 6

The idea that democracy is grounded in the principle of public equality, can give a unified and satisfying explanation for the authority of democracy. Since there is no defensible natural authority of some sane adults over others, legitimate political authority must be grounded in part in the fact of disagreement among equals, and must respect the judgments of each as equal. The only standpoint from which political authority can be defensibly assessed in a way that it treats everyone as an equal is from the egalitarian standpoint, i.e. from the standpoint of the realization of public equality.<sup>36</sup>

Legitimate political authority can be divided as follows:

- 1) justified coercion (minimal account of authority)
- 2) capacities to impose duties (instrumental authority)
- 3) right to rule (inherent authority)<sup>37</sup>

In conformity with this division, it can be said that democratic authority is a kind of right to rule, while the other kinds of authority in a democratic state such as bureaucratic, judicial, and executive authority, are essentially kinds of instrumental authority that are grounded in the fact that they are implementing democratically chosen purposes.<sup>38</sup> More specifically, democratic authority is the right by the democratic assembly to make laws and policies for the society over which it has jurisdiction, and is grounded in the realization of public equality. This gives democratic societies the right not to be interfered with by other societies or persons outside the society. Democratic and liberal rights are underwritten by public equality. Democratic decisions are authoritative in the matters of substantive law and policy.<sup>39</sup>

However, even though democratic authority can be said to give a state strong legitimacy, it is by no means an absolute, limitless authority. There might be instances in which democratic

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<sup>36</sup> Thomas Christiano, 2008, *The Constitution of Equality: Democratic Authority and its Limits*, New York: Oxford University Press, Ch 6

<sup>37</sup> Ibid., pp. 240-241

<sup>38</sup> Ibid.

<sup>39</sup> Ibid., Ch 7

authority can be shaken, or even lost altogether. For instance, if the democratic assembly violates public equality its authority is weakened in the least. In other words, if there are equal political rights of the citizens, then the democratic assembly has the right to rule, if it violates these rights, then its right to rule is either limited, or trumped. The scenarios of when the authority is only limited, and when it is lost altogether are wide in scope, and the consequences differ in accordance with the gravity of the insult. Because of the scope and the gravity of this issue, I shall deal with it in depth in the following subchapter.

### ***3.3 The limits of democratic authority***

Democratic authority by its very nature cannot be an absolute one. It is an instance of strong legitimate political authority, however, only to the extent that it is realized closely to its ideal. Similarly as justice, legitimacy is also a matter of degree. According to Ronald Dworkin legitimacy has two dimensions. It depends both on how the alleged government has acquired its power, and how it uses that power.<sup>40</sup> In democracies, governments mostly acquire their power by being elected to power by means of a collective decision making process, i.e. through general elections. Thus, in functioning democracies governments are deemed legitimate, if the process used to elect them was legitimate, i.e. if all adult members of the political society were granted an equal voice in the elections. On the other dimension, the governments can be seen as legitimate, if their laws and policies can be interpreted as recognizing that the fate of each citizen is of equal importance, and that each has a responsibility to create his own life.<sup>41</sup> In other words, “a government can be legitimate, if it strives for its citizens’ full dignity even if it follows a defective conception of what that requires.”<sup>42</sup> This points to the conclusion that legitimate political authority of a democracy cannot be seen as an absolute one. The degree to which the state is legitimate is a matter of

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<sup>40</sup> Ronald Dworkin, 2011, *Justice for Hedgehogs*, Cambridge, MA: The Belknap Press of Harvard University Press, Ch 14

<sup>41</sup> Ibid.

<sup>42</sup> Ibid., p. 322

interpretation. There might be some injustices that can be interpreted as a defective conception of what equal concern and respect require, while on the other hand, there may be other injustices, which clearly cannot be seen as merely defective conception, but may lower the degree of legitimacy considerably or even eliminate it altogether. Some state laws or policies that may be seen as instances of grave injustices, which diminish or eliminate its legitimacy, are for instance the exclusion of some particular minority (might be a racial, national or class minority) from benefits that others are benefiting from under a certain policy. Another example might be the adoption of certain coercive laws that threaten liberty, e.g. laws to improve the sexual ethics of the community.<sup>43</sup> These examples show that there are limiting cases to the democratic authority. If any such injustices occur, then a government can no longer be said to possess a fully legitimate political authority. As Dworkin put it, such policies may stain the state's legitimacy without destroying it altogether.<sup>44</sup> In these kinds of situations, if political processes for correction are available, citizens can protect their dignity by means of refusing, as far as possible, to be party to the injustice, by working in politics to erase it or even, when appropriate, contest it through civil disobedience.<sup>45</sup> Nonetheless, this stain can vary in size. There might be instances in which a government adopts policies or laws, which are too big to let them off only with a warning. Some injustices might be big enough to destroy the legitimacy of a certain government completely. In that case political obligations cease to exist. As Dworkin very poetically put it: "If the stain is dark and very widespread, however, and if it is protected from cleansing through politics, then political obligation lapses entirely."<sup>46</sup>

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<sup>43</sup> Ronald Dworkin, 2011, *Justice for Hedgehogs*, Cambridge, MA: The Belknap Press of Harvard University Press, Ch 14

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid., p. 323

Thus far I have established that there are some injustices that are not grave enough to trump the legitimacy of a democracy, and there are also some that stain it so deep that the injustice cannot be rectified, and thus legitimacy is lost overall. However, not much has been said yet about these injustices themselves. In what follows, I try to best determine, which injustices can count as the main limits to democratic authority, and which amongst them are trumps, i.e. the ones, which when they occur, result in the loss of legitimate authority.

### 3.3.1 The main limits to democratic authority

The task at hand has been more or less elaborately explored by Thomas Christiano. He points out four main things, which are to be seen as limits to democratic authority. These are democratic and liberal rights, the assurance of an economic minimum, the constitutional court, and the generation of permanent minorities.<sup>47</sup> What is meant by these limits is that it is not within the rights of the democratic assembly to take away basic democratic and liberal freedoms, it needs to make policies which sustain an economic minimum, the constitutional court limits the authority of the democratic assembly by means of judicial review, and democratic assembly cannot employ policies or laws which would result in the generation permanent minorities.<sup>48</sup>

As stated in the previous subchapter, democratic and liberal rights are underwritten by public equality. Thus, they can be considered to be violated, if the principle of public equality is being violated. Moreover, public equality is the key ingredient in the second limiting consideration as well, i.e. the provision of an economic minimum. For Christiano, the provision of an economic minimum is necessary for public equality, and as such if not provided by a democratic assembly, it weakens the assembly's authority. The reason for his

<sup>47</sup> Permanent minorities are sometimes referred to as persistent minorities, i.e. Thomas Christiano, 2008, *The Constitution of Equality: Democratic Authority and its Limits*, New York: Oxford University Press and 2006, "A Democratic Theory of Territory and Some Puzzles about Global Democracy," in *Journal of Social Philosophy*, Vol. 37, No. 1: 81-107. I shall use the term permanent minorities throughout this dissertation and by this I also refer to what others have called persistent minorities.

<sup>48</sup> Thomas Christiano, 2008, *The Constitution of Equality: Democratic Authority and its Limits*, New York: Oxford University Press, Ch 7

claim that economic minimum is necessary for public equality is that such a minimum is essential to the advancing of the interests that are secured by democratic and liberal rights. In other words, without an economic minimum a person cannot successfully exercise those rights, due to the fact that lacking the basic minimum the person cannot present arguments in the public forum, lacks the means to associate with others, does not have the means to do those things that might be required of him by conscience, and last but not least, lacks the means to engage in private pursuits.<sup>49</sup> Considering all of the above, it can be concluded that if one lacks the basic means, this hinders, or makes it impossible for persons to advance their interests and advance them equally, and so if there is no provision, or sustenance, of a basic economic minimum, then public equality also cannot be guaranteed.

Furthermore, Christiano also believes that the principle of public equality can provide guidance as to when judicial review is justified, and when it is not, and that the democratic assembly must be constrained by a constitutional court with powers to review the legislation.<sup>50</sup> Whether or not judicial review ought to be a constituent part of a democracy is a rather controversial issue. Whereas some join Christiano in his belief that it ought to be a part of a democracy, others believe it is not so, as the institution in itself is undemocratic, since the justices are not elected but appointed and even then appointed for life.<sup>51</sup> Since this issue is a very complex one indeed, and not a necessary step in my argument, dealing with it would at this point take me too far from my task at hand. Thus, I shall set this issue aside.

The issue that is of great importance for me is the issue of permanent minorities, and incidentally, this issue is also intimately, and quite evidently, connected to the principle of public equality. Were namely a democratic assembly to issue laws and policies, which would have the generation of permanent minorities as a result, then such a democratic assembly

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<sup>49</sup> Thomas Christiano, 2004, "The Authority of Democracy" in *The Journal of Political Philosophy*, Vol. 12, No. 3, p. 273

<sup>50</sup> Thomas Christiano, 2008, *The Constitution of Equality: Democratic Authority and its Limits*, New York: Oxford University Press, Ch 7

<sup>51</sup> Jeremy Waldron, 2000, *Law and Disagreement*, Oxford: Oxford University Press



would obviously violate the principle of public equality, as some people's interests would neither be considered, nor would they be advanced equally.

To recap, I have identified four limits to democratic authority at the beginning of this section and will in what follows consider three of them, i.e. democratic and liberal rights, provision of an economic minimum, and the generation of permanent minorities. Now that the possible limits of democratic authority have been identified, as the next step it has to be determined how they limit democratic authority. In order to do that, it might be helpful to briefly take a look into the nature of the limiting considerations against the democratic authority.

### **3.3.1.1 The nature of the limiting considerations against democratic authority**

According to Christiano the limits to democratic authority are the principle violations, which defeat the authority of the democratic assembly, either completely, or partially. However, there are different types of considerations against the democratic authority. On the one hand, there are considerations, which count against the obedience to the democratic decisions and can be put in the balance with the considerations, which ground the duty of obedience. What happens then is that sometimes these considerations are outweighed by the considerations in favor of obedience, and other times they override the obedience favoring considerations. Such considerations are called the *countervailing considerations* against democratic authority. What counts as an example of such considerations might be certain considerations that are connected to the correct decision on when to go to war with another state.<sup>52</sup> In such situations there is a high chance of disagreement about the decision to go to war with another state, and the considerations which ground such a decision are then balanced against the considerations for obedience. In some cases the considerations for obedience tip the balance to their side, and then democratic authority remains intact, whereas in other cases the obedience favoring

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<sup>52</sup> Thomas Christiano, 2008, *The Constitution of Equality: Democratic Authority and its Limits*, New York: Oxford University Press, Ch 7

considerations may be overridden, and then the legitimacy of democratic authority is weakened and needs to be restored.

On the other hand, there are the so called *undercutting considerations* against democratic authority. This differ from the countervailing considerations in the respect that they are not considerations, which can be outweighed, or even weighted in the balance of considerations that are obedience favoring. Rather, when speaking of undercutting considerations, the reference is made to the limiting considerations, which undercut the claim to authority that the democratic assembly makes. What these considerations entail is that when they are the case, then the democratic authority is either significantly weakened or lost altogether.<sup>53</sup> These undercutting considerations are the kind of considerations I concern myself with here.

What has been above listed as limits to democratic authority falls into the category of undercutting considerations. Namely, if the democratic assembly were to violate liberal and democratic rights of the citizens, for instance, then that would undercut the assembly's claim to authority, since these kinds of violations are violations of principles, which are underwritten by the key principle, i.e. the principle of public equality.

Having made this distinction, which clarified the nature of the limits of democratic authority, I shall now turn to the argument, which illuminates the reasoning of why the limits of democratic authority weaken or defeat it.

### **3.3.1.2 The argument for the limits to democratic authority**

The basic structure of the argument for the limits to democratic authority is as follows:

- 1) Democratic assemblies have legitimate authority only when they publicly realize justice in themselves or they are instrumentally just.
- 2) Disenfranchisement of part of the sane adult population is a public violation of equality.
- 3) Democratic assemblies publicly realize justice in themselves only when their decisions do not publicly violate justice.

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<sup>53</sup> Thomas Christiano, 2008, *The Constitution of Equality: Democratic Authority and its Limits*, New York: Oxford University Press, Ch 7

- 4) (from 2 and 3) Therefore, when a democratic assembly votes to disenfranchise some of the population, it does not publicly realize justice in itself (nor is it instrumentally just).
- 5) (from 1 and 4) Therefore, when a democratic assembly votes to disenfranchise some of its members, it does not have legitimate authority.
- 6) Just as disenfranchisement of part of the adult population publicly violates equality, so do suspension of the core of basic liberal rights, some form of radical discrimination against a part of the sane adult population, failure to assure a decent economic minimum, or the creation of persistent minorities publicly violate equality.
- 7) (from 4-6) Therefore, when a democratic assembly votes to suspend the core liberal rights, or radically discriminates against a part of the sane adult population or fails to secure a decent economic minimum or creates a persistent minority, it does not publicly realize justice and so does not have legitimate authority.<sup>54</sup>

In other words, the basic argument for the limits to democratic authority states that if there is a public violation of public equality, then there is no realization of justice, and so by consequence the state is also not just. If that is the case, then the state has no legitimate authority. What also counts as a violation of justice, next to violations of public equality is the suspension of core liberal rights, radical class etc. discrimination, failure of decent economic minimum, and the creation of permanent minorities. Therefore, the state has no legitimate authority if all, or any of the individual things is the case, as it is not just.

The main emphasis is on the premises, which state that there should be no violation of public equality, as public equality is inherently important for the collective decision making process, i.e. premises 1-3 and 6.

### **3.3.1.3 The extent of damage the limits do to democratic authority**

If I now look back at the three instances I have singled out as limiting democratic authority, I can with the help of this basic argument try to determine, to what extent they damage democratic authority.

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<sup>54</sup> Thomas Christiano, 2008, *The Constitution of Equality: Democratic Authority and its Limits*, New York: Oxford University Press, pp. 264-265

First, let me consider democratic and liberal rights. As has already been stated, democratic and liberal rights are underwritten by public equality. They are at the very core of democracy. Thus, it would seem that when democratic or liberal rights are being violated by the democratic assembly, the insult is devastating for its authority. When these rights are being violated, the democratic assembly clearly also violates the realization of public equality, and by doing so there is no public realization of justice.

The same might be said about the second limit to democratic authority, namely, about the assurance of a decent economic minimum. This assurance is at its core also intimately connected with the realization of public equality. Namely, a decent economic minimum is necessary for the equal advancement of interests, which are secured by liberal and democratic rights. Thus, the lack of economic means might prevent us from exercising our liberal and democratic rights. Because of this, it would also seem that when democratic assembly fails to insure a decent economic minimum, it significantly weakens its authority, because it fails to bring about favorable conditions, which bring about the realization of public equality.

However, the question is, how deep must the violations be, in order for them not to only weaken the legitimacy, but to defeat it completely. The answer to this lies in the frequency, and the size, of the violations. If the assembly only passes one law, which violates the principle of public equality, then it cannot be said that all is lost. Democracies are built in a way that such “minor” indiscretions can be rectified from within, through political channels acting towards the change of that unjust law. However, if the violations are on a much bigger scale, meaning that the defeating of public equality is done on a systematic, and grand scale level, then it can be said that such democratic assembly has lost legitimate authority altogether.<sup>55</sup>

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<sup>55</sup> Thomas Christiano, 2008, *The Constitution of Equality: Democratic Authority and its Limits*, New York: Oxford University Press, Ch 7

There is another limiting consideration against the democratic authority that has not been dealt with yet, namely the problem of permanent minorities. This problem presents a challenge for the idea that democratic process confers legitimacy on the outcomes of the decision making process. Democratic process can bring about the existence of permanent minorities in the collective decision making process. They are a group within a democratic society that are almost always, or always, outvoted in the democratic decision making process, i.e. they always or almost always fail to get their way. A permanent minority is a number of social groups that differ from each other in a highly salient way, from the points of view of the members. These may be religious groups, ethnic groups, political groups, linguistic groups. These differences are global in that they have significance for a wide variety of issues. Preferences conflict in a way that compromise is necessary, if both groups are to get some of what they want. One group or combination of groups is considerably larger than the others, so that it may be able to dominate in majority rule without compromise with any others.

Permanent minorities are problematic for democratic authority, because since a part of the citizens is always or almost always outvoted, they can be said to be treated as inferior to other citizens, since the realization of public equality is violated. Their interests cannot be said to be treated and advanced equally with others, since they fail in connection to the correcting for cognitive bias and making them feel at home in the world they live in.<sup>56</sup>

In the text on territory and democratic theory, the conclusion Christiano draws from this situation is that since the state violates the principle of public equality, and the members of permanent minorities are not being treated as equals, the democratic assembly loses the authority over the people of such minorities, and also loses to some extent the authority over the rest of the population, as the directives of the democratic assembly makes the other groups

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<sup>56</sup> Thomas Christiano, 2006, "A Democratic Theory of Territory and Some Puzzles about Global Democracy," in *Journal of Social Philosophy*, Vol. 37, No. 1: 81-107 and 2008, *The Constitution of Equality: Democratic Authority and its Limits*, New York: Oxford University Press, Ch 7

in the society treat the members of permanent minorities as inferior.<sup>57</sup> Out of this statement it can be inferred that his position is that the states, which generate permanent minorities lose their authority over some part of the population completely, and (significantly) weaken the legitimacy in respect to the rest of the population. This pushes to the conclusion that the generation of permanent minorities is legitimacy defeating in some sense.

His position, however, changes in his later book. While permanent minorities are still seen as a limiting consideration to the democratic authority, he no longer seems to think that the generation thereof results in the loss of legitimate authority by the democratic assembly. What he asserts there is that the generation of permanent minorities weakens the authority of the democratic assembly, or in other words that when the democratic assembly is ruled by a permanent majority its authority is weakened, but not lost altogether. It is weakened to the extent it fails to realize public equality, and as seen, generating permanent minorities is an instance of such a failure. However, the problem of permanent minorities can be mitigated by democratic assemblies with the adoption, and the implementation, of certain directives that make up for what is lost through the democratic decision making process. Instances of such procedural constraints include the separation of powers, the use of bicameral legislatures, some form of federalism, or some form of consociational decision making including some super majority requirements.<sup>58</sup> Thus, the legitimacy of the democratic assembly is only weakened and not lost overall, as long as there exist the means and possibilities to make up for the injustices created in the process. Much like discussed above, when the injuries become large scale and/or systematic, the legitimacy also is lost completely.

Out of the above, the conditional nature of justice of democracy can be better seen. It is conditional on the realization of public equality, but it is not merely instrumental to the

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<sup>57</sup> Thomas Christiano, 2006, "A Democratic Theory of Territory and Some Puzzles about Global Democracy," in *Journal of Social Philosophy*, Vol. 37, No. 1: 81-107

<sup>58</sup> Thomas Christiano, 2008, *The Constitution of Equality: Democratic Authority and its Limits*, New York: Oxford University Press, Ch 7

realization of public equality; democracy embodies the public equality. Its justice is conditional on certain basic facts accompanying democratic process, but its justice is not a mere instrument to the realization of those facts. The way democracy loses its authority is by way of losing its intrinsic justice altogether. The democratic assembly simply does not have a moral right to violate the requirements of political equality, or even to neglect them when it can do something to satisfy them. No one has the moral right to undermine democratic rights, or basic human rights of any citizen. Authority is lost because the right is lost altogether.<sup>59</sup>

### **3.3.1.4 Interim conclusions**

The above discussion has singled out three main limits to democratic authority, which turned out to be undercutting considerations in their nature. Considering the main argument for the limits to democratic authority, I have found that what lies at the heart of the issue, is the realization of public equality. Democratic assembly possesses legitimate authority as long as it does not violate the realization of public equality. As soon as such a violation occurs, the legitimacy of the assembly is shaken. However, the extent to which the legitimacy is shaken depends on the size and scale of the violation. If the violation can reasonably easily be mitigated through democratic processes, then the legitimacy can be said to have been weakened, but not lost by the actions of the democratic assembly. Nonetheless, when the violations are grand scale and/or systematic, then the justice of the democratic assembly is lost altogether, and with it also the legitimacy.

The question that this raises is what all this entails. What is the consequence of the loss of legitimate political authority of a state? Both Dworkin and Christiano implied that the action that should follow the loss of legitimate political authority is resistance.<sup>60</sup> So the next question

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<sup>59</sup> Thomas Christiano, 2008, *The Constitution of Equality: Democratic Authority and its Limits*, New York: Oxford University Press, Ch 7

<sup>60</sup> Ronald Dworkin, 2011, *Justice for Hedgehogs*, Cambridge, MA: The Belknap Press of Harvard University Press, Ch 14 and Thomas Christiano, 2008, *The Constitution of Equality: Democratic Authority and its Limits*, New York: Oxford University Press, Ch 7. Both authors use the word revolution, which will be substituted by resistance in this dissertation, as revolution is a very loaded term.

that presents itself is how and where does secession enter this picture. The very basic and vague idea at this point would be that secession to some degree comes into this picture as deriving from the violation of a democratic principle, i.e. the principle of ‘equal say’ and not as it was thus far conceived as an instance of self-determination, or a remedy for gross human rights violation. However, what has been said thus far, does not fully establish this claim. It does, however, point to a rather promising direction, and I shall deal with it in depth in what follows.

### ***3.4 The connection between secession and the loss of democratic authority, and the argument for democratic theory of secession***

While paving the way towards a democratic theory of secession, I have thus far arrived at several key points. I have determined that since secession is inseparably connected to territory, a complete theory of secession should not neglect this aspect. More importantly, it has been determined that in order to arrive at intelligible and sound results, not only must the legitimate claim to the territory be taken into account, but we must start at the beginning, i.e. the territory of a state as a whole ought to be taken into consideration, and it needs to be determined under what circumstances a state has legitimate boundaries.

It has further been clarified that when talking about legitimate boundaries, we do not have actual territory in mind, but rather concern ourselves with the questions of the states legitimate authority across the whole of its territory, i.e. the states’ sovereignty. Even though I concede that the seceding group ought to have a legitimate claim to the territory it is about to take from the state, I nonetheless believe that the issue is a bit more complex than that. Considering that secession is directly opposed to the principle of territorial integrity of states, it seems that merely showing that one has a legitimate claim to a part of the territory one inhabits is not enough to justify that group to take that piece of territory from the state. Thus, the key to the justified taking of a part of the state’s territory lies within the bigger picture.



The first step that needs to be taken is to establish whether the boundaries of the state are legitimate. If that is the case, then secession is a non-starter. However, if it can be shown that the boundaries of the state are not legitimate, we arrive at the second step, which is to show that the group has a legitimate claim to the part of the territory it is about to take with it, when creating a new state. In short, the question of when secession is morally justified should be understood as the question of when the boundaries of the state are justified. When the boundaries are legitimate, secession is not justified, and when the boundaries are illegitimate, secession is justified.

After establishing this point, I have dealt with the content of the claim that boundaries of a state are legitimate, and found that the legitimacy of the state boundaries is dependent on the legitimacy of the authority of that state, and in turn is connected to justice, i.e. a state is legitimate, if it is just in some sense. I dealt with several approaches to legitimate political authority and determined that the best approach is democratic authority as it gives the state strong legitimacy. Democratic theory of secession then holds that the state has legitimate boundaries, when the state itself has legitimate democratic authority. Legitimate democratic authority is held, when the state is just. The state can be said to be just, when it realizes public equality. What is meant by this is that the state not only treats every person as an equal, but also that every person can see that s/he is being treated as an equal. Included in this notion is that the state advances everyone's interests equally, and everyone can see this being done. Moreover, liberal and democratic rights are underwritten by this principle of public equality. However, democratic authority is by no means unlimited. The three main limits to it are democratic and liberal rights, the assurance of a decent economic minimum, and the generation of permanent minorities. The principle that lies at the core of all these limits is the principle of public equality. When a state violates democratic and/or liberal rights it weakens or loses its authority, because it fails to realize public equality. If anyone's right is violated,

we can no longer say that s/he is being treated as an equal. Something similar is true when speaking about a decent economic minimum. A decent economic minimum is necessary for the equal advancement of interests, which is in turn secured by the liberal and democratic rights. Thus, when the state fails to secure a decent economic minimum it by this violates the public realization of equality. It does not come as surprise that something similar can be said about the generation of permanent minorities. When a group or several subgroups within a state are always, or almost always, outvoted and so never, or almost never, get their way, then the state is also in violation of the realization of public equality. It is not possible to say that the members of those groups are being treated as equals, and it is mostly easily seen by them and the others that they are not being treated as equals. Hence, it is obvious that in the case, when a state generates permanent minorities, it violates the key principle that confers on to it legitimate political authority.

The loss of legitimate political authority is a matter of degree. When the policies, which lead to the violation of the realization of public equality, can be amended reasonably easily, then the legitimate authority is weakened (as it can be restored through democratic processes). However, when the violations are grand scale and/or systematic, then we can speak about the loss of legitimate political authority altogether.

### **3.4.1 Secession**

If we now connect this to secession, we get the following. Democratic states have legitimate boundaries as long as they have legitimate democratic authority. They have legitimate democratic authority as long as they do not violate the principle of public equality. When the violations of the principle are rare and easily mitigated, then the legitimacy of the authority, and consequently, of the boundaries are weakened, but can be restored by means of democratic processes. However, in the case of systematic and/or grand scale violations the legitimacy of the authority, and by consequence, the legitimacy of the boundaries is lost

altogether. Thus, secession could be justified deriving from the violation of basic democratic principles.

Nonetheless, this conclusion seems premature at this point. While the reasoning at hand does entail the loss of political legitimacy and the legitimacy of the boundaries, it does not entail secession, but something else, namely resistance. When a state is obviously illegitimate, people have the right to a revolution by means of which they attempt to overthrow the illegitimate government and elect a new legitimate one. This is so, because even though the state has lost the right to rule, at least some institutions necessary for re-establishing someone's right to rule are to some degree still intact and readily available. So the question is, whether there is room in democratic theory for secession at all. I believe there is, however it requires a further step in the argument.

#### **3.4.1.1 The necessity of states and the instrumental dimension of democracy**

Before I can turn to the second step in my argument, I need to show why states as such are a must. States are necessary to provide unitary and public interpretation of rights of individuals and to enforce these rights in a way that is consistent with those individuals' continued freedom and independence from one another. If there were no states, we would face at least two important problems, i.e. the problem of unilateral interpretation and the problem of assurance.<sup>61</sup> The existence of the state, and with it the existence of certain institutions surmount these problems.

The existence of the state is often connected to the problems arising in the state of nature. For Locke, for instance, states are necessary, because in the state of nature there is no impartial authority that can resolve conflicts between people.<sup>62</sup> Lea Ypi employs a very similar idea, attributing it to Rousseau; i.e. since social conflict cannot be solved through the efforts of

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<sup>61</sup> Immanuel Kant, 1991, *The Metaphysics of Morals*, Cambridge: Cambridge University Press

<sup>62</sup> John Locke, 1960, *Two Treatises of Government*, Peter Laslett (ed.), Cambridge: Cambridge University Press

individual moral agents, the state emerges as an instrumentally necessary institutional mechanism.<sup>63</sup> Similarly, Laura Valentini states, that the creation of a state is a remedy for pre-political coercion, since coercion can only be justified by creating justly governed state-like authorities.<sup>64</sup>

It should be noted at this point, that there is a difference between Locke's and Kant's reasons for the moral necessity of the state. Whereas Locke emphasizes the need for an impartial authority to resolve conflicts arising even between reasonable and well-motivated parties due to cognitive bias, etc., Kant's claim is more fundamental, as he argues that without proper institutions the rights themselves that people have are underspecified. It would seem that Ypi's position is closer to what Locke had in mind, Valentini, on the other hand, seems more inclined to the Kantian idea.

While all the above have somewhat similar, but different, arguments for the necessity of the existence of the state, and I shall not discuss in this dissertation, which reasoning, if any, is right, they all show that states are a must. And this is enough for me to be able to continue with the discussion at hand.

States are necessary. But of course not all states are just states. However, as it has been established throughout this chapter, well functioning democratic states can be seen as instances of good states, provided they possess legitimate political authority.

Up until now, I have extensively dealt with the intrinsic value of democracies, and with their inherent authority, i.e. the right to rule. However, democratic states in addition to their intrinsic value, of being states that value liberty and equality, and treat its citizens publicly as equals, also have an instrumental value. Moreover, when discussing democratic authority legitimate political authority was divided in three parts. To recap, legitimate political authority can be divided into justified coercion (minimal account of authority), the right to

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<sup>63</sup> Lea Ypi, 2011, *Global Justice and Avant-garde Political Agency*, Oxford: Oxford University Press

<sup>64</sup> Laura Valentini, 2011, *Justice in a Globalized World: A Normative Framework*, Oxford: Oxford University Press

rule (inherent authority), and capacities to impose duties (instrumental authority).<sup>65</sup> While discussing democratic authority as limited by the principle of the realization of public equality, the focus was on establishing that when a democratic state realizes public equality, it has the legitimate right to rule, i.e. it has legitimate inherent authority. However, thus far another, also vital part of legitimate political authority, namely instrumental authority, i.e. the capacity to impose duties, was more or less neglected. In order to have a complete picture of legitimate political authority, instrumental authority cannot be neglected, or better said it must be included the discussion.

In addition to the fact that democracies are special, since they through their unique decision making process treat each adult member as an equal, by giving them equal say at the crucial point of the decision making process, democracies are also valuable because of their institutions. They have a set of governing institutions, like periodic elections, representative public officials accountable to the people, decisions by majority vote, transparent government, a free press, and the rule of law, which are instrumental for the well functioning of a state.<sup>66</sup> However, a situation can be imagined, where these democratic institutions are impaired or non-existent, due to the fact that there is a great disagreement, or an insurmountable disagreement, within these institutions, or even worse, the disagreements prevent (some of) these institutions altogether. What comes to mind is the example of Belgium. It is so split that they haven't had a government in over a year as the two sides were incapable of reaching an agreement. The problem that arises from such situations is that institutions like periodic elections and transparent government are seriously impaired, and sometimes even non-existent. However, considering that these institutions are instrumental to the functioning of democracy, and to the intrinsic value of democracy, one might argue that in such cases

<sup>65</sup> Thomas Christiano, 2008, *The Constitution of Equality: Democratic Authority and its Limits*, New York: Oxford University Press, pp. 240-241

<sup>66</sup> Elizabeth Anderson, 2009, "Democracy: Instrumental vs. Non-Instrumental Value" in Thomas Christiano and John Christman (eds.) *Contemporary Debates in Political Philosophy*, Malden, MA: Wiley-Blackwell, pp. 213-229

secession is permissible in order for states to be able to put the needed institutions back into place.

Moreover, institutions play an important part for the inherent authority as well. It is usually through institutional arrangements that the shortcoming on the inherent part can be mitigated or eliminated. As mentioned above, the problem of the generation of permanent minorities can, for instance, be mitigated by adopting some institutional arrangements that would help mitigate the problem of them being always, or almost always, outvoted by the majority. Thus, the failure on the instrumental level implies secession also due to the fact that it is not in the position to correct for the shortcomings on the inherent dimension.

It can thus be concluded that when speaking about democratic authority, there are two important dimensions, both of which are necessary, and pose limits to legitimate political authority. On the one hand, there is inherent political authority, which is in the case of democratic authority held when the principle of public equality is realized, and is also limited by this principle. On the other hand, there is instrumental political authority, which in the case of democracy is substantiated by certain democratic institutions, and is limited by the existence, or well functioning, thereof. In addition to this, it can be said that instrumental democratic authority is also limited by the principle of the realization of public equality, at least partially so. When institutions like periodic elections, transparent government, free press and the rule of law, representative public officials accountable to the people, and decisions by majority vote are impaired or non-existent, then it is also impossible to say that everyone is treated as an equal, and can see that s/he is treated as such. If there is no government, then no one is advancing any interests, thus I cannot see that mine are being advanced equally. If there are no periodic elections, then the fact that each adult member has an equal vote at the crucial stage of the decision making process counts for very little, since s/he has a right s/he cannot exercise. Moreover, if the institutions fail, there is no possibility to mitigate the shortcoming

on the inherent dimension of authority, since there is no one who can do so, and no means through which to do it. Thus, the argument can be made that when democratic states fail on the instrumental level they are in violation of the principle of the realization of public equality, and as such are not in full, or not at all, in possession of legitimate political authority.

How does this step help us with regards of secession? It has previously been shown that when a democratic state fails on the inherent authority level, i.e. when it loses authority, because it violated one or more of the three limits to democratic authority, then the people of that state do not have the right to secession yet, but have another right, namely the right to resistance. They do not possess the right to secession yet, because they can in common fight to create better, more just institutions for themselves. If we, however, combine the fail of the state on the inherent authority level with the step I have discussed now, it can be seen that secession seems as a feasible option. If the states authority is weakened, because it has violated one or more of the three limits to democratic authority, and if the state in addition to that has impaired, or non-existing, institutions necessary for the well functioning of the state, or when these are precluded because of the deep division between the groups within the state, then separating the groups guilty for not being able to create viable institutions seems not only as a viable but also as a good option.

However, before making the argument for secession explicit, we need to take a step back and look closely at the key premise the discussion at hand started from, i.e. at legitimate boundaries. As asserted throughout this chapter, legitimate boundaries are a pre-condition for secession. In what follows, I will give some remarks on the nature of state boundaries in general, and then from that systematically look at what happens after the legitimacy of the boundaries is lost, and where the place of secession is within this.

### 3.4.2 Legitimate boundaries and the residual right argument

It has been argued that territorial boundaries of states are morally arbitrary, since they are the product of historical contingency, and mostly came about in an unjust way. Many states attained their current borders in a past of wars, by means of repression and destruction of minorities.<sup>67</sup>

However, even though this may be so, it does not mean that they can be changed at will. In order to change the borders something more is needed. I can think of at least two reasons. On the one hand, borders can be changed simply by agreement. An example of that is the break-up of Czechoslovakia, where following an agreement between the parties involved, two separate states were created, i.e. Czech Republic and Slovakia. On the other hand, where there is no agreement between the parties, we may find some reasons upon which the borders can be redrawn. In this case some past injustice gives rise to the future redrawing of the borders. For instance, the illegal annexation of the Baltic States in the past, gave them a legitimate reason to secede from the Soviet Union. Moreover, all secessions fall into this category. According to Buchanan the borders may be changed as a consequence of the state's grand scale violations of human rights' of a certain group. On my account, on the other hand, the right to redraw borders stems from the state's failure to realize public equality. All of the latter cases, i.e. non-agreement change of borders are connected to the legitimacy of state boundaries.

As stated previously in this chapter, the legitimacy of state boundaries is connected to the concepts of sovereignty and territorial integrity. A state is seen as sovereign as long as it can be seen as possessing legitimate political authority. When it is such it also possess territorial integrity. However, states can lose legitimacy. On my account, the state loses legitimacy,

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<sup>67</sup> Discussion on this can be, amongst other, found in Cara Nine, 2008, "The Moral Arbitrariness of State Borders: Against Beitz" in *Contemporary Political Theory*, 7, pp. 259-279, Charles Tilly, 1990, *Coercion, Capital and European States, AD 990-1990*, Oxford: Blackwell, Michael Mann, 2005, *The Dark Side of Democracy. Explaining Ethnic Cleansing*, New York: Cambridge University Press and Andreas Wimmer, 2002, *Nationalist Exclusion and Ethnic Conflict: Shadows of Modernity*, Cambridge: Cambridge University Press.



when it fails on the inherent and instrumental dimensions of democracy, i.e. when it fails to realize public equality. As a consequence of losing legitimacy, the state also loses legitimate boundaries, i.e. boundaries of the state lose legitimate force. In itself the loss of sovereignty may be a reason for international intervention. However, it also has strong implications for secession. Since the dissertation at hand deals only with the latter, I shall refrain from saying much about international interventions, as it goes beyond the scope of the dissertation. I will, however, in what follows closely deal with what the loss of legitimate state boundaries entails for secession.

As has been established, the loss of legitimate boundaries entails the loss of sovereignty, and by consequence, territorial integrity. Does that entail that the territory is up for grabs? The answer to this question has to be negative. Even if the state collapses completely, this in no way means that it has found itself in a state of complete moral vacuum. Nonetheless, it also does not follow that the moral situation is equivalent to the one prior to the collapse. In order to make these points explicit, I will resort to the so called residual right argument.

#### **3.4.2.1 The residual right argument**

The residual right argument basically states that even when a state fails, or loses authority over the people on a certain territory, there are so called residual rights that all the people from that territory have in common. The argument, put forth by Anna Stilz, states that the state has a legitimate right to the territory, when it fulfills the following four conditions: it effectively implements a system of law regulating property in that territory, its subjects have a legitimate claim to occupy the territory, the state's system of law 'rules in the name of the people' by protecting basic rights and providing for political participation, and the state is not an usurper.<sup>68</sup> The basis that grounds the residual right is the claim that states possess jurisdiction over territory, but the people possess a kind of right over the territory. Residual

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<sup>68</sup> Anna Stilz, 2011, "Nations, states and territory" in *Ethics*, Vol. 121, No. 3, p. 574

right is vested in the people to reconstitute legitimate political institutions on their territory, when their prior state fails, becomes illegitimate, or is usurped. The argument for residual rights is as follows:

- 1) When a state disappears often a people persists.
- 2) There is a claim to collective autonomy that attaches to a people so understood.
- 3) This claim to collective autonomy justifies granting the people the right to reconstitute a state on their territory as long as they can meet the legitimacy conditions.<sup>69</sup>

What is meant by the ‘legitimacy conditions’ is the minimal consideration of rights. What is meant by that is that a legitimate state gives at least a minimal consideration to each member’s interests by delineating a set of basic rights<sup>70</sup> as a standard for state legitimacy.<sup>71</sup>

The people are understood as the collective subject of the prior state. The people have to meet two individually necessary and jointly sufficient conditions: *the political history condition*, i.e. the group has established a history of political cooperation together by sharing a state (legitimate or otherwise) in the recent past, and *the political capacity condition*, i.e. the group possess the ability to reconstitute and sustain a legitimate state on their territory today.<sup>72</sup>

Having presented the residual right argument, it now becomes obvious that the issue this argument addresses is the moral situation after a state has failed. The claim that after a state fails, the territory is not simply up for grabs, since the state is not left in a moral vacuum, is explicitly supported by this argument. As it is clearly shown, even if a state fails the people of that state do not vanish into thin air, and it is these people that have the right to the territory in question.

<sup>69</sup> Anna Stilz, 2011, “Nations, states and territory” in *Ethics*, Vol. 121, No. 3, p. 591

<sup>70</sup> By these rights are meant most of the rights set down in the UN Declaration of Human Rights, amongst others including the rights to life, liberty and security; rights against slavery, torture and arbitrary imprisonment; rights to equal protection of the law and fair trial; rights to freedom of conscience and freedom of association; and the rights to some form of political participation. From: Anna Stilz, 2011, “Nations, states and territory” in *Ethics*, Vol. 121, No. 3, pp. 572-601.

<sup>71</sup> Anna Stilz, 2011, “Nations, states and territory” in *Ethics*, Vol. 121, No. 3, pp. 572-601

<sup>72</sup> *Ibid.*, p. 591

More importantly, this argument also shows that other states, and also the people of the failed state, cannot just divide the territory amongst themselves at will. Other states are precluded from doing so, because the persisting people have the right to the territory against them. But more importantly, the persisting people also cannot just divide the territory amongst themselves, because the right to the territory belongs to them in common. Thus, the residual right is both, a right people have against the outsiders, but it is also a right claimed against the people of the territory, as it is a right of all of them in common, meaning that it precludes them from dividing the territory amongst them.

At this point it can be concluded that the residual right helped proving the point that the territory after a collapse of a state is not up for grabs, however, it also seems to have proven too much. As things stand now, after the state loses legitimate boundaries, people may only have a right to resistance, in the sense that they have the right to create a new government for themselves in place of the previous unjust one. They, however, do not have the right to secession, since they do not have the right to divide the territory. Does this entail that we have to abandon the right to secession? I don't think so.

What the residual argument rightly points out, is that even after the state has lost legitimacy of the boundaries, its territory cannot simply be taken by other states, or without further ado, divided between the original population. However, there seems to be a problem with the argument as well. Namely, it does not take into account the complexity of the situation. It simply assumes that people should be taken as a whole, without taking into account the situation those people were in preceding the state's loss of legitimate boundaries. I believe that in certain cases people can indeed be taken as a whole; however, there are many instances in which this would be a misinterpretation of the situation. Thus, I believe, the mistake of Stilz's account lies in the fact that it reaches a too strong conclusion, which is based on the

omission of some crucial facts involved at the very core of the situation preceding and/or causing the loss of legitimacy.

Which are the instances that require special attention when considering redrawing the boundaries after their legitimacy has been lost? The first, and perhaps the most clear cut examples, are those groups whose democratic and liberal rights have been grossly and/or systematically violated, and permanent minorities. Obviously, a state can lose legitimate boundaries, if it violates democratic and/or liberal rights across the board, affecting the whole population of the state. However, more often than not, the targets of such violations are specific groups within the whole population. Moreover, permanent minorities, who never, or almost never, get their way, and the state is incapable or unwilling to provide for institutional arrangements, which would solve or mitigate the problem, are also groups affected by state policies, as opposed to the whole population being affected at least in the narrow sense. The whole population is affected, since they can see that not everyone is being treated as equal, and so the principle of public equality is not realized, but it is the members of the permanent minority that take the blow of not being treated as equals. So the question is how it can be claimed that after the state has lost legitimate boundaries as a consequence of its actions, these maltreated groups should be put under a strong claim against dividing a territory with the rest of the population. I believe it cannot. The fact that a part of the population was suffering maltreatment from the government should be seen as a trumping reason to the residual right claimed against the whole population. In cases where groups have been maltreated, the threshold set at the highest point possible by the residual right argument should be lowered, and the affected groups given the right to form their own states.

Moreover, another trumping instance comes to mind. In deeply divided states, where even agreements on basic issues between inhabiting groups are very difficult or next to impossible, and thus the failure of securing the institutional dimension of democracy is next to impossible,

forcing these very groups to reconstruct a common state on the grounds of the failed one, seems like a very unreasonable and unrealistic thing to do. When there is little or no willingness to continue living together and the state has, for whichever reason, lost legitimate boundaries, the groups of such a state should be in the position of dividing the territory, and create separate, better functioning states. Why this consideration seems to trump the residual right, is the fact that there is little, or almost no chance of them creating a well functioning state in common, and so there is little or no chance of the realization of public equality, and it is precisely this principle that is at the core of state's legitimacy, and so by consequence the legitimacy of its boundaries depends on it.

In order to fully understand the force of the principle of the public realization of equality, we need to take a look at one of the key concepts involved in it, i.e. the common world. This will help explain exactly why the instances listed above should be seen as trumping circumstances to the residual right.

### **3.4.2.2 The Common World**

The common world is a notion involved in the shaping of unitary system of law, which is not such that is imposed on all, but is a matter of shared arrangements (e.g. system of property, contract and torts, the system of collective provision of goods financed through taxation, the system of regulations).<sup>73</sup> According to Christiano, the common world is “a set of circumstances among a group of persons in which the fundamental interests of each person are implicated in how the world is structured in a multitude of ways.”<sup>74</sup> Within this common world we find a deep interdependence of interests among the members, since the fulfillment of fundamental interests of each person is connected with the fulfillment of fundamental interests of every other person. Members of such common worlds also have more or less

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<sup>73</sup> Thomas Christiano, 2008, *The Constitution of Equality: Democratic Authority and its Limits*, New York: Oxford University Press, Ch 3

<sup>74</sup> Ibid., p. 80

equal stakes in the world they inhabit. Because of the interdependence of interests in such a world, their interests are more or less equally at stake.<sup>75</sup> These common worlds are the result of “long-term formations of common legal, political and educational institutions as well as regulatory, welfare, and taxation regimes within certain territorial confines.”<sup>76</sup> According to Christiano, these very activities have manufactured common worlds for its citizens.

If we now connect the notion of common world with the discussion above, we can conclude that when it comes to maltreated groups, they cannot be said to have shared, or to share, a common world with the common population of the state, since it is not possible to say that their interests were a part of the deep interdependence of interests of the whole. Their interests were either treated as less important or excluded from the scheme altogether. In their case it was also not true that they had more or less equal stakes in the world they inhabited. While perhaps the stakes of others were more or less equal theirs were higher, since their interests either did not make it on the agenda, or were not properly addressed. Similarly, it cannot be said that we are talking about a common world in deeply divided societies either. There are common worlds, but they are divided between certain groups of the state. The consequence of people not leaving in common worlds is that there is no realization of public equality, and if there is no realization of public equality, a state of such constitution cannot be said to possess legitimate political authority. Thus, it can be concluded that the groups which do not share a common world, should not be forced to recreate a state on a territory in common, after the legitimate boundaries of that state have been lost. Rather the groups, who do indeed share a common world, should be given the right to secession, and create their own states.

The notion of the common world, in addition to showing why some groups should be allotted the right to secession, also shows why other countries do not possess the right to take over the territory of a state that has lost legitimate boundaries. The reasoning behind this claim is that,

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<sup>75</sup> Thomas Christiano, 2008, *The Constitution of Equality: Democratic Authority and its Limits*, New York: Oxford University Press, Ch 3

<sup>76</sup> Ibid., p.82

while each state has separately forged their own common world for decades for their citizens, they have not been creating a cross border common world between other states. While I concede that it is possible that some of the elements between several common worlds might be similar, it can by no means be claimed that they are identical, and that persons from either would feel at home in the other common world. Thus, when legitimate boundaries are lost, even if a state in a perfectly just war takes over the territory of the state that lost legitimacy of its boundaries, and from the start adheres to the general democratic principles, by giving each person an equal say, equal democratic and liberal rights, providing and maintaining democratic institutions necessary for the well functioning of the state, it still lack one key characteristic, namely the two previously different political communities do not share a common world. Because of this, it is also impossible to claim that the new state is treating everyone as equal, and everyone can see to be treated as equal, i.e. that the new state is in full compliance with the principle of the realization of public equality. Thus, the state does not have full legitimate democratic authority, and by consequence, does not have fully legitimate boundaries.

It can be hence concluded, that even though the residual right argument rightly points out that after the legitimacy of state boundaries has been lost, the territory is not up for grabs by outside actors, it is fallacious in its assertion that the territory cannot be divided between the persisting people. The mistake stems from the fact that the complexity of the situation is not taken into account. Certain instances that led to the loss of legitimate boundaries, or which are a part of the situation after the legitimate boundaries have been lost, are such in nature that they trump the presumption of the common right of all the people to the territory. All these instances are deeply rooted in the principle of the realization of public equality, and are inherently connected to the notion of the common world. When certain groups do not share a common world with the rest of the population, then these groups should be given the right to

secession. If that were not the case, then the newly created states would not be in adherence with the principle of the realization of public equality, and so by default would not possess full legitimacy of their boundaries from the start.

Having shown that the loss of legitimate boundaries in certain instances allows for the division of territory, I can now make the argument for secession within the realm of democratic theory explicit.

### **3.4.3 The argument for democratic theory of secession**

The argument is as follows:

1. The question of when secession is morally justified should be understood as the question of when the boundaries of the state are justified, i.e. legitimate. When the boundaries are legitimate, secession is not justified, and *vice versa*.
2. The boundaries of the state are legitimate, when the state itself has legitimate political authority.
3. The state has legitimate political authority, when it has legitimate democratic authority.
4. The state has legitimate democratic authority, when it realizes public equality.
5. When the state violates the realization of public equality systematically, and/or on a large scale, then it loses legitimacy.
6. (from 2-5) Therefore, when the state loses legitimacy, the boundaries of the state are also illegitimate.
7. Democratic authority has both an instrumental and an intrinsic dimension.
8. On the intrinsic dimension democratic authority is limited by the democratic and liberal rights, the assurance of a decent economic minimum, and the generation of permanent minorities.



9. On the instrumental dimension, democratic authority is limited by the degree to which it is successful in maintaining, and establishing democratic institutions, i.e. periodic elections, representative public officials accountable to the people, decisions by majority vote, transparent government, a free press, and the rule of law.
10. The establishment, and maintenance, of democratic institutions is necessary for the well functioning of a state.
11. When the state fails to uphold the intrinsic, and/or the instrumental dimension, of democratic authority it loses its legitimacy.
12. The state is necessary to provide unitary and public interpretation of rights of individuals, and to enforce these rights in a way that is consistent with those individuals' continued freedom and independence from one another.
13. If the state fails to establish, and/or maintain, institutions, then it fails in its role to provide unitary and public interpretation of rights of individuals, and to enforce these rights in a way that is consistent with those individuals' continued freedom and independence from one another.
14. (from 2-5 and 7-11) Therefore, if the state loses its legitimate authority on either intrinsic or instrumental, or both dimensions, then it loses its legitimate boundaries.
15. When a state loses legitimate boundaries, the territory may not be taken by another state, but can be divided between groups of that state that do not share a common world.
16. (from 1 and 12-15) Therefore, when the state loses its legitimacy and cannot/does not establish and maintain democratic institutions, a group not sharing the common world with others within such state has a moral right to secede.

The crucial points in my argument are that the legitimacy of the boundaries of the state is a necessary condition for secession, and that when legitimate boundaries are lost, groups not

sharing a common world with the rest of the population, have the right to divide the territory of that state. The argument is in two steps. The legitimacy of borders is dependent on the question of whether the state has legitimate political authority. The answer to this question has two dimensions. On the one hand, the state has legitimate political/democratic authority on its inherent/intrinsic reading. It has such an authority, because it establishes and realizes public equality. This dimension is limited by the democratic and liberal rights, the assurance of a decent economic minimum, and the generation of permanent minorities, all of which have the principle of public equality at the core. If any of them are violated systematically, and/or on a grand scale, then legitimate authority is lost.<sup>77</sup> On the other hand, the state has legitimate authority on its instrumental reading. It must establish and maintain democratic institutions, in the absence of which the well functioning of a state is impossible. If the state fails to establish or maintain these institutions, it loses legitimate authority. Thus, in both cases legitimate authority, and with it the legitimacy of state boundaries, is lost. However, only the failure of both is sufficient to generate the right to secession. While the loss of legitimate authority on the inherent/intrinsic reading indeed has the consequence of the loss of legitimate boundaries, it is neither enough, nor does it entail the right to secession. This is the case, because the loss of intrinsic/inherent authority has a different ‘outcome’ as a consequence. It merely generates the right to resistance, but it does not generate the right of a group to take a part of a territory, i.e. secession. Thus, the loss of such authority is merely a necessary condition for secession, but not a sufficient one. This is the case because the state instrumentally can mitigate for this failures. It is possible for the state to ‘reconstruct’ its authority on the inherent dimension by means of certain institutional arrangements.

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<sup>77</sup> The assurance of an economic minimum is an important limit to democratic authority. However, when it comes to secession, it is merely instrumental, in the sense that it causes the loss of democratic authority. On the other hand, the violation of democratic and/or liberal rights, and the generation of permanent minorities have a much more direct role in connection with secession, as they not only can cause the loss of democratic authority, and by consequence the loss of legitimate boundaries, but they also present trumping circumstances for the residual right argument, and so help explain why the failed state’s territory can be divided among the remaining people.

However, when the loss of inherent authority is joined by the loss of instrumental authority, then we can speak about the right to secession. The importance of instrumental authority lies in the fact that democratic institutions are necessary for the well functioning of a state, and can make up for the shortcoming on the inherent dimension. When the state does not have such institutions, or when they are broken without the possibility of repair, then groups within such state capable of establishing well functioning institutions for themselves, and having a legitimate claim to the part of territory they inhabit, have the right to secede and establish a new state on that territory.

They have this right, because they do not share the common world with the rest of the population, and so there is no chance of the adherence to the principle of public equality across the population. Because that is not possible, there is by default no chance of having a state with legitimate boundaries.

### **3.5 Conclusions**

I have explored the possibility of a democratic theory of secession in this chapter, and during this exploration I have found many important things. First, I found that if one wants to have a complete theory of secession, one needs to take a closer look at the legitimacy of the boundaries of a state, and put the question of whether they are legitimate, before the issue of whether a group has a legitimate claim to the part of the territory it attempts to take in the case of secession. Thus, I have found that secession is conditioned by the legitimacy of state boundaries. If the boundaries of a state are legitimate, then secession is not justified and *vice versa*.

Second, I have established that the question of the legitimacy of state boundaries is connected to the question of legitimate political authority. If the state can be said be just in some sense, then it has legitimate boundaries. It can be said that the state is just, if it possess legitimate political authority. Having explored several approaches to legitimate political authority, I

found, that the best approach is democratic authority. A state has democratic authority, if it realizes public equality, i.e. if it treats each person as an equal, and everyone can see that they are being treated as such. Further, I found that democratic authority is not limitless, and has two important dimensions. The three main limits to democratic authority on the intrinsic/inherent dimension are democratic and liberal rights, the assurance of a decent economic minimum, and the generation of permanent minorities. At the core of all these is the principle of the realization of public equality. If any, or all these limits are not observed, then the authority of the democratic assembly is weakened in the least, and in some instances, where the violations are systematic and/or grand scale the authority is lost altogether. Since the authority is lost, so is the legitimacy of the boundaries.

However, this is not enough to generate the right to secession, as it merely generates another right, i.e. the right to resistance. Thus, a second dimension needs to be added, i.e. the instrumental authority. On this dimension, democratic authority is limited with the establishment and maintenance of democratic institutions, e.g. periodic elections, representative public officials accountable to the people, decisions by majority vote, transparent government, a free press, and the rule of law, which are necessary for the well functioning of a state. If the state cannot, or will not establish, or maintain such institutions, then it loses its authority. The role of the institutions also plays an important part in the inherent authority dimension, as various institutions, when in place and functioning, can make up for the shortcomings in that dimension, e.g. they can mitigate the problems created by permanent minorities. So, if the state fails on the instrumental dimension, again in this case as in the previous one, the legitimacy of the boundaries is lost.

I have further established that even when the legitimacy of state boundaries is lost, the territory is not up for grabs. With the help of the residual right argument I have shown, that after the loss of legitimate boundaries, the residual right of the people of that territory

precludes other states to occupy that territory. Further, I have also shown that the argument is mistaken in its assertion that the people have the right to the territory in common, and so cannot divide it after the state has lost legitimate boundaries. I have shown this to be the case with the help of the notion of the common world. Since certain groups in the state due to several actions by the state, and their general position as a consequence thereof, cannot see themselves as equals, and are not seen as equals, they cannot be said to share a common world with the rest of the people. Moreover, adding to this the failure of the instrumental dimension of democracy, we can see that this groups should be given the right to secession, due to the fact that nothing is being, and/or can be, done in order to forge a common world with the rest of the people. In addition to this, the notion of the common world also shows how the residual right argument's claim, that other states don't have the right to occupy the territory of a state that lost legitimate boundaries, can be further substantiated.

After having carefully considered all the above, I had enough to explicate the argument for secession within the realm of democratic theory. The argument is thus a two step argument. When the state loses the inherent/intrinsic authority the necessary, but not yet sufficient condition for the right to secession is established. When the state to that also loses instrumental authority, then the right to secession follows from the loss of legitimate boundaries, and the loss of both dimensions of legitimate political authority.

I have now created the backbone for a viable democratic theory of secession. There are still many things left in the murky waters at this point. Thus, I shall go back to the beginning and point by point create a clear democratic theory of secession in the next chapter.

## Chapter 4: Democratic theory of secession

The potential democratic theory has shown, in regards with secession, proved to be all, if not more than it promised. Within the realm of democratic theory, the right to secession as construed in the previous chapter, seems to stand strong against most of the objections that have been raised against other theories of secession, and in addition to that is able to provide some additional, but vital insights other theories either fail to deal with completely, or do not address adequately.

First and most importantly, it is a derivative right and as such does not in any way presuppose the state to be a voluntary organization, which as has been shown throughout this dissertation a state not only is not, but also cannot be.

Second, democratic theory of secession does not seem to be affected by the objections directed at the consequences the exercising of the right might have on the state itself, and the national and international situation. In other words, democratic theory of secession is not vulnerable to the objections such as the limitless fragmentation, the strategic bargaining, and the paralyzing of state functioning objections. This seems to be the case, because the right to secession within the realm of democratic theory cannot be seen as a very permissive right. As opposed to the national self-determination theories, and the plebiscitary right theories, secession is not something that can be easily obtained. Whereas in the above mentioned theories a group could be granted secession in virtue of them being a nation, or when the majority of the groups' members on a clear question vote in favor of secession, according to my theory, secession can only become permissible as a result of several circumstances, which need to arise, before we can even begin to talk about a right to secession.

Third, the most important feature of the democratic theory of secession, as I conceive of it, is that it specifically addresses the question of legitimate boundaries and builds the theory from there. According to my account, secession is not permissible when the state has legitimate

boundaries. Even though legitimate boundaries are not directly connected to the territory, they do play an immensely important role in any discussion on secession, since they are inherently connected with two important aspects of the state secession goes against, namely state sovereignty and territorial integrity. For any theory of secession to be complete, it should address this issue, since secession is in direct opposition with territorial integrity, and so every theory needs to be in the position to adequately address this point. Whereas the national self-determination theories, and the plebiscitary theories, remain silent on this point, the remedial right theories, and the democratic theory, address this issue directly. The importance of the democratic theory, as constructed in the previous chapter, lies in the fact that it not only addresses this issue, but that it puts this issue at its core.

Lastly, even though democratic theory can be said to be similar, or even a variation or a part of the remedial right theories of secession, it seems that the two can be set apart, since the democratic theory seems to have a broader scope than the remedial right theories, and so can have a wider range of application. Though it is rather unproblematic to treat the democratic theory of secession as a variation of the remedial right theories, it perhaps deserves to be treated as a separate theory of secession, since it does not confine itself to the past injustices of the state, like gross violations of human rights of a certain group, or the illegitimate incorporation of a certain territory into the state, i.e. states that are not very democratic in their actions to begin with, but it rather seeks to explain how secession is possible from states otherwise based on solid democratic principles that with certain actions or inactions jeopardize their legitimate political authority, and so by consequence lose the legitimacy of their boundaries. Though the violation of human rights is one of the possible triggers towards the loss of legitimacy of the state, democratic theory seeks to show that the loss of legitimacy is a matter of degree, and in some instances can even be mitigated by the adequate institutional arrangements. Secession only becomes possible, when the state loses its

legitimate political authority both on the inherent dimension (it does not adhere to the principle of the realization of public equality), and the instrumental one (it is incapable, and/or unwilling, to maintain and provide institutions necessary for the well functioning of the state). Having shown the positive findings about the democratic theory that in some form or other presented themselves thus far in my discussions, there are several points in which the theory is still left in murky waters. Not much has been said thus far about certain practical aspects of the theory, the most important of them being, how the theory can comprehensively account for the presumption that secession is a collective decision. Moreover, it also remains to be established, whether the right to secession, as conceived of here, can overcome the problems other theories face in connection with the puzzle presented in chapter 2 of this dissertation, i.e. when secession is needed the most from a moral point of view it seems very difficult to achieve it in a legitimate manner, and when it is not urgent, then it is easy to attain.

In order to clearly point out the strengths of the democratic theory, and test the theory against potential problems, I must start at the beginning and point by point examine its features. To accomplish this, I shall start by explicitly spelling out the democratic theory of secession. While doing that I shall point out the strengths and weakness of the theory, and address the weaknesses as they present themselves. I shall continue by checking the theory against the guidelines for a comprehensive theory of secession I have established in the first chapter of this dissertation and lastly, I shall check the democratic theory in respect to the puzzle concerning the theories of secession presented in the second chapter of this dissertation.

#### ***4.1 Democratic theory of secession spelled out***

##### **4.1.1 The nature of the right to secede in democratic theory of secession**

Democratic theory of secession, as opposed to the national self-determination theories and most of the plebiscitary theories, takes a statist position, when it comes to the question of secession. What is meant by ‘statist’ is the fact that the theory does not take the state to be in



any way a voluntary association, from which groups can separate simply by performing some action, which can be interpreted as their will to leave it. Moreover, democratic theory of secession takes the states to be necessary as they provide unitary and public interpretation of rights of individuals, and to enforce them in a way that is consistent with those individuals' continued freedom and independence from one another.<sup>1</sup> Only states with their institutions are in the position to ensure the principle of the realization of public equality. Thus, the statist position the democratic theory of secession commits itself to, entails that the state is seen as necessary to ensure the realization of public equality, and that the state is not considered to be a voluntary association.

Whereas the national self-determination theories hold that a nation can leave the state in virtue of them being a nation, and as such having the right to self-determination, and most plebiscitary theories assert that if the majority of the members of a group on a clear question in a referendum vote in favor of secession, then such a group has the right to leave, democratic theory does not permit secession in either of those instances, since it does not permit secession from states with legitimate boundaries. The difference between these positions is explained by the views they take on legitimate political authority. National self-determination theories take the state to have legitimate political authority, as long as all the people within the state authorize the state as having such an authority. Thus, when a nation desires to leave a state, it is allowed to do so, since it does not authorize the state to rule over them anymore. Similarly, plebiscitary theories of secession hold that the relationship between the state and the people is explained in terms that the state is seen as an agent of the people. Hence, the relationship between the state and the people can be revoked. This is explicitly done by holding of referenda on an unambiguous question, in which the majority of a group votes in favor of secession. Both of these theories then can be said to base legitimate political

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<sup>1</sup> On this issue I follow Immanuel Kant found in 1991, *The Metaphysics of Morals*, Cambridge: Cambridge University Press. For more details see the subchapter 3.4.1.1 of this dissertation.

authority of the state on some kind of consent of the people. As long as the state enjoys the consent of the governed, it possesses legitimate political authority. However, as soon as a certain group revokes their consent, legitimate political authority over that group is lost. This position, as has been discussed in several places in this dissertation, is false, since consent theory of political obligations fails in several ways.<sup>2</sup> Since this issue has been addressed throughout the dissertation, I shall not go into detail about it now. What must be pointed out for my purposes here, however, is that the mistake of national self-determination theories, and the majority of plebiscitary theories, lies in the fact that they conceive of states as voluntary associations.

Democratic theory of secession bases legitimate political authority in democratic authority. It asserts that the state possesses legitimate political authority, when it is just in some sense. On my account, justness of the state is connected to the principle of the realization of public equality.<sup>3</sup> The connection between the two lies in the fact that the state succeeds in its achievement of justice, if it treats each person with equal concern and respect.<sup>4</sup> The principle of the realization of public equality lies at the heart of democratic authority. The principle basically entails that everyone in addition to being treated equally, also needs to be able to see that s/he is being treated equally. What lies in the background of this principle is that in just societies the interests of all persons need to be advanced and they need to be advanced equally. The principle of the realization of public equality is manifested in the democratic decision making process, i.e. the participation of each adult member of a society in the decision making process. In addition to the condition that the state needs to be reasonably just in order to possess legitimate political authority, it also needs to respect different opinions of

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<sup>2</sup> Discussion on the failure of the consent theory and the state as a voluntary association can be found in subchapters 2.3 and 3.2.1 of this dissertation.

<sup>3</sup> My account on this issue follows the theory of democratic authority of Thomas Christiano as he conceived of it in 2008, *The Constitution of Equality: Democratic Authority and its Limits*, New York: Oxford University Press.

<sup>4</sup> This idea can be found in Ronald Dworkin, 2011, *Justice for Hedgehogs*, Cambridge, MA: The Belknap Press of Harvard University Press.

each citizen, has to have an established just legal system, and should not be predicted by utopian agreement between citizens. Democratic authority meets all of the above mentioned conditions. Since democracies make use of the realization of public equality, i.e. their decision making processes, they can be seen as reasonably just, as taking into consideration different opinions of each citizens, and by no means can be accused of not taking the fact that there is disagreement between citizens into account. The realization of public equality also helps correct for the fallibility and the cognitive bias of others, and so the decisions made through the democratic decision making process, are binding on all, even those who disagree with the outcome. This is due to the fact that everyone is a part of this process, so no one can be said to have chosen anything for someone else. In addition to this, democracies have established institutions, which adhere to the principle of the realization of public equality. Thus, on my account, legitimate authority of the state does not derive from some voluntary action of its citizens, but is grounded in the principle of the realization of public equality, which lies at the core of how the state itself functions.

Another important distinction that can be deducted from the fact that the state is not seen as a voluntary association is that on my account secession is a derivative right, whereas on the accounts of the national self-determination theories and the plebiscitary theories it is a primary right. Secession is a primary right on the afore-mentioned accounts, because it is seen as a right in itself. The right does not derive from any violations on the side of the state, but is seen as a right of certain groups of people meeting certain requirements that need to be true in order for those groups to have the right to secession. It needs to be noted at this point, however, that the correlation between holding that the state is a voluntary association and secession being seen as a primary right is not absolute. Secession can be seen as a primary right, even though one takes the statist position. This is the case in Christopher Wellman's

theory.<sup>5</sup> According to him, states are valuable because of the functions that only states can perform, i.e. political stability, security, etc. Nonetheless, secession is permissible, if the redrawing of state boundaries does not handicap the very functions that make states valuable. What is at the core of his belief is that groups within existing states have the right to self-determination, and it is the exercising of this right that entails the right to secession. This conception, however points to a different problem. Namely, it seems to conflate the right to self-determination and the right to secession. Even though self-determination on its external interpretation in fact does encompass the right to secession, without a further argument it cannot be seen as entailing the right to secession. It can be easily claimed that in well-functioning states the right to self-determination is satisfied when each adult member of that state is given an equal say in the decision making process. When this is the case, citizens of such a state, exercise their right to self-determination by electing a government for themselves. If one wants to extend the meaning of self-determination to include secession, then weighty arguments have to be given in support of such interpretation. As I see it, this cannot be done in a way that would make secession upon the principle of self-determination a primary right. Rather, instances will have to be found in which self-determination is not being properly exercised, and so secession will become a derivative right from those instances. One of such instances already accepted in international law are colonial states, which have the right to create their own independent states in accordance with the principle of self-determination. Secessions like this, however, can only be seen as derivative upon the previous subjugation of the colonies to a foreign power.

Two conclusions can be reached at this point. One, secession as a primary right relying on the conception of the state as a voluntary association is fallacious due to the fact that the state is not, and cannot be, a voluntary association. Two, secession as a primary right relying on the

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<sup>5</sup> I am referring to the theory constructed in Christopher Heath Wellman, 2005, *A Theory of Secession: The Case for Political Self-Determination*, Cambridge University Press.

right to self-determination fails due to the fact that self-determination can only entail secession, if an additional argument for it being so is given, and it seems that arguments that can be given in this support point to the fact that secession can only be a derivative right. Having reached these conclusions, I should return to the democratic theory of secession. As stated above, on my account secession is a derivative right. But what does it derive from? On my account, the right to secession derives from the failures of democratic authority.

Even though democratic authority gives a state a strong legitimate political authority, such authority is by no means limitless. Legitimate political authority is first and foremost limited by the principle of the realization of public equality. The limits itself, however, present themselves on two different dimensions. Legitimate political authority, and as such democratic authority, has three different dimensions; justified coercion (minimal account of authority), capacities to impose duties (instrumental authority), and the right to rule (inherent authority).<sup>6</sup> On my account, the right to secession derives from the failures on both, the instrumental, and the inherent dimension of legitimate political authority. Democratic authority can be seen as a legitimate political authority to the degree to which it is close to the ideal. What is meant by this is that certain actions of the democratic assembly can lower the degree of its legitimate political authority and in some cases, where violations are grand scale and/or systematic, legitimate political authority can be lost altogether. On the inherent/intrinsic dimension there are three main limits to the democratic authority, namely democratic and liberal rights, the assurance of an economic minimum, and the generation of permanent minorities.<sup>7</sup> All of these limits are essentially connected to the principle of the realization of public equality. Namely, all of these limits have at its core the equal advancement of interests of each member of the society. If the state violates basic liberal

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<sup>6</sup> Thomas Christiano, 2008, *The Constitution of Equality: Democratic Authority and its Limits*, New York: Oxford University Press, pp. 240-241

<sup>7</sup> My account on the limits to democratic authority follows, with some changes and additions the one of Thomas Christiano as constructed by him in 2008, *The Constitution of Equality: Democratic Authority and its Limits*, New York: Oxford University Press, Ch 7

and/or democratic rights of some or all of its members, then this state cannot be said to advance the interests of all its citizens, let alone that all are being advanced equally. Moreover, if the state does not secure an economic minimum, then again it is in violation of the principle of the realization of public equality, because the people may lack the basic means to advance their interests.<sup>8</sup> The cases of permanent minorities most obviously violate the principle of the realization of public equality, since such minorities always, or almost always, get outvoted on the majority of issues, so they are not being treated as equal, and more importantly, can see that they are not being treated as such.

Nonetheless, though such violations are limits to democratic authority, there are degrees to which they affect the legitimacy of political authority. When the violations are minimal, and can be mitigated by the implementation of certain institutional arrangements, then the authority of democracy is weakened, however can be restored. When the violations of these limits are grand scale, and/or systematic then the legitimate political authority of such a state is lost altogether.

The right to secession, as has been said, derives from the failures on both the intrinsic and the instrumental dimension. While democratic authority can be lost, if the three limits inherently connected to the principle of the realization of public equality are on a grand scale and/or systematically violated by the state, it can also be shaken or lost on the instrumental dimension. The instrumental dimension of democracy is represented through various democratic institutions, e.g. periodic elections, representative public officials accountable to the people, decisions by majority vote, transparent government, a free press, and the rule of law, which are instrumental for the well functioning of a state.<sup>9</sup> This dimension, though not as

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<sup>8</sup> For the explanation of the role of the economic minimum concerning the right to secession see footnote 77 of the previous chapter of this dissertation.

<sup>9</sup> These examples can be found in Elizabeth Anderson, 2009, "Democracy: Instrumental vs. Non-Instrumental Value" in Thomas Christiano and John Christman (eds.) *Contemporary Debates in Political Philosophy*, Malden, MA: Wiley-Blackwell, pp. 213-229

obviously, is also connected to the principle of the realization of public equality. If some of these institutions cease to exist, then the principle is lost with them. When there are no periodic elections, then we cannot say that the public officials are accountable to the people in the substantive sense, the government cannot be seen as transparent, and by consequence there is no realization of public equality, since the decision making process, through which it is manifested, is not in place. In addition to this basic role of democratic institutions, they also play another important role in connection to the inherent dimension. Namely, when certain limits to democratic authority on the inherent level have been overstepped, the instrumental level is the place where they get corrected and/or mitigated. For instance, the problem of permanent minorities can be mitigated or corrected for by means of some institutions, which allow the members of such minorities to get their way on some issues. Thus, if the state fails on the instrumental dimension, because it cannot or is unwilling to provide, and maintain, democratic institutions necessary for the well-functioning of the state, then it loses legitimate political authority. For the right to secession the failure of both dimensions is necessary. That is so because certain failures or shortcomings on the inherent dimension can be mitigated by means of certain institutions, so on the instrumental dimension. If both of the dimensions are severely impaired, however, the right to secession is justified. Hence, on my account the right to secession derives from the loss of legitimate political authority in the form of democratic authority, i.e. when democratic authority is lost on the intrinsic/inherent, and the instrumental dimension.

Democratic theory of secession then, is a theory that takes a statist position and sees secession as a derivative right upon the loss of legitimate political authority, i.e. the loss of democratic authority. The loss of legitimate political authority does not only serve us to determine the nature of the right to secession, but it is also inherently connected with another extremely important aspect of the theory, namely with the territorial component. As has been stressed

throughout this dissertation, secession by default does not only imply the severance from political authority of the state, but it also entails the taking of a part of the rump states territory. Thus, every theory of secession, in order for it to be complete, needs to account for the territorial nature of secession. Democratic theory of secession addresses this issue on two levels. It not only presupposes that the seceding group needs to have a legitimate claim to the territory it is about to take as theirs from the state, but it also explicitly states that secession is not possible as long as the state has legitimate political boundaries. In what follows, I shall deal with these two levels in turn.

#### **4.1.2 Territorial component**

The legitimate boundaries of the state, though they are connected to the territory of the state, have a more general scope of substance. They are connected to the territory in so far as legitimate boundaries of the state ensure the territorial integrity thereof. But more generally, what I have in mind when I speak of legitimate boundaries of a state is the fact that as long as the state possesses them, it can be said to have full sovereignty over that territory. In practice this means that a state with legitimate boundaries has exclusive rights to rule within these boundaries, and rights against all others to interfere with the state's internal affairs. It also possesses territorial integrity, meaning that the boundaries of the state cannot be changed, either from within, or from outside parties.

The state has legitimate boundaries as long as the state has legitimate political authority. When this is the case, no one can intervene with the internal policies of the state. When the state to a greater degree loses legitimate boundaries, then the international community has the right to intervene either with some non-violent policies, e.g. economic sanctions, or with humanitarian intervention, e.g. NATO's interventions in Kosovo or Libya. Even though it can be said that most of the states arrived at their contemporary boundaries through undemocratic means, for instance, through wars, forced assimilations etc., and so the boundaries of the



states can be said to be morally arbitrary, this still does not entail that once the legitimacy of state boundaries is lost, the territory is up for grabs.

This is best exemplified by the residual right argument.<sup>10</sup> When a state fails, the people that persist as a collective have the right to reconstruct the state on the territory of the previous failed state. They, and only they, have this residual right. This means that no outsiders have the right to come in take any part of that territory. However, this does not mean that there are no limiting considerations to the residual right argument. In cases, where the state has lost its legitimate political authority due to its grand scale, and/or systematic, violations of democratic and liberal rights directed at a specific group, and/or it has generated permanent minorities without being willing or in the position to set up special institutional arrangements to mitigate or correct for this problem, then these instances count as trumping considerations to the residual right claimed against the people to divide the territory of the failed state. Another limiting consideration to the claim that the people have to reconstruct the state on the territory as a collective is that in some societies the division between the groups is high, and the willingness to cooperate very low. In such instances it would be futile to force them to re-create a common state, since the willingness to cooperate is close to non-existent, and probably this unwillingness also played a part in the loss of legitimate political authority in the first place.

The reasoning behind the claim that the above mentioned considerations should count as limiting considerations to the residual right argument can be explained by the notion of the common world. The common world basically means that the interests of the people living within certain territorial confines are deeply interdependent, since the fulfillment of the fundamental interests of each person is connected with the fulfillment of the interests of every other person. Also the members of such common world have more or less equal stakes in the

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<sup>10</sup> The residual right argument is presented by Anna Stilz in 2011, "Nations, states and territory" in *Ethics*, Vol. 121, No. 3, pp. 572-601.

world they inhabit.<sup>11</sup> Considering the above mentioned limiting considerations to the residual right argument, it can be seen that the members of those groups cannot be said to be the members of the same common world as the rest of the population. This is mainly due to the fact that their interests had less value than the interests of others, and their stakes in the world they inhabited were not equal. Thus, the notion of common world explains why these groups should be seen as the limiting consideration to the residual right argument claimed against them, when it comes to the division of the territory of the failed state.<sup>12</sup>

Democratic theory of secession then holds that secession is not possible as long as the state has legitimate boundaries. The state, however, can lose legitimacy of their boundaries, if it loses legitimate political authority, i.e. legitimate democratic authority. Because certain groups living on the territory of that state have not been a part of the common world other members of that state shared, they have a right to take a part of the territory with them in secession, after legitimate boundaries have been lost, and democratic authority has failed on both, the intrinsic/inherent and the instrumental dimension.

The question of the legitimate boundaries is of vital importance, because they are inherently connected with the notions of state sovereignty and territorial integrity. Since democratic theory of secession involves the conditions that secession is not permissible when the state has legitimate boundaries, and *vice versa*, it is in position to explain how a group can separate from a state despite the state's presumable sovereignty and territorial integrity.

Having shown the connection between the democratic theory of secession and the legitimate boundaries, I shall now deal with the other territorial component of the theory, i.e. the legitimate claim to the territory. The legitimate claim to the territory is directly connected to the territory that the seceding group is occupying. It is a vital part of any theory of secession.

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<sup>11</sup> My account on the issue of the common world follows the one of Thomas Christiano as constructed by him in 2008, *The Constitution of Equality: Democratic Authority and its Limits*, New York: Oxford University Press, Ch 3. The application of the common world to the residual right argument is my addition.

<sup>12</sup> For a more detailed analysis of this issue see subchapters 3.4.2, 3.4.2.1 and 3.4.2.2.

If a group cannot establish a legitimate claim to the territory that it wants to take with them in the process of secession, their secession cannot be seen as justified. The importance of this issue lies in the fact that, if we would allow secession without it, we would face some rather ridiculous situations, and unjust takings of territory. As has been mentioned previously in this dissertation, we could imagine situations where, provided the legitimate claim to the territory was not needed in order to gain the right to secession, a group of people would move to a part of the state's territory they particularly like or value, and secede with that territory from the state.<sup>13</sup> It is obvious that a taking of the territory in this case would be unjust, and moreover, that allowing secession without demanding that the group be able to present a legitimate claim to the territory they attempt to take would lead to chaos. Thus, democratic theory of secession not only demands that secession is only possible, when the legitimate boundaries of the state are lost, but also that the group that wants to secede has a legitimate claim to the territory it attempts to take. The legitimate claim to the territory is established when firstly, a group can prove that they have been living on a specific territory for a reasonably enough long time. It is impossible to determine the exact amount of time the group has to live on the territory. It can be, however, claimed that it has to be at least several decades, in which the group has formed attachment to that piece of land, and marked it with its own architecture and culture. Secondly, following from the first, the group needs to be connected to the land in some substantive sense. That may range from architecture, cultural monuments to graveyards. Third and most importantly, the group must be invested in that territory through certain institutions build as the realization of their common world. What I have in mind here are schools, cultural institutions, health care institutions, sport centers, etc. All of the above together show that a group has a legitimate claim to the territory.

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<sup>13</sup> For a discussion on this topic see subchapter 1.1 of this dissertation.

Democratic theory of secession thus has a double territorial condition. First and foremost, secession is not justified when a state has legitimate boundaries, and the other way around, it is justified when the state's boundaries are not legitimate. Second, any group claiming the right to secession needs to show that it has a legitimate claim to the territory it is attempting to take.

Another remark broadly connected to the territory needs to be made at this point. Secession as a right can only be allotted to territorially concentrated groups. This fact obviously follows from the nature of secession, i.e. that the group attempting secession, not only severs itself from the political obligations of the state, but also takes a part of the state's territory. There may be a certain group, who would otherwise qualify for the right to secession, upon the violations of their democratic and/or liberal rights, or could be seen as permanent minorities, but are territorially dispersed throughout the state. Examples of such minorities include, but are not limited to, sexual, racial and religious minorities. Even though such groups may meet other requirements for secession, they do not qualify for the right, because they cannot meet the requirement of being a territorially concentrated group.

#### **4.1.3 Secession as a collective decision and possible minorities**

Thus far I have dealt with the nature of the right to secession, and the territorial component of the democratic theory of secession. However, I have not said much yet about another very important aspect of the theory. Namely, democratic theory of secession understands secession to be a collective decision. What is meant by this is that in order for secession to be legitimate, a proper voice has to be established.<sup>14</sup> Secession cannot be justified, for instance, if some members of an elite within the group claim it, without the proper support for their cause

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<sup>14</sup> The idea that for secession to be justified the voice of the wish to secede and proper representatives of a group identified can be found in Allen Buchanan, 1991, "Toward a Theory of Secession" in *Ethics*, Vol. 101, No. 2 and 1991, *Secession : the morality of political divorce from Fort Sumter to Lithuania and Quebec*, Boulder : Westview Press.

by the majority of the members of that group. Furthermore, secession cannot be justified in the case, when it does not enjoy the majority of the support of all the people of the group that is attempting to secede. Thus, democratic theory of secession in addition to all the conditions for justified secession listed above, also presupposes that a proper voice expressing the wish to secession is established. Since secession is seen as a collective decision, democratic theory of secession holds that the decision in favor of secession has to be reached by means of a collective decision making process. To put it plainly, the decision on whether to secede or not has to be voted on in a referendum. The referendum has to be on an unambiguous question, and the majority of the members of the group have to vote in favor of secession. In order to ensure that it is really the majority of the people that want to secede, an additional procedural constrain has to be put forth. Namely, the attendance of the referenda has to be more than 50% of those who have the right to vote in the referendum. This additional condition is necessary, since it prevents the situation in which the majority of the minority of people decides for others. What I have in mind is a situation, where the attendance of the referendum is minimal, i.e. something in the vicinity of 20% of all eligible to vote, and the result of the referendum is clearly in favor of secession. For several reasons such a result cannot be seen as representative of the will of the whole group. To name a few, those who are against may show their dissent by not attending the referendum at all, after the secession a sizable minority or even majority of people may find themselves living in a state they did not want to, etc. Thus, for the collective decision on secession to be seen as such in a substantive way, the referendum needs to be attended by the majority of the members of the group, and the majority of them need to vote in favor of secession.

The problem that presents itself at this point, however, is that in order for the collective decision to have a binding effect, it needs to be carried out in a legitimate manner. Thus, for secession to be justified, democratic procedures need to be available to the group that attempts

to secede. In addition to that, further requirements are needed for the decision to be legitimate. To name a couple, there needs to be adequate time for social-political deliberation prior to the vote. Also, the circumstances of the deliberation need to be adequate. What is meant by this is that each side needs to have adequate means to reach all voters, there is no intimidation thereof, etc. Why this could be seen as a problem for the democratic theory of secession, as I have construed it in this dissertation, is the fact that secession only becomes an option after the state loses legitimate boundaries due to the loss of its legitimate political authority on both, the inherent/intrinsic and the instrumental dimension. Thus, it would seem that the groups find themselves in a procedural vacuum, and so they cannot perform a referendum. While at the first sight this seems a futile situation, it really is not all that impossible. Even though the state, and with it the state institutions, do not exist anymore, we can still imagine that the group that wants to secede can in some way hold a referendum on secession. On the one hand, we can imagine that some of these groups were organized politically before the loss of legitimate boundaries of the state, and so it would not be difficult for them to identify their representatives and organize a referendum on secession. This would presume that the representatives are in the position to set up *ad hoc* institutions, which make the carrying out of a decision making process possible. However, since they would not be organized as a state yet, and the institutions would be set up *ad hoc*, they would not enjoy any status concerning the legitimacy of the unit attempting to hold a referendum, such referendums would have to be monitored by the international community in order for the referendums to have legitimate outcomes. Moreover, in situations where secession is urgent from a moral point of view, and international help is either not possible, or cannot happen soon enough, then the conditions of legitimacy applying to collective decision making should be more relaxed too. This would enable the groups to secede more easily, when they find themselves in peril. The reason behind this recommendation is that morality cannot require the impossible, and in cases

mentioned above, it seems to be doing just that. Thus, though the problem at hand does complicate issues it does not make secession as conceived of in the democratic theory impossible.

It should be emphasized at this point that secession is not a decision reached at once and in one instance. When speaking of secession, we do not speak of a situation in which people at a certain point just decide to get together and vote on whether they want to secede or not. Rather, it is a reflection of a consolidated view of the (majority) of people that has been arrived at through prior deliberation.

Another important issue that has not been addressed by the democratic theory of secession thus far is the problem of possible minorities that find themselves within the newly created boundaries of the majority group that seceded from the original state. It is almost impossible to draw boundaries in such a way that the newly created state does not include any minorities. This however, does not present a problem for secession. The problem can be addressed by including a provision that the seceding group obligates itself to observe minority rights of any possible minorities within their newly created state. Moreover, considering the whole democratic theory of secession, it becomes obvious that the group that secedes from a state, which lost its democratic authority, is bound by the same principles the rump state was bound by, but failed to oblige. This basically means that the seceding group needs to make sure that the newly created state will function in adherence to the principle of the realization of public equality. The newly created state will also be limited by the same limits the previous state was limited by. Thus, it can be claimed that democratic theory of secession seems to adequately address the possible newly created minorities on the territory of the newly created state.

#### **4.1.4 Democratic theory and its applicability**

After having spelled out the democratic theory of secession, I need to address two more questions, before I can turn to the testing of the theory against the guidelines for a complete

theory of secession. The first question is whether democratic theory of secession excludes all other possible reasons for a justified secession. It does not. I strongly believe, however, that we need to exclude national self-determination theories and plebiscitary theories as justifying the right to secession. I shall not go into a detailed discussion on why this is the case, as I have done that in other parts of this dissertation. I will, however, point out the most striking reasons for my claim.

National self-determination theories and choice theories should be rejected as justifying secession, because both types of theories are grounded on fallacious assumption that the state is a voluntary association. Moreover, both types of theories hold that secession is a primary right, which as I have shown throughout this dissertation it is not. National self-determination theories also ultimately fail, because they do not provide us with any argument as to why nations are to be singled out as the proper units for the right to secession. Choice theories, on the other hand, rely too much on self-determination as grounding secession, without providing us with any argument as to why the meaning of self-determination should be extended to entail secession.<sup>15</sup>

Remedial right theories are a different story. They are in fact quite similar to the democratic theory of secession, as they do not see secession as a primary right, nor do they hold the state to be a voluntary association. Furthermore, the reasons that remedial right theories give for justifying secession are good reasons, and they should not be excluded as grounding secession. Nonetheless, as already mentioned in this dissertation remedial right theories seem to be too narrow. The reasons they give to justify secession are limited to the illegal annexation of the territory, i.e. secession is justified in order to rectify situations in which a state has illegally incorporated a territory into a larger state, the gross violation of human rights of a certain group, and the violation of the intra-state autonomy agreements. All of

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<sup>15</sup> For detailed discussion see subchapters 1.3.1.2, 2.1.1, 2.3 and 3.2.1 of this dissertation.



these reasons for justified secession can also be reasons for justified secession within the democratic theory of secession. Namely, when a state illegally incorporates a territory, it cannot be said to possess legitimate boundaries, since it cannot be said to possess legitimate political authority over the incorporated part of the territory. This is so, because the people of the territory that was incorporated cannot be said to share a common world with the rest of the population, and so the state violates the principle of the realization of public equality. Gross violation of human rights of a certain group is also included in the democratic theory of secession. It belongs to the limiting consideration to democratic authority, which states that the state that systematically, and/or on a grand scale, violates basic liberal and democratic rights loses its democratic authority, and by this makes itself vulnerable to justified claims to secession. Lastly, violations of intra-state autonomy can also be conceived of as a part of the democratic theory of secession, since such violations can be interpreted in the sense that the state does not respect the principle of public equality, since it does not treat the people with whom it made such agreements as equal, and everyone can see that they are not being treated as equal. But even though all these instances can be seen as covered by the democratic theory of secession, it is also true that the democratic theory covers much more ground than the remedial right theory.

It does not limit itself to these three specific cases, but grants secession to any group that was a target in a state, which lost its legitimate political authority due to failing to respect the principle of the realization of public equality on the intrinsic/inherent and the instrumental dimension. Thus, while on the remedial right theory account permanent minorities, for example, would not be eligible for secession, since it is possible that their basic human rights have in fact been respected by the state, they would be eligible for secession on the democratic theory of secession, provided all the circumstances spelled out above would be the case. Thus, though remedial right theory should not be rejected, it should also be

acknowledged that it is, by itself, too narrowly construed. Thus, having analyzed all the theories of secession in this dissertation, it can be concluded that while national self-determination and choice theories of secession should be rejected, remedial right theory should not, however, it can be seen as covered by the democratic theory of secession.

The second question that needs to be addressed before I can test my theory against the guidelines for a complete theory of secession established in Chapter 1 is the following: What does democratic theory of secession have to say in cases of non-democratic states? Democratic theory of secession indeed seems to address only the question of how secession is possible from a democratic state. This, however, does not mean that it must remain silent on secessions from states that are not democratic. The most straightforward answer democratic theory of secession has concerning non-democratic states is that secession from such states is justified by default. However, this is a matter of degrees. We can imagine non-democratic states that on some level still can be said to function in a more or less just way. When this is the case, then secession should not be a default option. Rather, the people of that state should strive to make the state fully democratic. However, when a non-democratic state is obviously and grossly unjust, and the possibility that the people can somehow overthrow the unjust leadership, and create a more just state for themselves together, is low or non-existent, then secession seems to be the only feasible option. The presumption behind the democratic theory of secession is that democracy is seen as valuable, and as such as the best political system. That is the case because it is only in a democracy of some sort that the principle of the principle of public equality can be realized. In the absence of decision making processes that include all adult members of a state, we can hardly realize the principle. In addition to that, democracies have valuable institutions that maintain and further the principle at hand. Non-democratic states can perhaps realize the principle in some other ways to a certain degree, but lack the institutions to realize it fully. Thus, the question of whether the right to secede on the

democratic theory account of secession applies within the framework of non-democratic states should be answered by closely observing the degree to which the state is in the position of realizing the principle of the realization of public equality. Where the degree is extremely low, or even non-existent, and other requirements for justified secession are met, secession should be the way to go. However, where the degree is higher and the possibility of democratization and so strengthening of the realization of the principle exists, secession should not be granted.

Democratic theory has now been spelled out and its strengths and weaknesses pointed out and addressed. Thus, the theory now has to be tested against the guidelines for a comprehensive theory of secession established in the first chapter of this dissertation.

#### ***4.2 Democratic theory of secession tested***

In Chapter 1 of this dissertation, I have established some guidelines for what a comprehensive and sound theory of secession should consider.<sup>16</sup> These guidelines were composed of several points, which can be divided into three groups. The first deals with the background of secession, i.e. it is concerned with what challenges the right to secession poses to the existing states. The second is concerned with the procedural constraining considerations concerning the right to secession, and its impact on the functioning of the state(s). The third deals with the nature of the right to secession. It is concerned with the fact that the right to secession is not merely a moral right, but also it needs to be plausible for it to be enforceable in international law.

In what follows, I will test the democratic theory of secession against these guidelines in order to establish, whether the theory can in fact be seen as a sound and comprehensive theory of secession.

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<sup>16</sup> For a detailed discussion on what theories of secession should consider see subchapter 1.2 of this dissertation.

#### 4.2.1 Secession vs. political authority, sovereignty and territorial integrity

As has been established secession poses a direct challenge to political authority, and territorial integrity. I could include a third notion here as well, i.e. state sovereignty. I have not singled it out thus far, since it is intimately connected to the notion of political authority, and so I will deal with state sovereignty together with the notion of political authority. Democratic theory of secession addresses these issues both adequately and extensively. What is more, it addresses them together, as it asserts that they are intimately connected.

The connection between political authority and territorial integrity lies in the notion of legitimate boundaries, which is central to the democratic theory of secession. To recap briefly, the state has legitimate boundaries, as long as it has legitimate political authority, and legitimate boundaries of a state imply that such a state has sovereignty, and territorial integrity.

Let us look at these issues in turn. Democratic theory of secession preconditions secession by legitimate boundaries, and as such by legitimate political authority. It claims that as long as a state possess legitimate political authority, secession from such a state is not justifiable. However, when a state loses legitimate political authority, on both the intrinsic/inherent and the instrumental level, secession becomes justifiable. Thus, democratic theory of secession is in the position to explain, under what circumstances the seceding group can claim that the state they currently reside in has no legitimate political authority over them, and so they have the right to leave that state. The loss of legitimate political authority is further not explained in terms of some action on the side of the seceding group, e.g. plebiscitary theories claim that political authority of the state is lost, because the people revoke their consent from the state, and national self-determination theories assert that the people cease to authorize the state as being theirs, but by some actions and/or omission by the state. In other words, according to the democratic theory of secession, the state loses its legitimate political authority due to the

fact, that the democratic assembly of that state either failed to observe the limits to democratic authority on a grand scale, and/or systematically, and/or the state fails on the instrumental dimension, i.e. it does not/will not/cannot maintain or establish democratic institutions necessary for the well functioning of the state. The fact that it explains the loss of legitimate political authority in terms of actions/omission by the state is of great importance, since it prevents the theory from relying on fallacious theoretical background, like for instance, the consent theory of political obligations.

Democratic theory of secession is further in the position to explain how the state by its actions, or lack thereof, loses legitimate political authority across the board, even if its actions or omissions are directed only at specific groups of that state. Even if the state violates the rights of a specific group, or generates permanent minorities, it can be said to have lost legitimate political authority over the whole of its population, since it is in direct violation of the principle of the realization of public equality, and so everyone can see that not all the members of the state are being treated equally.

The loss of legitimate political authority, on my account, also entails the loss of state sovereignty. Namely, as long as states possess legitimate political authority, they possess legitimate boundaries. Legitimate boundaries entail that a state that has them, has the sole control over their internal affairs, i.e. the state has sovereignty. Thus, when the state loses legitimate political authority, it by default also loses sovereignty. But there is more to the story here. The state in addition also loses territorial integrity. Democratic theory of secession is in the position to comprehensively explain how the state loses territorial integrity, and also how the division of its territory is possible in light of it. Even though legitimate boundaries of a state are lost, this does not entail that the territory of such a state is up for grabs. What is meant by this is, that there are residual rights of the people of that state against all others, i.e. other states cannot just divide the territory, and incorporate it into theirs by will, and at the

same time, the residual right to the territory is claimed against the people that remain after the state has lost legitimate boundaries, i.e. they cannot without further ado divide the territory amongst themselves.

However, democratic theory of secession provides an explanation as to how the division of the territory is possible, in spite of the residual claims the people of the failed state have in common. Namely, democratic theory of secession shows that the residual right is not an absolute right. Rather it has several limiting considerations. For instance, in cases where political authority was lost due to the violation of some basic liberal rights against a certain group, then such a group has the right to secede, in spite of the residual right of the people that they have in common. Since the group has been targeted by the state, it should not be forced to recreate another state in common with the people it does not share a common world with. Whereas the stakes of most people of that territory in the common world were relatively equal, the stakes of the group under consideration were not. Moreover, their interests were not equally considered, and so the members of the maltreated groups cannot be said to have been treated in adherence to the principle of the realization of public equality. In addition to the group, whose rights have been violated systematically, and/or on grand scale, permanent minorities should count as a limiting consideration to the residual right as well, following the same rationale. Another trumping circumstance is represented through deeply divided societies, where the agreement between groups is next to impossible. Where there is no will, or possibility for different groups to cooperate after their common state has lost legitimate political authority, forcing them to create a new state in common seems futile and unreasonable.

Democratic theory of secession then addresses the challenges secession poses to political authority, and territorial integrity (and consequently sovereignty), through the use of its key notion, i.e. legitimate boundaries. It is in the position to address all these issues directly and

adequately. It is in addition in the position to offer a sound explanation as to how, and why, the territory of a state that lost legitimate boundaries in specific instances can be divided amongst the people of that state, but not amongst others states. All this makes the democratic theory of secession better fit as a theory to ground secession than the national self-determination theories, or the plebiscitary theories, since they though they do touch the point of political authority, cannot offer a good explanation as to what gives the seceding unit the right to break territorial integrity. Moreover, as has been shown throughout this dissertation, these theories rely on fallacious assumptions regarding the severance from political authority as well. The remedial right theories, on the other hand, give good reasons as to why a seceding group severs itself from the political authority of the state, and also show that a state that grossly violates human rights, or illegally incorporates territories, or violates intra-state autonomy agreements, loses legitimacy over its territory. They, however, are more narrowly construed than the democratic theory of secession, and so the democratic theory is able address more issues, like for instance, why even the just incorporation of a territory does not imply that the state possesses legitimate political authority.<sup>17</sup>

#### **4.2.2 Procedural considerations**

Procedural considerations about the right to secession are concerned with the consequences the adoption of any right to secession would have on the functioning of the state itself, and the international situation. These considerations are twofold. On the one hand, the right to secession should not be an unlimited right, since if it were such, this would put wind under the wings of the anarchist objection against the existence of the right to secession *per se*. On the other hand, even the limited right to secession should make conditions for achieving justified secession stringent, so not to make the right too permissive, as this could be detrimental to the well functioning of states.

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<sup>17</sup> For a detailed discussion on this point see subchapter 3.4.2.2 of this dissertation.

If secession would be seen as an absolute right, this would with high probability have disastrous consequences. An unqualified right to secession would namely imply, that any group that wanted to secede could simply do just that, and so we would be faced with limitless fragmentation of states. This would be disastrous both for the state itself, since there would be no stability, and so the basic functioning of the state would in the least be impaired, and also for the international situation, since the probability for the outbreak of violence would be high and international institutions heavily burned by the ever changing situation. Were the limitless fragmentation the case, it would be a valid reason for denying the right to secession. Moreover, if the right to secession was unqualified, then the groups attempting secession may use their secession as a treat in negotiating a better bargain for themselves within the existing state, e.g. they may try to get unfair advantages concerning tax policies. This objection is referred to as the strategic bargaining objection. Both of these objections present us with weighty reasons against the right to secession.

However, the right to secession is not an unlimited right. Nonetheless, some theories of secession are still vulnerable to it, since they do not restrict the right, either in the right way, or not enough. For instance, national self-determination theories, and some plebiscitary theories, can be objected to on the ground of the above mentioned objections. The question I am concerned with at this point, however, is whether the democratic theory of secession is vulnerable to the limitless fragmentation and the strategic bargaining objections. I believe that it most certainly is not. Democratic theory of secession takes the right to secede to be a highly qualified right. It cannot be said to cause limitless fragmentation, because it only allows secession under circumstances, when states lose their legitimate boundaries, and they lose the legitimate political authority on both the intrinsic/inherent and the instrumental dimension. In other words, secession only becomes possible, when the states violate the principle of the realization of public equality, and either do not, or cannot, do anything in order to put it back



into place. This in turn means that the right to secession, as conceived of on my account, is not likely to be exercised excessively, since only a small amount of groups will be eligible for secession. Moreover, the strategic bargaining objection also does not gain any ground against the democratic theory of secession, since secession only comes into play after the state has lost its legitimate political authority. This basically implies that states that are well functioning, and possess legitimate political authority, have nothing to worry about, and also the groups with secessionist aspirations have no jokers up their sleeves, when it comes to negotiating with the states.

As mentioned above, though secession is a limited right, some theories are still vulnerable to the limitless fragmentation and the strategic bargaining objections. An important factor in that is that those theories are not stringent enough. In other words, the theories in question are too permissive. For example, a theory of secession that would assert, that in order for a group to justly secede, it needs to vote on it in a referendum, and the majority has to be in favor of it, would indeed count as being a theory that conceives of the right to secession as a limited right. On the other hand, it would still be vulnerable to the limitless fragmentation and the strategic bargaining objections, since the conditions for secession under such theory are not very stringent, and as such are quite easy to meet. Thus, the limit to the right to secession would in fact not really limit the number of secessions, and groups would have a strategic argument when negotiating with the state.

Democratic theory of secession, however, cannot be objected to as being too permissive. The requirements it sets up for the right to secession to be allotted to a certain group are very stringent. No loss of legitimate boundaries, no secession. No loss of legitimate political authority on both dimensions, no secession. Democratic theory of secession cannot be said to be too permissive, since the right to secession under the theory is rather hard to achieve, provided the state is just and adheres to the principle of the realization of public equality.

Since this is so, it can also not be objected, that the right to secession, as construed on my account, would have damaging effects on the normal functioning of the state.

It can thus be concluded, that the right to secession, as conceived of in the democratic theory of secession, meets the procedural considerations a comprehensive and sound theory of secession should consider. The right to secession is both a limited right, and also limited to the right degree, i.e. it is stringent enough.

#### **4.2.3 The nature of the right to secession**

The nature of the right to secession is complex. It has a moral component, i.e. when talking about the right to secession, moral reasons are given for why the right to secession is needed, and a procedural component, i.e. after establishing that there is a moral right to secession procedural constraints are put on that right in order to constrain the right by means of certain procedural requirements. Both of these dimensions are of vital importance.

Democratic theory of secession establishes the moral right to secede through the fact that it allots the right to secession to groups, whose interests were not taken into consideration equally, and everyone could see that this was so, and the state could not, or/and did not, want to compensate for this shortcoming on the instrumental level. However, it also puts procedural constraints on the right to secede. In addition to the fact that the groups must be eligible for the right to secession, i.e. they must be a part of states that have lost their legitimate boundaries as a consequence of them losing legitimate political authority, they also have to decide on the matter of secession by means of referenda, they must have a valid claim to the territory, and they must create institutions that make sure that minority rights of possible minorities, that may find themselves within the boundaries of their newly created states, will be protected. It can thus be said, that democratic theory of secession adequately takes the complexity of the right to secession into consideration.

Nonetheless, the complexity of the right to secession is not the only important consideration, when it comes to the nature of the right. Theories of secession can namely deal only with the establishing of a moral right to secession, or in addition also with the question of whether such a right should be morally recognized by the international law. As I have established in Chapter 1 of this dissertation, there is no moral right to secession, if it is not plausible for it to be enforceable in international law.<sup>18</sup> The right to secession can be interpreted in Raz's terms as being a right that sets limits to the sovereignty of states<sup>19</sup>, and it can only be such if it is at least plausible that it be a part of the international law. In this dissertation, I do not explicitly deal with the question of whether the right to secession, as I conceive of it, should be morally recognized by the international law. I do, however, believe that for a comprehensive theory of secession such endeavor is not necessary. What is necessary, on the other hand, is to show that it would be plausible for the right to secession to be enforceable in the international law. The right to secession, as conceived of on my account, seems to be a plausible candidate. It does not seem to be too farfetched that the international law, if it had a provision on secession, would enforce the right to secession as conceived of in this dissertation. Considering that the democratic theory of secession precludes any secession from states in possession of legitimate boundaries, we can conclude that this part is already in the accordance with international law. Moreover, since secession is only possible after the state has lost legitimate boundaries as a consequence of losing legitimate political authority, it would seem that enforcing such a right through international rules is not only plausible, but would perhaps also be a must, since the international community would be needed to monitor referenda on secession. Hence, it can be concluded, that the democratic theory of secession is in adherence with the guideline that it must be plausible for the right to be enforceable in international law.

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<sup>18</sup> For a detailed discussion see subchapter 1.2 of this dissertation.

<sup>19</sup> Joseph Raz, 2007, "Human Rights Without Foundations", *Oxford Legal Studies Research Paper No. 14/2007*. Available at SSRN: <http://ssrn.com/abstract=999874>

Having tested the democratic theory of secession against the guidelines for a comprehensive and sound theory of secession, it can be concluded that it passes the test on all levels. However, there is one more thing that needs to be established before the evaluation of the theory can be concluded. Namely, we have to look at how democratic theory of secession fares in respect to the puzzle theories of secession create, that has been described in Chapter 2 of this dissertation.

### ***4.3 Democratic theory of secession and the puzzle***

Before looking at how democratic theory of secession fares with respect to the puzzle, it would be helpful to briefly recap what the puzzle is all about. Considering different types of theories of secession, it can be noted that national self-determination theories are the first ones to be rejected and set aside. That is so because the theories face many problems, and it seems impossible to find amendments that would salvage them from the objections raised against them.<sup>20</sup> On the other hand, some amendments to the plebiscitary theories that enable them to avoid the devastation objections raised against them can be found. For the sake of argument, rationalizations for the principle of self-determination that these theories have at their core can be found.<sup>21</sup> Thus, plebiscitary theories with amendments were not rejected out of hand, but considered as a candidate for grounding secession. The remedial right theories seemed to be restrictive enough and fitted well with the guidelines for a comprehensive theory of secession, and as such could be seen as a good candidate for grounding secession. The situation then was that different theories of secession fit different circumstances. Whereas in cases, where the stakes are relatively low, and procedures readily available, the right to secession can be

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<sup>20</sup> For a detailed discussion on this see subchapters 1.3.1.1 and 2.1.1.

<sup>21</sup> For a detailed discussion see subchapters 1.3.1.2 and 2.1.2. I have to stress that what is presented in 2.1.2 is only a rationale on how one could argue for the right to self-determination to be understood in its external sense. It is done so for the sake of argument, to test how one could back the intuition that the right to secession may be given to people who desire it very much. Moreover, it was used as a device to test the applicability of the right of secession and led us to an important theoretical device of the puzzle. It has been shown elsewhere in this dissertation (4.1.4) that in fact self-determination is best interpreted as the right to secession, when it is seen as a right deriving from mistreatment of the peoples seeking self-determination by the state.

explained in terms of the amended plebiscitary theories, in cases where the stakes are high, situation unstable, and procedures either not available, or hard to use, the remedial right theories were seen as the best fit to ground the right to secession.

This, however, brought us to a puzzle. It would namely seem that when secession is most needed from a moral point of view, e.g. when people's rights are grossly violated, secession is very hard to achieve, and on the other hand, when secession is not urgent from the moral point of view, i.e. the state is not violating anyone's rights, people only secede because they want to, it is easy to achieve. Thus, secession would seem like an elusive solution to the problem.

The conclusion drawn from this was that either we must confine ourselves to one theory of secession, or reject both theories that have been deemed appropriate, and find a third option. After further investigating choice theories, I have concluded that secession cannot be seen as a primary right, which basically entails that the amended version of these theories would have to look at the right to secession in a derivative fashion. This basically means that if we were to read self-determination in its external meaning, it would have to be granted upon some other considerations, like for instance, that the right to self-determination implies secession in cases where the peoples claiming it were subjugated to a foreign power. That, however, would have the consequence that secession would not be quite so readily available and that such choice theories would fall under the scope of remedial right theories. Perhaps secession would still be easier to achieve on their account than on the pure remedial right account, but the puzzle would be dissolved, since secession would not be possible in cases where stakes are low and procedures readily available. Since the groups eligible to the right to self-determination in the sense of secession would have to be the victims of some wrong doing from the part of the state, the stakes would be higher and proximate to the ones in remedial right only theories. Choice theories have thus been rejected as fit to ground secession, because of a fundamental flaw in the way they conceive of secession, i.e. seeing it as a primary right.

This leaves us with the remedial right theories. However, these too need to be rejected. As I have pointed out in Chapter 2 of this dissertation, remedial right only theories are faced with the problem that they are too narrowly construed, which renders them incapable of addressing situations, in which secession is pertinent from a moral point of view, however is not seen as justified from the point of view of the theories in question. Namely, remedial right theories only address gross human rights violations, illegal annexation of territory, and violations of intra-state autonomy agreements. There are, however, many other situations in which secession would be urgently needed because of moral reasons. Just to name an important example: not being treated as equal though your basic human rights are *pro forma* being observed is a situation which, if all other things necessary obtain, represents a morally urgent situation that can be remedied by means of secession. Thus, when it comes to the puzzle the correct conclusion seems to be that both of the options, i.e. the choice theories, and the remedial right theories, should be rejected.

Even though this entails that the puzzle is technically not existent any more, there is still an important problem remaining, i.e. how to best address situations in which secession is urgent from a moral point of view. Hence, in what follows I will take a look on how democratic theory of secession fares with regards to this problem.

The position of the democratic theory of secession regarding the puzzle is complicated. It cannot be said to occupy the same place as the remedial right theory, since the stakes are not quite as high as in cases where states are clearly grossly unjust. Nonetheless, the stakes are not very low either, since secession is only possible from a state that is unjust to the degree that it loses its legitimate boundaries, and it does so by violating the principle of the realization of public equality, which in turn means that the state does violate grossly, and/or systematically, certain rights of its people. Since the theory covers quite a broad spectrum of cases, the stakes are not the same in all situations. They can range from quite low to relatively

high. The stakes can be said to be low, when the state has violated the principle of the realization of public equality by generating permanent minorities, or by the unwillingness or inability to find common ground, but all of these can happen rather peacefully. On the other hand, democratic theory of secession also applies in situations where the state has grossly, and/or systematically, violated basic liberal and/or democratic rights, and the stakes in such a situation are higher than in the previously mentioned one. Moreover, democratic theory of secession includes the provision that the right is manifested through a collective decision, and so it will be easier to achieve where the stakes are lower and so the establishment of the procedural mechanism easier. Now, it is important to note that secession, on my account, is always morally urgent. It is morally urgent because no matter what the stakes are, people have the right to secede, because they have not been treated as equals, and everyone could see that this was the case. Secession is thus morally urgent in order to correct for this injustice. On my account, we are not simply talking about the will of the people to create their own state. The will plays an important part, but it is not at the core of my account. Thus, it can be said that, on the account of the democratic theory, sometimes, when it is morally urgent, secession is easier to achieve, and sometime more difficult.

If we now return to the puzzle, we can start by pointing out an important finding. It seems that when secession is not morally urgent, there should in fact not be any right to secession. The right to secession as a primary right stemming solely from the will of the people is not justifiable. In cases where there is a strong will of the people to secede, without any morally urgent reasons for why the right should be allotted to them, other arrangements should be made, in order to satisfy this will, somewhat short of secession. In the cases where secession is in fact morally urgent, the right to secede may be more difficult to achieve, but it just has to be conceded, that such is the nature of secession. Perhaps, other auxiliary means should be added to the process, in order to make the situation less likely to break out in violence, and

help the people to reach the right more easily. What comes to mind are certain forms of international involvement, like humanitarian intervention, monitoring of the international community, and the like. However, if international involvement is for some reason or other not possible, or cannot happen in a timely manner, then the conditions of legitimacy for collective decisions should be more relaxed too, making it possible for groups, for which secession is urgent from a moral point of view, to secede. As mentioned before in this chapter, this would follow, since morality should not demand the impossible, and it would seem that in these cases it is doing just that.

Thus, even though according to the puzzle secession would seem like an elusive solution, it is in fact not such, since the puzzle is misleading. It is such, because it includes cases where secession is not morally urgent at all, and assigns the right to secession to groups, which in fact are not eligible for it. Even so, it does point us to the fact that when secession is morally urgent, it is not something that can be achieved easily. This, however, should be taken as a fact of the process itself, and instead of giving up on secession, ways to aid the process should be established, or in certain cases, legitimacy conditions for collective decisions made more relaxed.

#### ***4.4 Conclusions***

Democratic theory of secession proves to be a comprehensive theory of secession. It is not vulnerable to any objections raised against other theories of secession. This, however, does not mean that it does not face any challenges. Considering that it conceives of the right as being manifested through a collective decision, and only allows the right after the state has lost its legitimate boundaries due to the loss of legitimate political authority on the inherent/intrinsic and the instrumental dimensions, it faces the problem of how the holding of referenda that will have legitimate results is possible in such a situation. Moreover, it is a theory constructed within the framework of democratic theory, so it focuses on explaining



when secession is possible from a democratic state, and thus needs to explain how it is applicable in non-democratic states. I do not believe, however, that these challenges are devastating for the theory. The first can be addressed by international aid with setting up the referenda, and monitoring thereof, and in certain cases with the relaxing of the legitimacy conditions for collective decisions. The second, on the other hand, can be addressed by looking at how the non-democratic states function, and assessing to which degree they can be seen as possessing legitimate political authority.

When it comes to the puzzle connected to the theories of secession, regarding the fact that when secession is needed the most, i.e. it is most urgent from the moral point of view, it is very difficult to achieve, and *vice versa*, when it is not needed (not morally urgent) it is easy to achieve, I have found that this puzzle mistakenly leads us to believe that secession is an elusive solution. This is so, because it supposes that secession is possible when it is not morally urgent. In fact, this is not so. When secession is not morally urgent, there is no justifiable right to secede. Nonetheless, it remains true that when secession is morally urgent, it is not easily achievable. This, however, should not point us in the direction of making the right less stringent, but rather to finding auxiliary means that would help make the right to secession more easy to perform.

## Conclusion

In this dissertation, I have constructed a new theory of secession, i.e. the democratic theory of secession. The aim of the dissertation was to develop a comprehensive theory of secession that could avoid the criticism brought against the existing theories of secession, and could adequately explain how secession is justifiable considering the claims the state has against the people living within them, and against other states. In addition to that, I have compiled a set of guidelines that any theory of secession should take into consideration, and pointed out puzzles theories of secession can lead to due to the nature of the problem of secession.

Before I started developing the democratic theory of secession, I first discussed the concept of secession, in order to clearly define what is understood under it. I have determined that secession is a unilateral process by which a group separates itself from an existing state, and forms a new, independent state of its own, by means of a collective decision making process. By this it both severs itself from the political obligations of that state, and takes a part of the rump state's territory. Secession thus challenges political authority, state sovereignty and territorial integrity. Hence, a comprehensive theory of secession needs to be in the position to adequately explain how these are damaged, and/or lost, in the case of secession. In order to make it clear what theories of secession should consider, I compiled a set of guidelines for a comprehensive theory of secession. In addition to the fact that a comprehensive theory needs to explain how political authority, state sovereignty, and territorial integrity are lost and/or weakened, I have found that such a theory needs to have a strong territorial component. Not only should the group be in the position to show that it has a legitimate claim to the territory that it is about to take, but a comprehensive theory should also deal with the legitimacy of the state boundaries themselves. This way it equips itself with the means to deal with why, and how, state sovereignty and territorial integrity can be suspended.

Furthermore, secession should be seen as a limited right, in order to avoid the anarchist objection, i.e. limitless fragmentation. Nonetheless, it is not enough that it is limited, it needs to be limited enough. If the right to secession is not construed stringently enough, then it is vulnerable to the limitless fragmentation, the strategic bargaining, and the paralysis of the normal functioning of the state objections.

Also, a good theory of secession should take the complexity of the right to secession into consideration. The right is a complex one, and has a procedural and a moral component. The right does not arise from a moral vacuum, but from circumstances that make it morally significant. The moral component is complemented by the procedural component. The procedural component tells us to what extent allowing the right to secession would affect the *status quo*. Where the procedural circumstances prove extremely detrimental, the right to secession may not be seen as justifiable, even if the moral component exists. Furthermore, it is not enough to establish that there is a moral right to secession. As I have found, moral rights cannot exist in a vacuum, but are connected to the question of whether they are institutionally enforceable or not. Thus, a comprehensive theory of secession should not only establish a moral right to secession, but it should establish a right to secession in such a way, that it would be plausible to be enforceable in international law.

After I have established the set of guidelines any comprehensive theory of secession should follow, I turned to the examination of the existing theories of secession. I found that all existing theories suffer from some more or less damaging objections. Whereas most primary right theories, i.e. national self-determination theories and choice theories, are vulnerable to the limitless fragmentation, strategic bargaining, and the paralyzing of the normal functioning of the state objections, derivative right theories, i.e. remedial right theories seem to involve a paradox; by allowing secession only as a last resort option to remedy the violations of basic human rights, or the violations of intra-state autonomy agreements, they seem to have the

consequence that the secessionist groups might provoke this violations, in order to get justification for their cause. Choice theories that are not vulnerable to the above mentioned objections nonetheless are vulnerable, because they either encompass a misconceived view about the legitimate claim to the territory, or they base the theory on the notion of self-determination, which is problematic for the fact that the theories fail to provide us with an argument as to why self-determination is to be taken in its external sense in the first place.

The question that needed answered at this stage was, whether in light of this objections all exiting theories, but the remedial right theories, should be rejected as fit to ground secession due to the deeply rooted problems they are facing, or whether there was a way in which they could be amended, and so made stronger, more stringent, and avoid the objections they faced. Upon closer examination it turned out that the national self-determination theories cannot be amended in any way that would make the theories stronger, and so safe from the objections raised against them. In addition to that, two additional and very strong objections presented themselves. Namely, due to the exclusive nature of the theories they could have expulsions, or assimilation, of the non-nationals as the consequence, and more importantly, the theories fail to give any arguments for what makes the nation, as opposed to other groups, the morally relevant unit when it comes to secession. Thus, I have concluded that national self-determination theories are indeed not fit to ground secession and have to be set aside.

Choice theories, on the other hand, proved to be much more promising. The statist version of them, i.e. the version that sees the states as necessary and non-voluntary, could be amended in a way that would make the theories much more stringent, and so safe from the objections they were facing. The amendment is procedural in nature. They can be strengthened, if stringent procedural constraints are put on them, i.e. if they include the provision that not only simple majority needs to be in favor of secession, but a qualified majority, and that most people of

the group need to participate in the referendum. To that, some argument needs to be added as to why self-determination is to be taken in its external sense.

It has further been shown that the remedial right theories can address the objection raised against them, since they include the provision of the international monitoring of intra-state autonomy, and so the secessionist cannot simply provoke their way into secession. Thus, it seemed that both, the amended choice theories, and the remedial right theories could be seen as good candidates for grounding secession.

This, however, lead to the following situation; the question of when to apply what theory seemed to be best answered by saying that it depended on the circumstances. If the circumstances surrounding secession were very relaxed and procedural mechanisms readily available, then choice theories would be applicable, and in cases where the circumstances were deteriorated, and stakes very high, the remedial right theories would apply. But this would lead into a puzzle. In cases where secession would be urgent from a moral point of view, it would be almost impossible to reach, and *vice versa*, in cases where the circumstances would be relaxed, and so secession not urgent, it would be easy to achieve. Thus, secession would seem like an elusive solution to a problem.

I saw two options as a response to this situation. Either only one theory should be applied across the board, or none of the theories was in fact a good theory to ground secession. I rejected the first option because, neither the choice theories, nor the remedial right only theories, were fit to address all situations. On the other hand, indeed I found reasons to reject both. I rejected choice theories, because they are built on faulty grounds. Namely, they take secession to be a primary right, and I have shown in Chapter 2 that secession cannot be a primary right. This is so, because even if we can find some reasons for why we should view self-determination as secession, none of the reasons, but the ones that involve some sort of fault on the side of the state are adequate. Thus, self-determination might be taken in the sense

of secession, however, then secession is not a primary, but a derivative right. Remedial right only theories, I found, also fail due to the fact that they are too narrowly construed. They are able to address a very limited number of cases, in which secession is urgent from a moral point of view, but on the other hand, leave out just as many, if not more.

Having reached this conclusion, I turned to exploring the possibility of the democratic theory of secession. Since the theory did not really exist thus far, I went about constructing it by taking certain parts of democratic theory concerning legitimate boundaries and legitimate political authority, i.e. Thomas Christiano's take on legitimate boundaries, and from that built my argument for a democratic theory of secession. I found that as long as the boundaries of a state are legitimate, secession is not justifiable, and *vice versa*. I dealt with the legitimacy of state boundaries in connection to the territorial component of a theory of secession. However, they are not connected to the territory directly. They are inherently connected to two other concepts, namely to state sovereignty, and territorial integrity. When a state has legitimate boundaries it is safe from outside interference with their internal affairs, and the state's territory cannot be divided. The legitimacy of the boundaries is closely connected to the legitimate political authority. As long as the state has legitimate political authority, it has legitimate boundaries. In this dissertation I show, that democratic authority can be seen as one of the strongest instances of legitimate political authority. Nonetheless, democratic authority is not limitless. I single out three main limits to democratic authority, i.e. liberal and democratic rights, assurance of an economic minimum, and the generation of permanent minorities. They are all closely connected to the principle of the realization of public equality, which lies at the core of democratic authority. It entails that everyone is being treated as an equal, and everyone can see that s/he is being so treated. If democratic assembly violates someone's liberal and/or democratic rights, fails to secure an economic minimum, or always, or almost always, outvotes a minority on the majority of issues (it generates permanent

minorities), then it violates the principle of the realization of public equality, and by that weakens its authority, or loses it altogether. It weakens it, if it oversteps its limits on a small scale, and is willing and able to mitigate for this. If its violations are systematic, and/or grand scale, then democratic authority is lost altogether. I call this the loss of inherent/intrinsic authority.

Democracies, on the other hand, also possess various institutions, which can make up for the shortcomings on the inherent/instrumental level, and are instrumental for the well functioning of the state. States can also fail on this dimension, if they cannot/ do not/ will not establish and maintain these institutions. On my account, if the state fails on both the intrinsic/inherent and the instrumental dimension, then certain groups have the right to secede from the state, since the state does not have legitimate political authority anymore, and by consequence also does not have legitimate boundaries. Both dimensions have to fail, since if the state only fails on the inherent/intrinsic dimension, but still possess most of the institutions, these can try to mitigate for the failure on the other dimension.

However, an additional argument is needed in order to justify the division of the failed state's territory. Even though the state lost legitimacy of the boundaries, this does not entail that the territory is up for grabs. This assertion is explained by Anna Stilz's residual right argument. She claims that when a state fails, people persist, and these people possess a residual right to the territory in common. While I agree with her that other states cannot grab up the territory of the failed state, I show that her claim, that even the people that persist cannot divide the territory, is wrong. This is so because there are certain trumping circumstances, which lower the threshold. For instance, groups, who were permanent minorities, or whose liberal and/or democratic rights have been systematically violated by the state, or groups that are deeply divided, should not be forced to create a new state with the rest of the people in common. Why this is the case can be explained by Thomas Christiano's notion of the common world.

The interests of the people who share a common world are deeply interconnected, i.e. the fulfillment of fundamental interests of each person is connected with the fulfillment of fundamental interests of every other person. They also have more or less equal stakes in the world they share. The above mentioned groups cannot be said to have shared common worlds with the rest of the population, and so they cannot be said have had equal stakes in the world. Moreover, the principle of the realization of public equality was not upheld. Thus, these groups should have the right to form their own states on the territory of the failed state, should they want to do so, i.e. should the majority of them express so in a referendum.

Democratic theory of secession proved not to be vulnerable to the objections existing theories of secession were vulnerable to. It does, however, face some challenges. Since it conceives of secession as a result of a collective decision, it faces the challenge that considering it applies only to situation where the states have failed, the procedural mechanisms are not in place, and so holding of referenda with legitimate outcomes is very difficult. However, this problem can be mitigated by the assistance of international community in monitoring of such referenda, and helping setting them up. In cases where international help is either not possible, or cannot reach the groups in time, the legitimacy conditions applying to collective decisions should be more relaxed. This is due to the idea that morality should not demand the impossible, but seems to do just that, when it comes to cases where secession is urgent from a moral point of view. Furthermore, it would seem that the democratic theory is confined only to secession from democratic states. This too proves to be a minor bump, not a full blown catastrophe. Democratic theory can indeed be useful also for assessing the legitimacy of secessionist claims in non-democratic states, by taking a closer look at how the non-democratic states function, and to which degree they can be said to possess legitimate political authority. All in all, it can be said that the democratic theory of secession proves to be a comprehensive theory of secession.



My main conclusion is that the notion of legitimate boundaries should be central in our thinking about secession, because only this way can a comprehensive theory of secession be constructed. If this notion is neglected, then one cannot adequately explain why secession is possible, in spite of state sovereignty, and territorial integrity. Moreover, the notion also helps explain why a group is justified in severing itself from political obligations to the state. In addition, using legitimate boundaries as the basis prevents us from constructing a too permissive theory and helps avoid fallacious assumptions about the voluntary nature of the state and the primary nature of the right to secession. It is, in other words, the foundation when building a theory of secession.

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